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Prisoners Exposed to Toxic Dust at UNICOR Recycling Factories

by Brandon Sample

Federal Prison Industries (FPI), the largest legal sweatshop in America, has jeopardized the lives and safety of untold numbers of prisoners and staff working in its recycling factories, according to a preliminary report in an investigation by the Justice Department's Office of the Inspector General (OIG), and an evaluation issued by the Federal Occupational Health Service in October 2008.

FPI, a wholly-owned government corporation commonly known as UNICOR, was founded in 1934 with the aim of rehabilitating federal prisoners through job training that could be used to increase their employability upon release from prison. Over the years, however, UNICOR

has moved away from its original mission; it now focuses more on taking advantage of its lucrative monopoly on providing goods and services to government agencies while using cut-rate prison labor.

Existing federal law requires federal agencies to look to UNICOR first for goods and services they may need. This lack of competition with the private sector, combined with low wages for prisoner workers, has been a boon for UNICOR. In fiscal year 2007, the prison industry netted \$853 million in sales and \$45.8 million in profit.

On Sept. 14, 2006, the U.S. House of Representatives passed the Federal Prison Industries Competition in Contracting Act, which would have eliminated UNICOR's monopoly on offering goods and services to federal government agencies. The bill also would have increased UNICOR wages for prisoners to minimum wage by September 30, 2009. The bill failed to pass the Senate.

Over the past decade, electronics recycling (e-waste) has become an increasingly important component of UNICOR's operations, though it is still the smallest part of UNICOR's business in terms of sales. First started in 1994 at the Federal Prison Camp (FPC) in Marianna, Florida, female prisoners would unload truckloads of computers each day and break them down for parts that could be reused or sold, such as processors or cathode ray tubes (CRTs). Often the computers or monitors would have to be broken apart with hammers to retrieve salvageable parts, which released a thick cloud of dust.

"It looked just like pollen," said Freda Cobb, a former prison employee at FPC

Marianna. "At the end of the day, we would go back to our cars and sort of laugh because we could write letters on our hood and on our back."

None of the prisoners or staff were supplied with masks, gloves, coveralls or other personal protective equipment. Some prisoner workers and employees raised questions about possible health hazards, but "they told us not to worry about it," Cobb said. "Nobody wanted to hear us."

UNICOR's recycling business expanded over the next decade to seven other facilities, with each new e-waste factory using the same unsafe work practices. From fiscal year 2003 to 2005, UNICOR processed over 120 million pounds of e-waste. Prisoners would break CRTs inside televisions and computer monitors without masks, gloves or other protective gear, exposing them to high levels of lead and cadmium from the release of heavy metal dust. In another operation, processors were removed from circuit boards using a de-soldering process that released lead fumes.

Lead can cause severe damage to nervous and reproductive systems, including miscarriages, stated John McKernan, an industrial hygienist at the Centers for Disease Control. Cadmium can cause lung damage and bone disease, and has been linked to cancer.

In March 2004, LeRoy Smith, the Safety Manager at United States Penitentiary (USP) Atwater, went public about the dangers that prisoners and staff were experiencing at UNICOR's recycling facilities. The Bureau of Prisons (BOP), however, ignored Smith's warnings. He was transferred to Federal Correctional

Inside

From the Editor	6
Solitary in Angola Prison	8
Prison Death Statistics	12
Chicago Jail Conditions Abysmal	16
Oregon Juvenile Prison Scandals	18
Prison Health Self Care Column	22
Florida Restores Some Felon Voting	26
Texas Parole Consultants	28
Florida Nurse Guilty Plea	31
California Death Row Costs Grow	34
PHS Wins Rikers Island Contract	38
1 of 99 Americans Behind Bars	46
News in Brief	50

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Toxic Dust Exposure (cont.)

Institution (FCI) Tucson after going public. Smith has since filed a whistleblower retaliation complaint; he has also experienced symptoms of hazardous material exposure that include anxiety, headaches, fatigue, memory lapses, skin lesions, and circulatory and respiratory problems.

"Instead of behaving responsibly, the Bureau of Prisons has looked the other way, while the federal prison industry authority, UNICOR, opened additional 'computer-recycling' facilities without proper health safeguards in place," said Mary Dryovage, an attorney who formerly represented Smith.

In April 2006, the Director of the BOP, Harley Lappin, asked the OIG to conduct a review of UNICOR's recycling activities. In conjunction with the Occupational Safety and Health Administration (OSHA), Federal Occupational Health Service (FOH) and the National Institute for Occupational Safety and Health (NIOSH) – a division of the Public Health Service within the Department of Health and Human Services – the investigation has focused on recycling activities at three BOP institutions: FCI Elkton in Ohio, FCI Texarkana in Texas, and USP Atwater in California. [See: *PLN*, March 2007, p.1].

A preliminary NIOSH report related to FCI Elkton, released on July 16, 2008, confirmed many of the dangers first reported by Smith. From 1997 until 2001, glass breaking of CRTs at Elkton was evidently done without "respiratory protection used or any type of engineering control in place to minimize exposures," the report found.

In 2001, a "sawdust collection system" was installed at the UNICOR factory and some prisoners began using respiratory protection. It was not until April 2003 that a glass breaking room was constructed to contain the harmful heavy metal dust.

Fitted with vinyl curtains hanging from the ceiling, a ventilation discharge area, local exhaust ventilation system and a "clean area" where prisoners can suit and unsuit into coveralls and other protective equipment, the glass breaking room was supposed to eliminate the exposure problems caused by prior unsafe work practices.

Yet despite those improvements, problems continued to persist. During a filter change-out process, filters were removed and cleaned by vacuuming, shak-

ing or banging them on the floor, causing a "thick cloud of dust" within the glass breaking room. Prisoners were exposed to "450 times the concentration adopted by OSHA as the Permissible Exposure Limit (PEL) for cadmium and over 50 times the PEL for lead" during this process, according to the preliminary report.

While most of the heavy metal contamination was confined to the glass breaking room, lead and cadmium residues were found on work surfaces outside that area, where workers were not wearing protective equipment. In one section of the factory, one dust sample was as high as "16% lead."

This, among other noted deficiencies, led investigators to conclude that "the current [glass-breaking operation] is a significant improvement, but can be further enhanced to limit exposure to those performing glass breaking as well as limiting the migration of lead and cadmium from the room into other areas."

The NIOSH report concluded that "electronic recycling at FCI Elkton appears to have been performed from 1997 until May 2003 without adequate engineering controls, respiratory protections, medical surveillance, or industrial hygiene monitoring." The extent of worker and staff exposure to toxic dust could not be determined because "medical surveillance that has been carried out among inmates and staff has not complied with OSHA standards."

The report called for "prompt but well-coordinated" remediation to address "legacy contamination at the factory," and made several specific recommendations that included: 1) Ensuring full compliance with all applicable OSHA standards; 2) contracting with an occupational medicine physician familiar with OSHA regulations to oversee a medical surveillance program; 3) Performing a detailed job hazard analysis prior to beginning any new operations or making changes to existing operations; and 4) appointing a union safety and health representative, plus ensuring that prisoner workers "have a way to voice their concerns about and ideas for improving workplace safety and health."

On June 27, 2008, all of FCI Elkton's recycling factories were shut down for a thorough clean-up. It was unclear when the facilities will re-open, according to Traci Billingsley, a spokesperson for the BOP.

Subsequently, an 87-page assessment by the Federal Occupational Health Ser-

Toxic Dust Exposure (cont.)

vice regarding environmental, safety and health issues related to UNICOR e-waste recycling operations at FCI Elkton was released on Oct. 10, 2008. That report, which was prepared for the OIG, dealt with practices and working conditions at the facility from 2003 to the present.

The FOH report found that UNICOR had implemented measures to control exposure to toxic heavy metals, and "since 2003 ... has made major improvements in engineering controls and its policies regarding the usage of personal protective equipment." Current measured lead and cadmium exposure levels were described as "minimal."

Further improvements to limit exposure in the glass breaking room were suggested, as well as hearing protection for workers due to a noise hazard. UNICOR had complied with previous recommendations by improving the filter change-out protocol and retaining an occupational physician to improve medical evaluations of recycling workers and staff.

Still, the past health and safety violations at Elkton remained a concern, and the report noted that according to an EPA inspection the UNICOR recycling program "had not adequately evaluated its wastewater, air emissions, and hazardous waste streams for compliance with applicable environmental standards" The report concluded with a number of recommendations for improvements.

Federal investigators next turned their attention to recycling operations

at FCI Texarkana. While investigators have yet to issue a report regarding the UNICOR recycling factory at that facility, preliminary indicators seem to suggest the existence of prior unsafe work practices similar to those found at Elkton.

According to one prisoner, glass breaking operations at FCI Texarkana from 2001 to 2003 were conducted without masks or other protective equipment. All glass breaking is now done at the satellite prison camp.

The UNICOR factory at the camp, as at Elkton, is now fitted with a glass breaking room. Prisoners who work in the glass breaking room receive an extra \$1.00 per shift on top of their regular pay, which ranges from \$.23 to \$1.25 an hour.

The extra dollar was not enough for one prisoner employed in the glass breaking area after investigators visited the camp. "I didn't feel like what we were doing was safe," the unidentified prisoner said, "so I quit."

Although all glass breaking operations are supposed to be done in the glass breaking room, some prisoners reported that glass breaking is occurring in the general work area, too.

Before televisions and monitors are sent to the glass breaking room, certain parts must be removed. Rather than unscrewing these parts without damaging the CRTs, some prisoners break the parts off, which causes the glass CRT to break and release lead and cadmium dust into the air. According to one prisoner, this occurs at least ten times a day. To make matters worse, prisoners in the general work area are not required to wear masks or other

protective gear.

When asked why the UNICOR staff don't prevent this from happening, one prisoner put it bluntly: "The guards don't give a fuck. They don't care as long as the work gets done. They sit in their office laughing, talking on the phone."

U.S. Representative Pete Hoekstra (R-Mich) has low expectations for the OIG's investigation into UNICOR operations. "It will result in nothing," he said. "We rail against Chinese prison labor, and what you've got here is a situation where our prisons have exposed our workers to low wages and dangerous working environments, with the full support of the Justice Department and with the full support of the White House."

While the OIG's investigation remains ongoing, twenty-six current and former prisoners, UNICOR staff, their family members and visitors to the FPC Marianna recycling factory have sued the U.S. Department of Justice, BOP and UNICOR, claiming they did not do enough to protect them from harmful metals and chemicals. See: *Smith v. United States*, U.S.D.C. (N.D. Fla.), Case No. 5:08-cv-00084-RS/AK.

"I never realized," said Freda Cobb, a former BOP guard at Marianna who is a plaintiff in the lawsuit. "We never put it together." Cobb has suffered from digestive problems, acute respiratory symptoms, short-term memory loss, muscle pain, kidney and liver problems, heart problems, internal bleeding and skin lesions. She was forced to retire from FPC Marianna in September 2004 for medical reasons.

Traci Hendrix, a 39-year-old former

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prisoner who worked in the recycling factory at Marianna, is considering joining the suit. "We didn't have nothing to put on our faces, and we just breathed and coughed all day," she said.

Hendrix first learned of the hazards caused by the toxic dust after another former prisoner told her that she, like Hendrix, had suffered a miscarriage after leaving prison. "It seemed like everyone that was working with me had a miscarriage," said Hendrix.

On August 1, 2008, Tanya Smith, a former prison employee at Marianna and a plaintiff in the lawsuit, died. The exact cause of her death has not yet been determined, but it's believed to be linked to her work at the facility. She had severe health problems that had forced her retirement from the BOP, including systemic lupus, blood clots, kidney failure, digestive problems, and heart and respiratory disease.

"We surely believe federal prisons started all of this," said Smith's mother, Doris Baker, who lived with her daughter. "We all believe that. Won't nobody admit it." Smith's death is among 12 others that attorneys point to as stemming from recycling operations at Marianna.

Interestingly, two of the defendants in

the lawsuit, Joe McNeal and James Bailey, who were employed by UNICOR, agreed to sign releases and become plaintiffs in the case, "because they and their family members suffer from some of the symptoms associated with exposure to the toxic substances alleged to have been produced by [the Marianna] recycling program." The lawsuit is still pending; the government defendants have raised a defense of sovereign immunity.

Even family members of BOP and UNICOR staff are potentially at risk. Staff "may have inadvertently exposed their families to heavy metals by wearing their dust-laden work clothes home," wrote S. Randall Humm, investigative counsel for the OIG.

That, according to Professor Tee L. Guidotti, an environmental and occupational health expert at George Washington University's School of Public Health and Health Services, never should have happened.

"They wore their work clothes home? Yikes. That has been known for years to be a set-up for exposing children," he said.

Several BOP employees had also purchased equipment from UNICOR for their personal use, including computers

and monitors, that may have been contaminated with toxic heavy metal dust.

Despite these problems, and ongoing investigations into workplace conditions at other UNICOR recycling factories, UNICOR continues to operate eight recycling centers that employ approximately 1,200 prisoners. This represents only a small part of the prison industry's workforce. Systemwide, as of Sept. 30, 2007, UNICOR maintained operations at 110 factories located at 79 BOP facilities involving 23,152 prisoner workers.

One has to wonder whether the documented safety, health and environmental workplace violations at UNICOR's e-waste recycling programs routinely occurred at the prison industry's other operations. ■

Sources: *ABC News*; *The Dothan Eagle*; www.unicor.gov; *Fort Worth Weekly*; www.computerworld.com; www.reviewonline.com; NIOSH preliminary report on work conditions at FCI Elkton (July 16, 2008); FOH report: "Evaluation of Environmental, Safety and Health Information Related to Current UNICOR e-Waste Recycling Operations at FCI Elkton" (Oct. 10, 2008)

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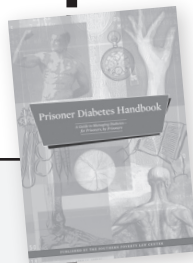
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From the Editor

by Paul Wright

Welcome to the first issue of *PLN* for 2009. For the new year we are introducing a new quarterly column in *PLN* called *Prison Health and Self Care* by Dr. Michael Cohen. Dr. Cohen is a doctor who has extensive experience working with prisoners in state prisons and jails and he helped put together the diabetes handbook distributed by *PLN* which is published by the Southern Poverty law Center.

PLN reports extensively on health and medical issues in prisons and jails. Unfortunately, our coverage is rarely positive. All too often we are reporting the medical neglect and abuse of prisoners; inadequate medical resources and outright malpractice and the systemic failure to provide prisoners with adequate medical care that afflicts pretty much every prison and jail in the United States. By adding this column we hope to be able to provide prisoners with sound, reliable and basic medical information they can use to try to maintain themselves healthy while they are imprisoned. Hence the need to have a medical professional who not only knows medicine, but also the reality of prison and jail life.

In the 17 years I spent in prison the biggest fear that I had was getting sick as I was all too familiar with the state of medical care in the Washington prison system. While prisoners are limited in the things they can do to keep and stay healthy, like everything else, there are always things prisoners can do to improve their health and that requires basic knowledge and information about how diseases and illnesses spread and develop and what individuals can do to reduce their risk of illness. Dr. Cohen's first column in this issue is on MRSA. Future columns will cover diabetes, hepatitis, hypertension and other illnesses. If you have column suggestions write directly to Dr. Cohen. Remember, this is a quarterly column which will appear four times a year so space is limited.

By now all readers should have received their *PLN* fundraiser for our annual fundraiser. To date we have raised a little over \$5,000 which is well below our \$15,000 matching grant goal. If you can make a donation please do so. Donations make our work possible and we rely on these donations for our annual fundraiser

to get us through the year. We realize that times are tough financially but all the more reason to donate to *PLN*.

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I would like to thank all those readers who send in copies of their verdicts and settlements for the cases they win so we can report them in *PLN* and add them to our database. Keep sending them in so everyone will know about your wins.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

Allegations of Contraband Smuggling, Sex and Corruption at Texas Prison

by Matt Clarke

The Inspector General's office of the Texas Department of Criminal Justice (TDCJ) has been investigating numerous cases of corruption at the 1,555-bed Terrell Unit near Rosharon, Texas. The allegations include sex between prisoners and guards, as well as the smuggling of tobacco, drugs and cell phones. One Terrell Unit guard faces felony charges; another has resigned, a captain was fired, and the warden has been removed.

The allegations came to light after several guards who were not involved in the corruption contacted a Houston television station, Channel 2 KPRC. The guards reported the illicit sex, funneling of contraband into the prison, and cash payments from prisoners to "allow all sorts of wrongdoings."

When the misconduct was reported to the prison administration, it was ignored and retaliation ensued. The guards who blew the whistle on the corruption alleged that prison administrators covered up the illegal acts and allowed organized criminal activity to persist. Channel 2 conducted an independent investigation and began a series of reports on the Terrell Unit that aired in early May 2008.

On April 23, 2008, former Terrell Unit guard Derrick Rice, 34, was indicted for smuggling tobacco into the prison, a felony in Texas. Accused of accepting money in exchange for tobacco deliveries

between May 2006 and June 2007, Rice was freed on \$35,000 bond after being charged with seven counts of bribery.

Terri Holder, who prosecutes prison crimes in Brazoria County, said the Rice case might be "the tip of the iceberg." She expects to prosecute additional cases resulting from the Inspector General's investigation.

"We were giving information to the office of the Inspector General and one thing led to another," said Holder. "They brought in a task force to see what was going on and, based on what information we have, it sounds like there could be more going on out there – more guards involved as far as illegal substances go."

"We have 15 to 20 investigators in a support role to conduct interviews and continue the investigation," stated John Moriarty, TDCJ's Inspector General. "We have 10 to 15 cases open down there right now."

On May 7, 2008, a drug dog alerted on a Terrell guard's vehicle. Drug residue was discovered and the guard "elected to resign" after a search of his residence uncovered numerous cases of Bugler tobacco, a brand commonly used in the illicit Texas prison tobacco trade. Moriarty refused to release the guard's name or state whether charges would be filed.

A captain at the Terrell Unit, 17-year TDCJ veteran Vonda Rafter, was fired fol-

lowing allegations that she had assigned a gang-affiliated prisoner to a work position that was against TDCJ policy. She also reportedly retaliated against the prison guards who reported corruption at the facility, filing false disciplinary reports against them. Rafter is appealing her dismissal.

Terrell Unit Warden Anthony Collins was removed in May 2008, pending reassignment to another position. While he was not accused of misconduct, he reportedly took no action when informed about corruption among Terrell employees.

Spurred by such incidents, state Senator John Whitmire, chair of the Senate Criminal Justice Committee, called for hearings into misconduct among prison staff.

"We've got some systemic problems and this might be the tip of the iceberg," he said. "It concerns me. ... There's no doubt the warden and other internal people were involved. If you have complaints by guards or employees and they fall on deaf ears, we've got a real security breach."

"Related specifically to the Terrell Unit, the agency has taken seriously allegations of retaliation, discrimination and criminal wrongdoing at the facility," stated TDCJ spokeswoman Michelle Lyons. Apparently, however, someone didn't get that memo.

An unusual incident occurred as a television news crew entered the 16,362-acre prison farm that the Terrell Unit shares with the Ramsey and Stringfellow Units at about 9:00 p.m. on May 14, 2008. The visit to the Terrell Unit had been cleared in advance by TDCJ officials. As the news crew followed other vehicles on a public

highway, they noticed two men speaking on cell phones near the unmanned and open highway gate that denoted the beginning of prison property. The men jumped in a car, passed the news van at an estimated 80 miles per hour, stopped, and maneuvered to block both lanes of the highway. The men then hurried a young girl and boy out of the car. One man approached the stopped news van.

The man repeatedly stated, "I'm the warden, I'm the warden." He refused to provide his name and said, "I was trying to stop you but you almost ran over me." He insisted on this even after reporter Stephen Dean told him that they had been taping since before entering the prison property and had the entire incident on videotape. The man then told the news crew they could not drive on the public highway.

The television station aired footage of the incident which clearly showed that the man, identified as Ramsey Unit senior warden Kenneth Negbenebor, did not approach or attempt to stop the news van at the highway gate. Dean said Brazoria County prosecutors were reviewing the video to see if criminal charges should be filed against TDCJ Lt. Reginald J. Gilbert, who was driving the car, for endangering his children who were passengers in the vehicle.

According to a written statement issued by the TDCJ, "Our goal was to set up a staging area where Mr. Dean could safely conduct his report – it was never the intention that an officer would use his vehicle to block the road to the facility. This was not agency-sanctioned behavior, nor was it requested – this officer was acting on his own, albeit believing he was help-

ing a unit warden." The TDCJ said the incident had been referred to the Inspector General's office.

When prison officials go to such lengths to stop the media from even getting close to facilities where questionable conduct is taking place, one can only imagine the real scope of the problem. Nor is the corruption at Terrell isolated. The Inspector General's office is investigating 46 cases of staff misconduct at the Clemens Unit, 31 at Coffield and 25 at the Connolly Unit.

TDCJ officials were called to testify before the Senate Criminal Justice Committee on June 4, 2008 regarding corruption among the ranks of prison staff. "It's amazing to me that we even have to have this damn conversation," observed Senator Whitmire. TDCJ executive director Brad Livingston blamed staff shortages and low pay for a lack of routine searches of prison employees to prevent contraband from entering state prisons. One TDCJ guard, Ray Stewart, testified that 8 to 10 percent of prison staff would turn around and leave if they knew they would be subjected to a thorough search.

It should be noted that when prison officials are questioned about contraband they routinely blame prison visitors, not their own staff. The fact that the TDCJ is at least acknowledging internal corruption is a welcome sign – assuming the department actually does something about it. ■

Sources: *The Brazosport Facts*, www.click2houston.com, *Houston Chronicle*

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Organizing for Freedom: Resistance at Angola State Penitentiary, Louisiana's Last Slave Plantation

by Jordan Flaherty

At the heart of Louisiana's prison system sits the Louisiana State Penitentiary at Angola, a former slave plantation where little has changed in the last several hundred years. Angola has been made notorious from books and films such as *Dead Man Walking* and *The Farm: Life at Angola*, as well as its legendary bi-annual prison rodeo and *The Angolite*, a prisoner-written magazine published within its walls. Visitors are often overwhelmed by its size – 18,000 acres that include a golf course (for use by prison staff and some guests), a radio station, and a massive farming operation that ranges from staples like soybeans and wheat to traditional Southern plantation crops like cotton.

Recent congressional attention has again brought Angola into the media limelight. The focus this time is on the prison's practice of keeping some prisoners in solitary confinement for decades, especially two of Angola's most well-known residents – Herman Wallace and Albert Woodfox. Woodfox and Wallace are members of the Angola Three who remain imprisoned, political activists widely seen as having been interned in solitary confinement as punishment for their political activism. As a result of this outside attention brought by activists and allies, new legal developments have brought Woodfox and Wallace closer to freedom.

Modern plantation

Norris Henderson, co-director of Safe Streets/Strong Communities, a grassroots criminal justice organization in New Orleans, spent twenty years at Angola – a relatively short time in a prison where 85 percent of its 5,100 prisoners are expected to die behind its walls. “Six hundred folks been there over 25 years,” he explains. “Lots of these guys been there over 35 years. Think about that: a population that's been there since the 1970s. Once you're in this place, it's almost like you ain't going nowhere, that barring some miracle, you're going to die there.”

Prisoners at Angola still do the same work that enslaved Africans did there when it was a slave plantation. “Angola is a plantation,” Henderson explains.

“Eighteen-thousand acres of choice farmland. Even to this day, you could have machinery that can do all that work, but you still have prisoners doing it instead.” Not only do prisoners at Angola toil at the same work as enslaved Africans hundreds of years ago, but many of the white guards come from families that have lived on the grounds since the plantation days.

Nathaniel Anderson, a current prisoner at Angola who has served nearly thirty years of a lifetime sentence, agrees. “People on the outside should know that Angola is still a plantation with every type and kind of slave conceivable,” he says.

Prison organizing

In 1971, the Black Panther Party was seen as a threat to this country's power structure – not only in the inner cities, but even in the prisons. At Orleans Parish Prison, the New Orleans city jail, the entire jail population refused to cooperate for one day in solidarity with New Orleans Panthers who were on trial. “I was in the jail at the time of their trial,” Henderson tells me. “The power that came from those guys in the jail, the camaraderie... Word went out through the jail, because no one thought the Panthers were going to get a fair trial. We decided to do something. We said, ‘The least we can do is to say the day they are going to court, no one is going to court.’”

The action was successful, and inspired prisoners to do more. “People saw what happened and said, ‘We shut down the whole system that day,’” he remembers. “That taught the guys that if we stick together we can accomplish a whole lot of things.”

Herman Wallace and Albert Woodfox were prisoners who had recently become members of the Black Panther Party, and as activists, they were seen as threats to the established order of the prison. They were organizing among the other prisoners, conducting political education, and mobilizing for civil disobedience to improve conditions in the prison.

Robert King Wilkerson, like many prisoners, joined the Black Panther Party while already imprisoned at Orleans Parish Prison. He was transferred to Angola,

and immediately placed in solitary confinement (known at Angola as Closed Cell Restriction or CCR) – confined alone in his cell with no human contact for 23 hours a day. He later found out he had been transferred to solitary because he was accused of an attack he could not have committed – it had happened at Angola before he had been moved there.

In March of 1972, not long after they began organizing for reform from within Angola, Wallace and Woodfox were accused of killing a prison guard. They were also moved to solitary, where they remained for nearly 36 years, until March 2008, when they were moved out four days after a congressional delegation led by Congressman John Conyers arranged a visit to the prison. Legal experts have said this is the longest time anyone in the U.S. has spent in solitary. Amnesty International recently declared, “the prisoners’ prolonged isolation breached international treaties which the U.S. has ratified, including the International Covenant on Civil and Political Rights and the Convention against Torture.”

Wilkerson, Wallace and Woodfox became known internationally as the Angola Three – Black Panthers held in solitary confinement because of their political activism. Wilkerson remained in solitary for nearly 29 years, until he was exonerated and released from prison in 2001. Since his release, Wilkerson has been a tireless advocate for his friends still incarcerated. “I'm free of Angola,” he often says, “but Angola will never be free of me.”

This history of struggle and resistance brings a special urgency to the case of the Angola Three. Kgalema Motlante, a leader of the African National Congress, said in 2003 that the case of the Angola Three “has the potential of laying bare, exposing the shortcomings, in the entire U.S. system.”

Swimming Against the Current

Wallace and Woodfox have the facts on their side. Bloody fingerprints at the scene of the crime do not match their prints. Witnesses against them have recanted, while witnesses with nothing to gain have testified that they were nowhere near the crime. There is evidence of pros-

ecutorial misconduct, such as purchasing prisoner testimony and not disclosing it to the defense. Even the widow of the slain guard has spoken out on their behalf. Most recently, their case has received attention from Representative Conyers, head of the House Judiciary Committee, and Cedric Richmond, chair of the Louisiana House Judiciary Committee, who has scheduled hearings on the issue.

But this is more than the story of innocent men railroaded by a system, struggling for freedom. The story of the Panthers at Angola is both inspiring and shocking. It is a struggle for justice while in the hardest of situations.

"They swam against the current in Blood Alley," says Nathaniel Anderson, a current prisoner at Angola who has been inspired by Wallace and Woodfox's legacy. "For men to actually have the audacity to organize for the protection of young brothers who were being victimized ruthlessly was an extreme act of rebellion."

Like many prisoners during that time, Norris Henderson was introduced to organizing by Black Panthers in prison, and later became a leader of prison activism during his time at Angola. The efforts of Wilkerson, Woodfox, Wallace and other Panthers in prison were vital to bringing improvements in conditions, stopping sexual assault, and building alliances among different groups of prisoners. "They were part of the Panther Movement," Henderson tells me. "This was at the height of the Black power movement, we were understanding that we all got each other. In the night-time there would be open talk, guys in the jail talking, giving history lessons, discussing why we find ourselves in the situation we find ourselves. They started educating folks around how we could treat each other. The Nation of Islam was growing in the prison at the same time. You had these different folk bringing knowledge. You had folks who were hustlers that then were listening and learning. Everybody was coming into consciousness."

Insatiable machine

The U.S. has the largest incarcerated population in the world – twenty-five percent of the world's prisoners are here. If Louisiana, which has the largest percentage imprisoned of any U.S. state, were a country, it would have by far the world's largest percentage of its population locked up, at one out of every 45 people. Nation-

wide, more than seven million people are in U.S. jails, on probation or on parole, and African Americans are incarcerated at nearly ten times the rate of whites. Our criminal justice system has become an insatiable machine – even when crime rates go down, the prison population keeps rising.

The efforts of the Angola 3 and other politically conscious prisoners represented a fundamental challenge to this system. The organizing of Wallace, Woodfox and Wilkerson, though cut short by their move to solitary, had an effect that continues to this day.

Prison activism, and outside support for activists behind bars, can be tremendously powerful, says Henderson. "In the early 1970s people started realizing we're all in this situation together. First, at Angola, we pushed for a reform to get a law library. That was one of the first conditions to change. Then, we got the library; guys became aware of what their rights were. We started to push to improve the quality of food, and to get better medical care. Once they started pushing the envelope, a whole bunch of things started to change. Angola was real violent then, you had prisoner violence and rape. The people running the prison system benefit from people being ignorant. But we educated ourselves. Eventually, you had guys in prison proposing legislation."

This was a time of reforms and grassroots struggles happening in prisons across the U.S. Uprisings such as the Attica Rebellion were resulting in real change. Today, many of the gains from those victories have been overturned, and prisoners have even less recourse to change than ever before. "Another major difference," Henderson explains, is that "you had federal oversight over the prisons at that time, someone you could complain to, and say my rights are being violated. Today, we've lost that right."

Working for criminal justice is work that benefits us all, says Henderson. Instead of investing in more prisons, "we should start investing in the redemption of people." After decades of efforts by their lawyers and by activists, Wallace and Woodfox have been released from solitary, and the positive developments in their legal battles have brought hope to many. However, Wallace and Woodfox remain behind bars, punished for standing up against a system that has grown even

larger and more deadly. And the abuse does not end there. "There are hundreds more guys who have been in [solitary] a long time too," Henderson adds. "This is like the first step in a thousand-mile journey."

UPDATE: On Sept. 25, 2008, Albert Woodfox's conviction was overturned by U.S. District Court Judge James Brady, based on ineffective assistance of counsel. Although the court ordered Woodfox released on bail pending a retrial, the State of Louisiana appealed to the Fifth Circuit to forestall his release, claiming prosecutors planned to bring new criminal charges against Woodfox from the 1960s that had never been previously pursued. As of December 2008, Woodfox remained incarcerated at Angola. ■

Jordan Flaherty is an editor of Left Turn Magazine (www.leftturn.org), and a journalist based in New Orleans. Most recently, his writing can be seen in the new anthology Red State Rebels, released by AK Press. He can be reached at neworleans@leftturn.org.

A version of this article was featured in the Summer 2008 issue of Left Turn Magazine.

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U.S. Homeland Security Illegally Drugged Immigrants for Deportation

by Gary Hunter

Until recently, immigrants destined for deportation due to their illegal residency status in the United States faced the possibility of being drugged before leaving. Since 2003, there have been more than 250 cases where psychotropic drugs were inappropriately administered to deportees, according to an investigative report by the *Washington Post*.

The Department of Homeland Security's newly-created Immigration and Customs Enforcement agency (ICE) has been administering "pre-flight cocktails" so powerful that some deportees needed wheelchairs and other medical assistance upon arriving back in their home country.

Officially, such sedations were portrayed as a measure of "last resort." In reality the opposite was true. The *Post* was able to obtain the records of 67 deportees who were sedated in fiscal year 2007. Of those, 53 were administered the cocktail, 48 of whom had no documented history of violence. Each detainee given the injections was accompanied by a medical escort and evaluated by a mental health expert in aviation medicine. But that doesn't justify the questionable way that ICE used such involuntary medications.

Yousif Nageib, a deportee, was being transported back to Sudan in January 2007. The entry in his medical file states, "DT calm at this time." The log also notes that Nageib "is handcuffed and states he will do what we say." Just before takeoff, Nageib was injected with a three-drug cocktail. The reason listed in his file, by medical director Timothy T. Shack, amounted to a single word: "problem."

Washington Post researchers found that 93 deportees, with no record of mental illness, were injected in 2007. Haldol was the drug used in 50 of those cases, sometimes in large doses. The cocktail also included the drugs Ativan and Cogentin.

Haldol and Ativan are powerful anti-anxiety medications. Cogentin is designed to counter muscle spasms and rigidity, which are side effects caused by Haldol.

Nigel Podley teaches international human rights law at the University of Essex in England. He also used to work for the UN as a special investigator on torture.

"In the history of oppression, using haloperidol is kind of like detaining people in Abu Ghraib," the Iraqi prison notorious

for torturing prisoners, said Podley. He went on to describe the use of Haldol as a "disabling chemical" that affects "one's psychological well-being."

Philip Seeman, a specialist in psychiatry and pharmacology at the University of Toronto, was even more blunt. "[P]rescribing Haldol ... [to people who are not psychotic] is medically and ethically wrong," he said.

Seeman explained that Haldol is not a drug used to calm typical emotional anxiety. Rather, Haldol would be used to calm an emotionally violent person such as one who had overdosed on PCP. Even then, psychotic patients with a tolerance for the drug are seldom given more than 19 milligrams a day. Records show that several of the ICE deportees received up to 40 milligrams during their trip home.

It's not as if U.S. officials didn't know their actions were wrong. Under the Clinton administration, a legal memo from the U.S. Dept. of Health and Human Services, issued in November 2000, forbade the use of "chemical restraints in which medication is not clinically indicated...."

However, a post-September 11, 2001 initiative under the Bush administration tossed such guidelines aside. In March 2002, two legal opinions were offered to administration officials. The first option stated, "seek a court order ... in every case where the alien's medication is not therapeutically justified." The second suggested creating a regulation that authorized the use of drugs by ICE officials with a warning to deportees that sedation might be used.

Both options were rejected. Instead, in May 2003 the Homeland Security department created its own policy which stated, "[A]n ICE detainee with or without a diagnosed psychiatric condition who displays overt or threatening aggressive behavior ... may be considered a combative detainee and can be sedated if appropriate under the circumstances."

This controversial position met with resistance from the global community. One deportee who was sedated before his trip from Colorado to Guinea was due to receive an injection during a stopover in Belgium. According to the trip log, Belgium officials "approached and informed [it was] illegal to medicate detainee against their will in Belgium...."

A similar incident occurred in France when ICE escorts attempted to inject a deportee a second time. French officials refused to allow the injection. When the prisoner became agitated the pilot refused to allow him onto the connecting flight. The prisoner was returned to the U.S., but was deported five weeks later after being shot up with Haldol.

Only after pressure from the American Civil Liberties Union (ACLU) has the current administration altered its stance on the involuntary medication issue. In May 2007 the chief of psychiatry for the Dept. of Homeland Security halted "all planned non-psychiatric behavioral escorts." One month later, the ACLU Foundation of Southern California filed suit on behalf of two drugged detainees, Raymond Soeoth and Amadou Lamine Diouf. Both had been recipients of injections while in ICE custody in California during deportation proceedings.

ICE Assistant Secretary Julie Myers acknowledged the issue of involuntarily medicating deportees during a Senate hearing in Sept. 2007. "I am aware of, and deeply concerned about reports that past practices may not have conformed to ICE detention standards," she said, while contending that many of the drugged deportees had been "combative."

On January 9, 2008, ICE's health division issued a memo stating, "[Homeland Security] may only involuntarily sedate an alien to facilitate removal where the government has obtained a court order. There are no exceptions to this policy. Emergency or exigent circumstances are not grounds for departures from this policy."

Based upon this policy change, the ACLU settled its lawsuit against the Dept. of Homeland Security in March 2008. As part of the settlement Diouf received \$50,000 and Soeoth was paid \$5,000 and allowed to stay in the United States for at least two more years. See: *Diouf v. Chertoff*, U.S.D.C. (C.D. Cal.), Case No. 2:07-cv-03977-TJH-CT.

How well the recent policy changes are working has yet to be determined. But the changes were definitely needed, since past records indicate that most deportees who received involuntary injections were neither psychotic nor violent. It is supremely ironic that the U.S. government, which has waged a domestic war on drugs for decades, aban-

doned the moral high-ground and forcibly drugged immigration deportees without justification.

"We are very happy that the gov-

ernment recognized that their barbaric sedation policy was wrong," stated ACLU attorney Ahilan Arulanantham. "This has been a shameful chapter in the country's

immigration history." ■

Sources: *Washington Post*, *Los Angeles Times*, *CNN*

Connecticut DOC Settles Prisoner's Brutal Beating By Ten Guards For \$500,000

The Connecticut Department of Corrections (CDC) settled for \$500,000 the civil rights complaint brought by a prisoner who was brutally assaulted by ten CDC guards solely for their sadistic pleasure. While the settlement stipulates "no admission of liability," the horror story of the beatings leaves scant room for envisaging otherwise.

Robert Joslyn was formerly incarcerated at CDC's Northern Correctional Institution. In a 42 U.S.C. § 1983 complaint, he sued guards Patrick Maia, Brian Bradway, James Yelinek, Gerald Hines, Shane Maloney, Robert Pepe, Sean Guimonod, Steven Congelos, Juan Melendez and Steven Lash for having viciously, sadistically and brutally beaten him on several occasions in 2004.

In March 2004, Joslyn noticed that NCI guards were routinely calling fake "code blues" (emergency code for prison riot) solely to permit the responding guards to assault prisoners in retaliation. Joslyn asked that he be transferred "because they're going to kill me." Joslyn knew what he was talking about, having already been assaulted by NCI guards and recently threatened with more. Later that day, several guards came to his cell, falsely calling him a "snitch" and "child molester" while broadcasting, "we're gonna call a code blue on you." When threatened by more guards over the next several hours, he drafted a misconduct complaint. Two hours later, a guard saw this, entered the cell and crumpled it up.

Joslyn's cell was shaken down; his pen and CDC rules book were taken. When two guards observed him writing another complaint, they threatened, "We'll show you how to write. We're coming soon. Get ready." One guard falsely wrote Joslyn up for making threats against the guard, when the opposite was true.

The next morning, ten guards entered Joslyn's cell. Joslyn was grabbed by the neck and slammed against the wall while handcuffed. One guard urged another, "spit on me, so we can set him up." Another threatened to "fuck you up and mace you." All ten guards' movements were recorded on the in-house video monitor. Fearing an imminent attack, Joslyn broke the sprinkler head in his cell and flooded it. The guards returned with gas masks and a dog and maced Joslyn through the food tray slot, then rushed him.

Nine of the ten picked Joslyn off his bed and slammed his body and head on the floor. They held him face down in the 16" of water so he could not breathe, while continuing to pound his face and head on the floor with their fists. Guard Maia kicked Joslyn's face and body while he was still submerged, turning his face into a bloody pulp. They then picked Joslyn up and took him, in full restraints, into a shower cell, where they beat him more. After roughly strip searching him, they took him to the medical unit. The doctor ordered his transfer to the outside hospital emergency room. When the doctor asked "what happened," he was told

to keep his mouth shut. Notwithstanding being sewed up and treated, Joslyn suffered permanent facial scarring.

A CDC investigative report concluded that NCI guards had used "excessive force" and "failed to follow proper procedures and protocols," and that the use of force on Joslyn "was planned." The report also found Maia "less than truthful" when queried on the melee. NCI records showed that Maia had been earlier disciplined for brutally beating another prisoner. It is not known what discipline, if any, the guilty guards suffered here.

Faced with the video recordings, CDC agreed to settle the complaint in August 2007, before trial. Joslyn was represented by Bridgeport attorney Antonio Ponvert III. See: *Joslyn v. Murphy*, U.S.D.C. (D. Conn.) Case No. 3:07CV305(JCH). ■

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Prisoners' Death Rate Report Indicts Prison Medical Care by Implication

by David M. Reutter

A report by the US Department of Justice's Bureau of Justice Statistics has issued a report on the 12,129 state prisoners' deaths reported between 2001 and 2004. That report examined the circumstances and causes of death using information obtained from individual death records collected under the Death in Custody Reporting Act of 2002.

During the period under analysis, 99% of all state prisoners were between the ages of 15 and 64. The good news is that the mortality rate for prisoners is 19% lower than the comparable age group of U.S. residents. While that trend continued for all prisoner age groups under 45, the prisoner death rate for the 55 to 64 age group was 59% higher than the U.S. resident population.

Although the report makes no direct connection to prison medical care, it does state that among illness fatalities: medical staff evaluated prisoners for illness in 94% of cases, administering medications for the fatal condition 93% of the time. A blood test, x-ray, or MRI was conducted in 89% of the cases.

Prisoners who died of illness entered prison with that illness in 68% of those fatalities. Amongst those deaths, the rates were 94% for AIDS, 10% for liver diseases, and 54% for cancer. Among leading causes of death, influenza and pneumonia were the least likely to be present at the time of admission.

Overall, prison authorities reported over 60 different fatal medical conditions, but prisoner deaths were heavily concentrated among a small number of diseases. Heart disease (27%) and cancer (23%) accounted for half of all prisoners deaths. When you combine liver diseases (10%) and AIDS related deaths (7%), two-thirds of all prisoner deaths were caused by these diseases.

The report says a specific cancer site was named in 79% of all cancer deaths. Lung cancer was the leading one, causing 8% of all prisoner deaths. That disease caused 910 deaths, which is more than the next 6 leading sites of cancer deaths (864) combined. Men died of cancer at twice the rate of women. For men, lung, liver, and colon cancer was the biggest

risk. In women, breast, ovarian, cervical, and uterine cancer accounted for 24% of cancer deaths. In all, men died at a 72% higher rate than women.

Over 41% of all prisoner deaths occurred in five states. Each of them recorded over 500 deaths between 2001 and 2004. Texas led all states with 1,582 deaths, followed by California (1,306), Florida (813), New York (712), and Pennsylvania (558). The mortality rates were lowest for Vermont, Alaska, Iowa, North Dakota, and Utah. A distinction not made in the report is that the difference between the highest and lowest rates is sheer size of the prison system.

A point that can not be missed in the report is that the older the prisoner, the more likely death is to occur. The death rate of prisoners age 55 or older was over three times higher than that of prisoners 45 to 54. While prisoners 45 or older account for only 14% of all state prisoners between 2001/2004, they accounted for 67% of all prisoner deaths over that period. Suicide was the leading cause of death for prisoners under 35.

The mortality rate for older prisoners

was particularly high. While those 65 or older only comprised 1% of the prison population, they accounted for 15% of all deaths. This group did not typically involve prisoners who have been incarcerated as young adults or on life sentences. A majority, 59% were 55 or older when admitted to prison and 85% of them were 45 or older upon admission.

While the report makes no conclusions about medical care, *PLN* readers will note past articles that detail the inept or nonexistent medical care that is often rendered to save states money or to increase the profits of a private vendor. Typically, health problems do not manifest themselves in young people. The fact that 89% of all prisoner deaths are attributed to medical conditions and that two-thirds of those deaths are in prisoners 45 or older is an indication that a problem exists in prison medical care, especially when we consider that death rate is 56% higher than the U.S. population

The report entitled, *Medical Causes of Death in State Prisons, 2001-2004*, issued in January 2007 is available on *PLN*'s website. ■

Multiple Incidents Indicate Florida Jail Has Culture of Abuse

Three recent incidents at the Hillsborough County Jail in Tampa, Florida demonstrate a culture of abuse at the facility. One of the incidents involved a guard dumping a quadriplegic prisoner from his wheelchair, which was caught on videotape.

When Brian Sterner, 32, awoke to knocking on his front door on Jan. 29, 2008, it was sheriff's deputies serving a warrant for a charge related to a traffic violation. Since 1994, Sterner has had no feeling below his sternum, no use of his legs and limited use of his arms as a result of a wrestling accident. The deputies took him to jail, placed him in a wheelchair and left him to the care of the jail staff. That proved to be a mistake.

During the booking process, Charlette Marshall-Jones, a 22-year veteran jail employee, asked Sterner to stand. When he said he couldn't, Jones lifted the back

of the wheelchair, dumping him on the floor. She then checked Sterner's pockets as Cpt. Steve Dickey stood by laughing. Sterner was then lifted back into the wheelchair.

"She was irked with what she was telling me to do," said Sterner. "It didn't register with her that she was asking me to do something I can't do." He suffered only bruising from the incident.

Shortly after viewing the jail's surveillance tape of the incident, Chief Deputy Jose Docobo suspended Jones, Dickey and six other employees who failed to intervene, including Cpl. Deondra Williams. "The best I could do is offer him our apologies," said Docobo. "There's no excuse. This is indefensible. To the extent we can make it right for this gentleman, we'll attempt to do so."

But an apology wasn't sufficient for Sterner. He wanted Jones charged with

felony battery. The sheriff's office "seems to be headed in the right direction" with the apology, but "when she's arrested, then I'll believe they're serious about it," stated Sterner's attorney, John Trevena. The videotape of the incident was disseminated widely on the Internet and resulted in national news coverage and attention from the governor's office on down.

Local prosecutors got serious on February 16, 2008, charging Jones with abuse of a disabled person. She was released on \$3,500 bail and subsequently entered a pretrial diversion program. Cpl. Williams was fired on June 6, 2008; another deputy was cleared of disciplinary charges related to the incident involving Sterner, but resigned anyway.

"This is not the norm at the sheriff's office. This is an aberration," Docobo said. However, other incidents at the jail put that assertion in serious doubt.

The sheriff's office is also investigating a January 10, 2008 incident that involved Jones and prisoner Tammy Lynn Mojica. "She snatched me by the back of my head and slammed me into the wall," said Mojica, who also claimed injuries to her hand and thumb.

A third incident at the jail involving exotic dancer Charlane Irving, 28, who was arrested in the early morning hours on drunken driving charges, also was caught on video. After she became frustrated because she was not allowed to make a phone call, Irving began knocking on the window of her holding cell. A guard told her to stop.

After he left she kept knocking. Deputy Milton Fassett came back to the cell. "He

just rushes into the cell, grabs me by the arm and swings me up against the glass. I said, 'How are you allowed to do this? You're not allowed to beat me up,'" said Irving. "He said, 'I can do whatever I want.' He twisted my left arm around like twice. He brought his fist up in a 45-degree angle. He brought [his] entire arm down onto my arm, like a wrestler move or something."

A jail nurse examined Irving and gave her a sling to wear. She received no other medical treatment, and upon being released later that day her jail jumpsuit had to be cut off because she couldn't lift her arm. She went to a hospital, where X-rays revealed she had suffered a broken bone that took four months to heal.

A sheriff's investigation cleared Fassett of wrongdoing despite the fact that the incident was videotaped. The investigative report stated it was "impossible to determine if this injury occurred prior to or after her contact with law enforcement the morning of the arrest."

Which may explain why the incident involving Sterner was described as an "aberration" – because if you keep your eyes closed to abuse most of the time, what you are occasionally forced to see must seem unusual. *PLN* has reported other incidents at the Hillsborough County Jail, including when pregnant prisoner Kimberly Grey was denied medical care and had to give birth over a jail toilet in March 2004. Her baby died soon afterwards. [See: *PLN*, Oct. 2007, p.32].

Further, a lawsuit filed in U.S. District Court in February 2008 claims that prisoner Marcella Pourmoghani-Esfahani was beaten by a deputy at the jail on Nov. 11,

2006, causing brain injuries. A videotape of the assault was released by Esfahani's attorney. See: *Pourmoghani-Esfahani v. Gee*, U.S.D.C. (M.D. Fla.), Case No. 8:08-cv-00328-SDM-TGW.

Hillsborough County Sheriff David Gee created an independent 11-member commission to review the jail facilities in February 2008; the commission's final report was released on Sept. 10, 2008. The report, which was based on interviews with staff, on-site jail visits and public input during twelve public hearings, included in-depth reviews of use of force policies, investigations into staff misconduct, and the prisoner grievance system. The commission "documented many more strengths than weaknesses" at the Hillsborough County jails, and largely lauded their policies and procedures.

Some deficiencies were noted in understaffing, the grievance system, and use of force definitions. In regard to grievances, the commission noted that in 2007 no prisoners had filed grievance appeals, apparently because it was not clear how the appeals should be filed. The Sheriff's office issued a formal response to the report on Nov. 12, 2008, explaining how the commission's recommendations would be implemented.

Sterner and Irving have both announced plans to sue the Sheriff's office, so a jury may have the last word as to whether the Hillsborough County Jail has a culture of abuse. ☞

Sources: *Fox News*, *Live Leak*, *MSNBC*, *Tampa Tribune*, *Associated Press*, *Sun-Sentinel*

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Welcome to Fun Day: Crime and Punishment in the United States

by Marie Gottschalk

Doing Time Together: Love and Family in the Shadow of the Prison. By Megan Comfort. University of Chicago Press. 256 pp. \$55.00 cloth. \$22.00 paper.

Race, Incarceration, and American Values. By Glenn C. Loury with Pamela Karlan, Tommie Shelby, and L  c Wacquant. MIT Press. 88 pp. \$14.95.

A few years ago, Graterford state prison outside Philadelphia hosted a large and unprecedented family fun day for imprisoned men and their families. Afterwards, a seven-year-old sent Superintendent Donald DiGuglielmo a letter thanking him for the “most fun I’ve ever had.” Sounding alternately proud, bemused, and troubled as he recalled this story, DiGuglielmo asked his largely suburban audience at a recent workshop on children and incarceration: what does it say about us as a society that the best day of this child’s life was a day spent behind the walls of a maximum-security prison?

Much recent research on prisoners and their families emphasizes the uniformly devastating economic, social, and political impact that mass incarceration has had on families and communities. Glenn C. Loury and his contributors survey some of the wreckage in *Race, Incarceration, and American Values*. But as Megan Comfort shows in *Doing Time Together*, the families and loved ones of people in prison have extremely complex and contradictory feelings about—and relationships with—the penal system, despite its many reprehensible consequences. Their ambivalence complicates the politics of penal reform and efforts to reverse the prison boom.

Loury and his contributors argue that mass incarceration aggravates some of the very social ills it is supposed to ameliorate. An analysis of New York City’s neighborhoods reveals a “perverse effect of incarceration on crime: higher incarceration in a given neighborhood in one year seemed to predict higher crime rates in that same neighborhood one year later,” Loury explains. Men with prison records have significantly lower wages, employment rates, and annual earnings over their lifetimes than similar men who have never served time.

The negative effects of mass incarceration are unevenly spread. L  c Wacquant

prefers the term hyper-incarceration because it highlights how poor people, especially African-American men and women in crumbling urban neighborhoods, are the primary victims of the country’s exceptionally harsh penal policies. By the time they are 40 years old, 60 percent of black male high school dropouts have been incarcerated at least once. A black man in California is more likely to go to a state prison than a state college. In Florida and Alabama, more than a quarter of all black men are permanently disenfranchised because of a criminal conviction. The black-white incarceration ratio of 8:1 dwarfs other major indicators of social and economic disparity, including unemployment (2:1), infant mortality (2:1), and net worth (1:5). “Mass incarceration has now become a principal vehicle for the reproduction of racial hierarchy in our society,” concludes Loury.

If the effects are so devastating and wide ranging for African Americans and other minority groups, why has no major political movement emerged to get the United States out of the mass incarceration business? Part of the answer may lie in the complex relationship between the country’s penal system and its welfare system. Police, jails, and prisons “are now the primary contact between adult black American men and the American state,” explains Loury. But the penal system also has become the social agency of first resort for low-income men and women, as Comfort shows in her gripping and provocative ethnographic study of the wives and girlfriends of men serving time in California’s infamous San Quentin prison.

Comfort stridently challenges the prevalent view among researchers and anti-prison activists that detention facilities have a uniformly negative impact on the lives of prisoners and their families. Mental health, substance abuse, and other health-care services are grossly inadequate behind bars—but they may exceed what exists in the community. And even if imprisoned men do not get adequate services on the inside, incarceration provides some women with a welcome respite from troubled men and household stresses like substance abuse, domestic violence, and out-of-control family finances. In short, this is “imprisonment as family therapy.”

For women with scarce resources, prison

provides a cherished refuge from “navigating the perils of housing projects, destitute neighborhoods, or the streets.” For couples that are permitted conjugal family visits, the 43 hours spent in one of San Quentin’s bungalows is their fun day, the idealized version of the home they never had.

Paradoxically, incarceration also confers respectability on some imprisoned men. It furnishes a “culturally acceptable and ‘manly excuse’” for their joblessness, their lack of interaction with their children, and their financial drain on the household.

Prison can also deepen a woman’s romantic connection with her imprisoned partner. Denied conventional ways to express masculinity—money, sex, a job, being a day-to-day father—imprisoned men may adopt “stereotypically feminine qualities—intensive communication, attentiveness to the relationship, expression of emotion.” The wives and girlfriends Comfort interviewed cherish this newfound intimacy, so much so that they “become reliant on, and even grateful for, carceral control.”

At the same time, these women recognize and denounce how penal control distorts their own personal lives. In mournful and moving detail, Comfort describes the extreme degradation that visitors face at San Quentin prison, which sits on the northern shores of San Francisco Bay. In the visitor waiting area, nicknamed “the Tube,” women and their families are herded into a gusty, chilly mini-wind tunnel where wasps periodically swoop down from ceiling nests, children play on filthy floors, and the poor acoustics of the concrete corridors “amplify and echo every outburst, squeal, tantrum, and reprimand.” As one regular visitor told Comfort, the Tube reminds her of a slaveholding tank. “Every time I walk in there and look out the windows at the water, all I can think is a place to hold slaves till the ship comes in,” she explained.

Prison not only dictates how the partners of imprisoned men behave on the inside but also how they run their lives on the outside. These women are quasi prisoners, quasi guards, quasi parole officers, and quasi parolees. They organize their schedules around the weekly visiting hours, the daily prisoner head counts, the collect phone call that may or may not come, and the ebb and flow of their part-

ner's legal case. They reward their partners for good behavior and emotional intimacy with letters, calls, visits, and elaborately prepared packages of extra food, clothing, and other items, which helps maintain order in the prison.

Upon release, they monitor their boyfriends and husbands to keep them from violating parole. But when hope turns to dismay about their leverage to control their partners on the outside, some women angrily turn on them, "often looking to the criminal justice system to validate their sense of betrayal by punishing the man who has done them wrong." For example, sometimes they collude with parole officers or orchestrate situations with the police to get their husband or boyfriend picked up on a minor technical parole violation. Because police and parole officers often have carte blanche to search the vehicles and homes of parolees, their partners do not escape the gaze of the intrusive parole system.

The women Comfort befriended "plainly realize that correctional facilities cause their own forms of harm" and are poor substitutes for the social and economic programs they and their partners desire. They also are perspicacious about criminal justice issues like sentencing policies, mass incarceration, and the death penalty. In their eyes, the main purpose of the penal system is to control African Americans and other minorities, restrict their political

power, and avoid investing in much-needed social and health services.

They single out larger structural forces, including racism and poverty, to explain why so many poor black men are incarcerated. But they do not always portray their partners as innocent victims of the system. They make fine distinctions between whether a man bears responsibility for his arrest or not. They are inclined to forgive and help a husband or boyfriend sent back to prison for a technical parole violation, while refusing to visit a man who committed a new serious crime while out on parole.

Comfort says relatively little about what happens to these relationships after the man is released. She hints that the prized intimacy forged behind prison bars is extremely brittle and not easily sustained on the outside. Moreover, Comfort focuses on an important—but somewhat exceptional—group of 50 women who maintain regular contact with their incarcerated partners, including about a quarter who first met their future partners while working or volunteering at San Quentin. Presumably women who do not keep up with their incarcerated husbands or boyfriends might have quite different views about the relative benefits of imprisonment and whether prison enhances emotional intimacy.

Other recent research based on survey data suggests that mass imprisonment damages more relationships than it repairs over the long term. Men who have been incarcerated are less likely to get married and stay married, to secure good, steady employment, and to be full citizens of their communities. They also are more likely to commit domestic violence. But to many of the women Comfort interviewed, criminal justice intervention appears to be the only reliable means of obtaining some momentary relief from troubled men and home lives. No wonder that many of them were not ready to "tear down the walls" alongside anti-prison activists and dismissed collective political action to reform penal policies as futile. Comfort's portrait of political quiescence is at odds with other recent work documenting growing political resistance among the families of incarcerated men and women, notably Ruth Wilson Gilmore's *Golden Gulag* on the prison build-up in California. ■

Marie Gottschalk is a professor of political science at the University of Pennsylvania and the author of, among other works, The Prison and the Gallows: The Politics of Mass Incarceration in America.

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Cook County Jail Conditions Unconstitutional, Charges Department of Justice

by David M. Reutter

On July 11, 2008, the U.S. Department of Justice's Civil Rights Division issued a letter to officials at Illinois' Cook County Jail (CCJ) which found that conditions at CCJ violated the constitutional rights of prisoners held at the facility. The 98-page letter detailed findings based upon on-site inspections that occurred on June 18-22 and July 23-27, 2007.

The inspectors found that prisoners were not protected from excessive use of force by jail staff or prisoner-on-prisoner violence. Medical and mental health care was inadequate, and serious risks were posed by a lack of fire safety precautions. Further, environmental and sanitation deficiencies existed.

CCJ is one of the largest single-site county jails in the nation. It sits on approximately 96 acres in Chicago, and has an average daily population of 9,800 male and female prisoners. In 2006, CCJ admitted 99,663 prisoners. As a historical note, Al Capone was once housed at the jail.

Since 1982 the facility has been under federal court supervision in a class action overcrowding lawsuit. CCJ is still under a consent decree in that ongoing case. See: *Duran v. Dart*, U.S.D.C. (N.D. Ill.), Case No. 74-C-2949. On August 22, 2008 the U.S. District Court over the *Duran* consent decree levied fines of \$1,000 per day against the CCJ for failure to comply with court orders related to staff training and medical care for prisoners.

The first issue addressed in the Department of Justice's letter was CCJ's "culture of abusing inmates." Several examples were cited where verbal altercations with prisoners "too often provoke physical responses from CCJ [guards]." A "heated" exchange or verbal insults between prisoners and guards landed several prisoners in the hospital after they were beaten by a group of guards. Failure to follow orders often resulted in beatings by CCJ staff.

Physical force was sometimes inappropriately used at CCJ even after an active dispute between a prisoner and guard had ended, apparently to punish the prisoner. Retaliatory use of force occurred when guards were dealing with mentally ill prisoners with limited impulse control, although the prisoners did not present a

threat to themselves or others.

A mentally ill prisoner identified as "Robert T." learned of such brutality firsthand after he exposed himself to a female guard. A group of guards took him to a clothing room, handcuffed him, and then hit and kicked him. Robert sustained head trauma that was so severe he had to be taken to an outside hospital.

The highest number of abuse of force allegations occurred in the Receiving, Classification and Diagnostics Center (RCDC), which is CCJ's intake area. The "RCDC is chronically overcrowded, cramped, chaotic, and insufficiently staffed," the federal investigators found. Prisoners who request attention for various needs risk being assaulted by guards. Many prisoners reported that those who are old, mentally ill or do not understand English are struck by guards for dressing and undressing too slowly.

Some prisoners were targeted for physical abuse purely because of their charges. Among the examples cited in the Dept. of Justice letter was the case of "Pedro S.," who was arrested on a sex charge involving his niece. Three guards taunted him in Spanish, asking if he knew what was going to happen to him. The resulting beating that Pedro received resulted in a broken rib and damaged jaw and knee. Another prisoner who did not return a guard's pen quickly enough suffered multiple fractures and a collapsed lung that required him to be placed on a ventilator.

"There's clearly examples of corrections officers in organized groups beating inmates to retaliate for verbal abuse, and people going to the hospital for it. And that's got to stop," said U.S. Attorney Patrick J. Fitzgerald.

Yet CCJ officials tried to ignore the problem. Investigations of excessive force complaints are not undertaken until after a prisoner files a lawsuit. It is then "almost impossible" for that investigation "to appear fair and unbiased when the investigation is undertaken only because CCJ is defending [against] an inmate lawsuit," the Justice Department stated.

The Use of Force and Incident Reports that CCJ utilizes are inadequate to determine if the amount of force used

was appropriate. While the reports may say the prisoner received medical attention, they fail to indicate the extent of the injuries or care provided. CCJ guards also attempted to conceal excessive use of force by themselves or others, and this extended to intimidating prisoners to keep quiet.

Overcrowding contributes to prisoner-on-prisoner violence, and inadequate staffing allows such assaults to occur. In the week of March 19, 2007, CCJ had 591 prisoners sleeping on the floor due to lack of bed space. That week there were 35 fights, 27 uses of force, and 34 homemade knives and 12 other weapons were found. CCJ averages 23.5 prisoner fights a week and 3 assaults on staff.

One of those attacks proved fatal, when CCJ prisoner John Lambert died due to massive head injuries in July 2007. His death was ruled a homicide, though the primary suspect – Lambert's cellmate, who had a history of violence – was not charged.

The CCJ's dilapidated physical condition provides prisoners with ample material for fabricating weapons. The poor condition of the building is also a health and safety threat. "The level of fire safety at CCJ is poor," the investigators noted. Not only does CCJ not have sufficient smoke and sprinkler systems, but fires are a regular occurrence at the jail. Prisoners frequently set small fires in their cells for two reasons: to get guards' attention and to utilize the metal plate on their bunks as a hot plate to heat food.

At every level of operation at the CCJ there are severe environmental health and safety problems. In addition to numerous electrical hazards and plumbing deficiencies, serious ventilation issues exist. The combination of high temperature and humidity, overcrowding, and lack of air movement increases the risk of communicable diseases. There is also a major pest control problem with mice, cockroaches and drain flies.

Of a more serious concern, prisoners who become ill face a broken and dysfunctional medical care system. Many of the problems with medical care result from inadequate staff. The deficiencies begin with insufficient intake screening, and continue through the entire spectrum of assess-

ment, acute and chronic care, medicine dispensation and mental health treatment. In August 2006, a prisoner's leg had to be amputated after an infection went untreated. "You can't have conditions where people are dying and being amputated," said U.S. Attorney Fitzgerald.

Following the official letter from the Dept. of Justice, the stage is now set for a consent decree between CCJ and federal officials. If that does not occur, CCJ could face a civil rights suit and greater scrutiny by the federal courts. Of course, that such conditions exist after decades of

litigation illustrate the limitations of civil rights litigation. The DOJ report is posted on PLN's website. ■

Sources: *Letter from U.S. Dept. of Justice dated July 11, 2008; Chicago Tribune; New York Times*

CMS Fails to Treat MRSA Infection; Florida Jail Prisoner Dies

When Dorothy Dian Palinchik was booked into Florida's Pinellas County Jail (PCJ) on February 13, 2008 for stealing a \$9.00 Philly cheesesteak sandwich from a grocery store, she was seemingly healthy. Two weeks later she died of pneumonia and an antibiotic-resistant staph infection.

Palinchik's family suspects she caught Methicillin-Resistant Staphylococcus Aureus (MRSA) shortly after arriving at the jail. Within a week after being booked, Palinchik, 42, was placed in PCJ's medical wing.

Her family claims that she repeatedly asked for medical care. Although Palinchik had a fever of 101.5 that raged for five days, she was only given one Motrin and one Sudafed. While some may wonder at such inadequate treatment, this is only one of numerous failures perpetuated by Correctional Medical Service (CMS), the jail's private health care provider. [See, e.g., *PLN*, Aug. 2002, p.1; May 2007, p.1].

After ten days at PCJ, Palinchik was sent to a local hospital. Doctors determined she had pneumonia and MRSA, and put her in a drug-induced coma in an attempt to save her life. The aggressive MRSA infection had already blackened her hands and feet; the doctors were considering amputating all her limbs. Just six days after she arrived at

the hospital, Palinchik died.

An autopsy determined that she had succumbed to MRSA. "If she wasn't massively infected, she'd be alive right now," stated Pinellas-Pasco Medical Examiner Jon Thogmartin. "It's like saying if not for the gunshot wound to the head this person would be alive. It's that absolute."

"Someone went in to the jail apparently very healthy and became sick enough that she died," said Mark Buell, Palinchik's family attorney. "The question is not where the germ came from, but did they give her appropriate medical care or were they indifferent?" Palinchik's family is considering filing suit.

An internal jail investigation, released on July 17, 2008, concluded that Palinchik had received proper medical treatment. Only one mistake was noted – a jail sergeant who threw away a medical request form instead of filing it. That error reportedly did not contribute to Palinchik's death.

Another PCJ prisoner, Roy Daffron, has claimed that CMS is guilty of "neglect, mistreatment and abuse." Daffron believed he has MRSA, and informed jail medical staff about his symptoms on March 24, 2008. Yet he didn't see a doctor until almost two weeks later on April 7. Although they hadn't done a culture of the infection on

Daffron's stomach at the time, CMS staff said he didn't have MRSA. Both CMS and PCJ stated Daffron was receiving proper medical care.

"It's not a safe place," observed Gerald Green, whose father, Orell Green, died in 2006 of jaundice and hepatitis shortly after being rushed from PCJ to a hospital. He was only given Motrin by jail staff. "You won't get any medical treatment and people do die in jail," said Gerald.

The story of Diane Palinchik's short – and fatal – stay at PCJ proves that point. ■

Sources: *St. Petersburg Times, Miami Herald, North County Gazette*

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Oregon Juvenile Facility Warden Indicted; Youth Authority Director Resigns

by Mark Wilson

From 2000 to 2007, Darrin Humphreys served as warden of the RiverBend Youth Detention Center, a 50-bed Oregon Youth Authority (OYA) facility in LaGrande, Oregon.

Supervisors were so impressed with his performance that they promoted him to head the MacLaren Youth Correctional Facility, the state's largest juvenile prison, even though he scored eighth out of nine applicants who were interviewed for the position. "This is a guy who was producing results," OYA Director Robert Jester declared at the time.

Just weeks later, however, the results weren't looking so good for Humphreys and his supervisors. In April 2007, the Oregon State Police began investigating Humphreys after a relative of a RiverBend employee complained to another state agency. Humphreys was placed on administrative leave and later resigned on June 8, 2007. Two other RiverBend employees also quit, and two were fired.

Internal documents and police reports revealed Humphreys as a warden who stole property, used prisoners to remodel his home, tried to take kickbacks from a contractor, claimed over \$12,000 in unearned mileage reimbursements, and attempted to fire potential whistleblowers and threaten possible witnesses.

Publicly, the OYA Director claimed to be offended. "What we're dealing with is a rogue manager who was particularly sophisticated, sociopathic," said Jester. "The fact that he is alleged to have stolen property – the multiple things he has done is abhorrent." Yet a subsequent report painted a different picture of Jester's private thoughts. One month after placing Humphreys on administrative leave, Jester and Brian Florip, Humphreys' immediate supervisor, met with Humphreys. He then admitted to them that he'd stolen roofing materials, but "they both gave him a hug and told him what he had done was stupid but it wasn't the end of the world," an internal report stated.

The theft of roofing materials was just the tip of the iceberg, however, according to the OYA report.

Cell Phone Abuse

Humphreys set up a state cell phone account, in violation of agency policy, which

gave him more minutes than most agency managers, according to the OYA investigative report. His supervisors didn't notice even when he routinely exceeded his limit, which cost the taxpayers more money. Had OYA officials investigated they would have discovered that most of Humphreys' 3,100 cell phone calls were personal.

Use of Prisoner Labor

A 2004 scandal involving board members of the Baker-Morrow Education Service District who used prisoner work crews for personal projects was never investigated by the OYA. Humphreys used youth work crews and staff to re-roof and build kitchen cabinets in his home.

Stolen Roofing Supplies and Lumber

Humphreys' home improvement projects were completed with lumber and roofing supplies he had stolen from RiverBend. Initially he lied to detectives about taking the building materials, but later changed his story. "Mr. Humphreys called me back and told me that he had not been honest with me and that it was eating him up," wrote a detective. "He explained that he did take OYA roofing materials off OYA RiverBend property and roofed his own personal residence with the materials. Humphreys said he intended to replace the materials but never did."

Kickbacks and Fraud

In June 2005, Humphreys contracted with a friend to build a sign for RiverBend. He directed staff to cut a check for \$4,999.99 – one penny under the amount requiring competitive bids. Supervisors didn't notice the unusual contract amount. A witness told investigators that Humphreys bragged that his friend was going to pay him \$2,000 for the contract. Ultimately, RiverBend prisoners and staff, not the contractor, built the sign, according to the OYA report.

Phony Mileage Reimbursement

Between July 2005 and January 2007, Humphreys collected over \$18,000 in mileage reimbursements – far exceeding anyone else in the agency. He often claimed mileage even when he used a state car, according to an internal review. Nearly \$12,400 of

Humphreys' travel reimbursements and per diem payments were based on false claims, investigators estimated. OYA's former business manager reported that Jester ignored his suggestion to investigate Humphreys' mileage claims.

Intimidation

A "large number" of RiverBend employees told investigators that Humphreys used bullying and intimidation to keep them from reporting abuses, according to the report. "This included telling staff that he had a brother in prison for murder and that his brother had friends on the outside who would take care of people that were a problem for Mr. Humphreys," investigators stated. Even while on administrative leave and under state police investigation, Humphreys attempted to intimidate possible witnesses.

All Eyes on OYA

An initial draft of the OYA report was submitted to Jester and OYA Deputy Director Phil Lemman. Two members of the review team accused Lemman of editing out anything embarrassing to upper management. Lemman denied the allegation, claiming he edited the drafts only for clarity. "It was never meant to shield or protect anyone from accountability," he said.

"Why is it that the Legislature is the last one to know about these types of incidents in state government?" asked State Representative and former Oregon State Police Detective Andy Olsen, upon first learning of the Humphreys case through an e-mail sent by Jester's deputy, which warned legislators of an article that would run two days later in *The Oregonian*.

Tim Nesbitt, deputy chief of staff to Governor Ted Kulongoski, admitted that the problems at RiverBend had drawn the Governor's attention, but he believed the actions taken by Jester were unnecessary. Few people shared this belief.

On May 14, 2008, *The Oregonian* reported that little had changed one year after the internal OYA investigation, while agency officials pointed to a long list of recommended – yet unimplemented – policy changes.

"I think it's a really nice policy review," said Joe Schaeffer, a union representative

for OYA employees. "But what happened were not failures of policy. What happened were failures of management."

Outside Audit Faults Supervisors

Two days after the newspaper story ran, Jester ordered an outside review of the RiverBend scandal by the Department of Corrections (DOC), a decision which would ultimately end his career. The DOC report echoed the OYA findings that management had missed or intentionally ignored a series of warning signs of problems at RiverBend.

The DOC found that several former OYA employees had warned Jester about problems with Humphreys, but he minimized them or didn't follow through. Former agency officials told investigators that Jester and his top deputies tacitly approved of some of Humphreys' conduct. Union officials criticized Jester's management, arguing that the Humphreys scandal demonstrated an agency-wide culture of protecting well-connected upper management officials.

In June 2008, a grand jury indicted Humphreys on 26 counts of theft, witness tampering, official misconduct and other offenses. The charges are still pending.

On July 7, 2008, Humphreys' immediate supervisor, OYA Assistant Director Brian Florip, resigned after being confronted about an alleged inappropriate romantic relationship with a subordinate. While not directly tied to the Humphreys case, Florip's departure resulted from an investigation into Humphreys and Florip that revealed the inappropriate relationship, according to Jester.

"Mr. Florip made a serious error in judgment such that I could not support him continuing in his current position with OYA," said Jester. "He was informed he was going to be removed from service today and resigned prior to that removal taking effect."

Governor Reviews DOC Report, Jester Quits

On July 29, 2008, the Governor received the DOC's report. "The report raised some concerns about managerial oversight as well as cultural issues and challenges in the agency," admitted Anna Richter Taylor, a spokeswoman for Gov. Kulongoski. She said the Governor had immediately summoned Jester to discuss the report's findings.

"They came to a mutual conclusion that it was time for new leadership in the

agency," said Taylor. Jester's resignation ended his 36-year career in Oregon Youth Corrections, where he had worked his way up from a guard to the director's position.

"It has become increasingly clear to me that my presence as director of the Oregon Youth Authority will be an ongoing distraction and impediment to this agency moving forward and accomplishing its mission," acknowledged Jester. "I feel very good about my contributions. I don't feel I'm leaving

under a cloud. ... My head is high." State Rep. Linda Flores, who serves on the House Judiciary Committee, has since called for an outside investigation into misconduct at the OYA. "I appreciate the work OYA has done to clean up any wrongdoing," she said, "but clearly there needs to be more oversight." Clearly, she's correct. ■

Sources: *The Oregonian*, www.salem-news.com, *Statesman Journal*

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Violence and Corruption at Rikers Island; Called a “Battle Camp for Kids”

by David M. Reutter

While there have been no escapes and only two suicides in the past year at New York City’s Rikers Island, the nation’s largest jail system – which houses 13,900 prisoners – is under scrutiny due to an increasing level of violence at the facility. Prison officials deny there is a significant problem.

“If it was so bad, they would be killing each other, they would be killing themselves, and there would be escapes,” said Martin F. Horn, Commissioner of the New York Dept. of Correction. “This is a safe jail system.”

Statistics, however, show that violence at the facility rose dramatically when compared with the previous year. Use of force injuries jumped from 1,079 to 1,565. During searches, the number of weapons found increased from 1,830 to 2,174. For the third year in a row, the number of violent incidents among prisoners was over 8,000; the number of stabbings or slashings increased from 35 to 44.

The surge in violence has at least one veteran jail supervisor concerned. “It’s indicative of less control on the part of the DOC staff,” the unidentified supervisor said. “When inmates make more weapons, it means they don’t feel safe. When officers use more force, it means they don’t feel safe.” Of greater concern is violence in the area at Rikers where juvenile offenders are housed.

The statistics and rhetoric make it easy to overlook the fact that many of the violent incidents at the jail may be the result of guards using prisoner gangs to maintain control of their units. “The inmates tell us it’s a really common set-up,” said Andrew Still, a lawyer who represented prisoner Donald Jackson. “In a lot of the houses, the correction officers use the house gang as enforcers and pay them with cigarettes and extra commissary.”

After prisoner Kirk Fisher walked up to Jackson and punched him in the head, Jackson dropped like a rock. His head struck a piece of metal sticking up from the floor, which caused him to develop a blood clot that required surgery to save his life.

Fisher, who was sentenced to prison for the assault, initially said he had at-

tacked Jackson because Jackson had stolen a cookie. In February 2008, however, he gave a sworn account that claimed a guard told him to assault Jackson. “[He] pulled me to the side and explained to me that Jackson was running around and thieving.” The guard told him, “Before you do anything, I’m going to go to the other side and [then] do what you got to do.”

Fisher also stated that he was allowed to run the unit. “I was the house captain and it was my job to enforce certain rules. Anybody that acted up in the house, it was my job to enforce certain rules. Anybody that acted up in the house, it was my job to put them in line,” said Fisher. As for the stolen cookie explanation, “It was a lie to gas myself up to hit the dude.” Jackson won a \$500,000 settlement from New York City for his injuries. [See: *PLN*, June 2007, p.41].

In April 2008, a New York grand jury indicted Rikers guard Lloyd Nicholson, 35, on numerous charges of gang assault, assault and official misconduct. He used a group of teenage prisoners as enforcers in his “program.”

“Basically, it was like the movie *A Few Good Men*,” a source told *The Village Voice*. “Either you were in the program or not. He thought the ones who weren’t abiding with the program were misbehaving, and he used other inmates to discipline them.”

The indictment charges that Nicholson had six youths beat up two others on June 10, 2007, for refusing to obey orders. He told them to avoid hitting the victims in the face so there would be no telltale marks. One of the prisoners who was assaulted suffered a collapsed lung, then was denied medical treatment for several hours.

Nicholson tried to avoid reporting the injury until the next shift. He only relented after another prisoner convinced him that the injured youth desperately needed medical attention. Nicholson told his gang they would get the blame. “Some of you are going to go down for this,” he said.

Indeed, the six juveniles involved in the incident were charged in October 2007 with gang assault. The indictment also charged that Nicholson used a “wooden

stick” to beat another prisoner in May 2007. He faces up to 15 years in prison if convicted.

“Young people tell me when they go in there, the culture is such that the kids control the jail,” stated attorney Michael Hueston. “The [guards] know this happens and they look the other way.” Hueston represents an 18-year-old whose jaw was broken in three places by other prisoners while a guard watched without interfering or calling for assistance.

Another 18-year-old, Ricardo Marsden, said he was assaulted by six prisoners on May 2, 2008. The lawsuit he filed alleges he suffered a “black eye, bruises all over body, leg, back, blood in my ears, busted lip ... Officer stood there watching.”

Every year, prisoners from Rikers Island file about 1,300 claims against the City of New York. Over the last five years it has cost the City \$61.7 million to settle those lawsuits. In 2006, the City settled a class action suit brought by prisoners who were injured by Rikers guards; that settlement cost the taxpayers \$2.2 million. [See: *PLN*, May 2006, p.1].

The City is currently defending itself against a lawsuit brought by 10 prisoners who allege two dozen Rikers guards rampaged through their unit in October 2005. After a prisoner attacked a guard, it became a free-for-all. The prisoners were beaten while guards shouted, “Whose house is this? Our house!” One minute of the melee was caught on camera. A guard then turned the camera off for the next 30 minutes. See: *Prude v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:06-cv-03024-RJS.

Recent events reveal that Rikers Island guards have a tendency to be more than observers of the criminal element; rather, they are sometimes part of it. On April 24, 2008, seven current and former guards were arrested for accepting money to smuggle drugs into the jail. A 16-month investigation that involved detectives posing as prisoners’ families resulted in jail guards accepting between \$100 and \$1,500 to smuggle marijuana, simulated heroin and cocaine to prisoners. The guards were charged with multiple counts of bribery, drug possession and promoting prison contraband.

Former PHS Doctor Arrested on Drug Charges

Guards Tamar Peebles and Daniel Marin face life sentences. The other indicted guards, Anthony Narcisse, Andrew Plaskett, Daniel Bethel and William Delgado, face up to seven years while Joseph Constantino faces 15 years if convicted. The charges remain pending.

Even when prisoners seek help for their addictions at Rikers, they are unable to avoid the influence of drugs. On October 4, 2007, Juan Delarosa sold \$100 worth of cocaine and some Percocets to an undercover officer. Four months later Delarosa was arrested at work.

Delarosa, 56, was employed as a drug-treatment counselor at Rikers. When he was arrested at the jail gate he had 109 packets of heroin labeled "Black Gold" in his jacket pocket and wallet, plus two baggies of cocaine. Drugs were also discovered in Delarosa's office at Rikers.

Despite such arrests, reports of increased violence, numerous lawsuits stemming from injuries caused by assaults from both staff and prisoners, and the high cost of these actions to the City, jail officials remain in denial. "We believe that such behavior by our correction officers is very infrequent," remarked Stephen Morello, a Department of Corrections spokesman.

DeAvery Irons of the Juvenile Justice Project told the City Council a different story. "Young people describe an atmosphere characterized by daily fights, power struggles, and intimidation." The environment at Rikers, he said, is a "battle camp for kids."

At least one recent battle proved fatal. Investigators are looking into whether Rikers guards caused a lapse in security or even looked the other way when juvenile offenders beat another youth to death at the jail on Oct. 17, 2008. Christopher Robinson, 18, was being held on a minor parole violation. He reportedly died due to internal bleeding after being punched, stomped and kicked by three other gang-affiliated prisoners.

Two Rikers guards were reassigned as part of the ensuing internal investigation, which is ongoing. The beating was not caught on surveillance video, and Dept. of Corrections officials initially told Robinson's family that he had apparently died in his sleep. The family has since filed a \$20 million wrongful death claim against the City. ■

Sources: *The Village Voice*, *New York Daily News*, *Associated Press*

In July 2008, former Prison Health Services (PHS) employee John N. Mubang, 57, was arrested by the Florida Department of Law Enforcement for prescribing drugs for monetary gain and trafficking in controlled substances.

The six-month investigation that led to the four felony counts against Mubang stemmed from citizen complaints. Mubang had previously served as the medical director of the Hillsborough County Jail, where PHS was the jail's medical provider. He had also worked for PHS's competitor, Correctional Medical Services.

Mubang had a private practice of 1,000 patients in internal and ambulatory medicine. Since 2006, four of his patients have died from overdoses or interactions between drugs that he prescribed, which included oxycodone, hydrocodone and Xanax.

Mubang was asked to resign or be fired by PHS in 2006, according to

depositions taken in a lawsuit against PHS filed by a prisoner whose newborn baby died in the Hillsborough County Jail. PHS settled that suit for \$1.25 million. [See: *PLN*, Oct. 2007, p.32].

More recently, for the past two years Mubang had been contracted to provide medical services at the CCA-operated Citrus County Jail in Lecanto, Florida. ■

Sources: *Tampa Tribune*, *www.baynews9.com*

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Prison Health and Self-Care: MRSA

by Michael D. Cohen MD

Introduction

There is much concern among prisoners about skin infections caused by a well-publicized germ called MRSA. This article explains what MRSA is, what you can do to protect yourself from MRSA, and how to take care of yourself if you get a skin infection caused by MRSA.

What is MRSA?

MRSA stands for **Methicillin Resistant Staphylococcus Aureus**.

Methicillin is one of the penicillin type antibiotics. Penicillin was one of the first drugs developed that was highly effective against bacteria that often cause skin, lung, ear, throat and other common infections.

Resistant refers to a germ's ability to live and multiply in the presence of an antibiotic. With widespread use of antibiotics over the last 50 years, some germs have developed the ability to survive treatment with some drugs. Penicillin resistance became widespread among certain germs commonly treated with penicillin. Methicillin was developed to re-establish the effectiveness of penicillins against these germs. Now some germs are resistant to methicillin and other penicillin-like drugs too.

Staphylococcus aureus is the scientific name for one germ that commonly causes skin infections. It is also called "staph" for short. Staph normally inhabits the skin and the nose near the nostrils. Most of the time it causes no harm. This is called colonization. When the skin is broken, or the body is weak, staph can multiply out of control and cause disease. Staph that are resistant to both penicillin and methicillin and the other penicillin-like antibiotics are being seen more frequently in skin infections.

So MRSA is the name for a group of staph bacteria that are resistant to penicillin, methicillin and other similar antibiotics that are usually used to treat staph infections.

Staph Skin Infections

People have always had skin infections. Skin infections are mostly caused by two families of bacteria, staph and another group called streptococcus or "strep". The establishment of good personal hygiene and elimination of crowded

living conditions have generally reduced the incidence of skin infections such as abscesses, boils, carbuncles, cellulitis, folliculitis, and furunculosis.

Staph can also cause pneumonia and other infections in major organs. People with weak immune systems are more likely to get these more serious infections. The immune system can be weakened by chronic illness, extremely young or old age, HIV infection, cancer chemotherapy, malnutrition and other causes. Sometimes even healthy young adults can get staph pneumonia.

Skin infections of all types occur more frequently in conditions of crowding and poor hygiene. Jails, prisons, military barracks, refugee camps and urban slums are all settings where crowded living conditions and limited opportunities to wash and bathe result in increased incidence of skin infections. Skin infections also spread easily among athletes who have frequent skin to skin contact.

Transmission and Infection

MRSA, like all other staph germs, is spread from person to person, most commonly by skin to skin contact.

For example: Someone who is carrying staph in his nose may touch his nose with his right hand. Then perhaps he shakes hands with someone else, passing the staph to the hand of the other person. That person may scratch an itchy mosquito bite on his leg, which breaks the skin and inoculates the staph onto broken skin. The bite becomes red, tender and swollen, increasing in size and tenderness over several days until it comes to a point and starts to drain pus. This is a skin abscess or boil.

Some people have called this sort of boil or small abscess a "spider bite". There are spiders that bite. Some types of spider bites do swell up or form ulcers as skin and other tissues dissolve from the digestive juices in the spider's venom. But most of the skin abscesses or boils observed in jails and prisons are simply the result of staph getting into the skin through small wounds.

Another example: Someone who is carrying staph on his skin is working out strenuously and sweating. He takes his shirt off to cool off and lays down bare-backed on a bench press. Sweat and staph are deposited on the bench. The

next man to use the bench also has no shirt on, and he happens to have scraped his back recently and his skin is slightly raw. Staph from the bench inoculates the raw skin of his back. The scratch becomes red, tender and warm to touch. The red, swollen, warm area spreads more widely over the next two days and he starts to get a tender lump in his arm pit on the same side as the spreading skin infection. This skin infection spreading under the skin is called cellulitis. It is more commonly caused by strep, but it can be caused by staph.

Fluids draining from a boil or skin abscess are teeming with bacteria and highly infectious. Outbreaks may occur due to contact with infectious wound drainage via contaminated surfaces, soiled bandages, clothing and bedding. Control of outbreaks involves better wound hygiene and decontamination of surfaces where transmission may be occurring, especially in medical clinics where patients are treated one after another, and in gyms where athletic equipment is shared among many people one after another.

Prevention of MRSA Infection

Good personal hygiene helps prevent exposure to staph infections, including MRSA.

Wash your hands frequently with soap and warm water. Wash your hands when you get up in the morning. Wash your hands whenever you return to your cell. Wash your hands frequently during workouts when using equipment that is used by others. Wash your hands before meals. Wash your hands after using the bathroom.

Bathe daily with warm water and soap.

Bathe as soon as possible after physical activity, contact sports or working out. Dry off after bathing with a clean towel.

Public health authorities recommend liquid soap rather than bar soap to prevent staph being spread on a bar of soap.

Don't share personal care items such as razors, towels, bars of soap, deodorants, creams, ointments or lotions of any kind.

Keep all skin injuries such as scratches, cuts, scrapes or insect bites clean and covered to keep germs from getting into the wound.

Protect yourself from exposure to

other people's skin and sweat. Wear shirts when exercising or playing contact sports like basketball. Place a towel or cloth over the bench before laying down to use the bench press. In some public or school gyms, shared equipment with skin contact is disinfected periodically to reduce the risk of disease transmission.

Don't scratch itchy insect bites. Scratching creates small wounds that can allow staph entry into the skin. Use a hot shower or antihistamines like diphenhydramine (Benadryl) or hydroxyzine (Vistaril) to reduce itching and avoid the urge to scratch.

Like HIV, hepatitis C and hepatitis B, MRSA can be spread on contaminated tattoo needles, injection drug works, and during sexual contact.

Avoid contact with other people's wounds or bandages. If you do have contact with other's wounds or bandages, always use gloves if they are available to you. Wash hands and forearms thoroughly after contact even if you do wear gloves.

In general, isolation or quarantine are not effective measures to control or prevent spread of MRSA. This is because many people carry MRSA in their nose or on their skin but are not sick. However, if a patient with a draining skin abscess is unable to keep the wound covered with a dressing, wash frequently, and generally avoid contaminating the shared environment with the wound drainage, then isolation may be necessary to protect others from his or her MRSA.

There is no vaccine for staph.

Management of Staph Skin Infections

Most staph skin infections are limited to one small local area. Throughout history the treatment of boils and skin abscesses has always been and still is to establish drainage of the liquid or pus from the infected area.

Warm dry or moist compresses for 20 minutes every four hours helps increase circulation to the infected area and allows the body's natural defenses to concentrate there. Local heat helps bring the pus to the surface where it can drain spontaneously. In larger abscesses it may be necessary to make a surgical incision into the abscess to establish drainage.

Do not squeeze or "pop" boils or other small skin abscesses. Squeezing or pinching can damage the surrounding tissues under the skin and allows the infection to spread more easily into the newly

injured area around the boil.

Drainage from a boil or abscess is full of germs. Contamination of surfaces, skin, hands and clothing enables staph to spread to other sites on the infected person, or to other people. Keep boils covered with a bandaid or dressing as well as clothing. This limits the spread of infectious drainage from the infection. Change the bandaid or dressing and shirt often, and dispose of soiled bandages in plastic bags. Wear gloves if you can when handling dressings or contacting wound drainage. Wash hands and forearms well after handling dressings even if you do wear gloves.

When clothes, towels, or bedding are contaminated with wound drainage, wash them in hot water and dry in a hot dryer to kill the germs via heat and dehydration.

Clean and disinfect objects or surfaces that may have become contaminated with wound drainage. In the free world a solution of one tablespoon household bleach in a quart of water works well as a disinfectant. Even if you don't have a disinfectant, use warm water and soap followed by towel drying to clean soiled surfaces in your cell.

Surfaces in medical clinics such as exam tables should be protected by disposable paper liners and disinfected regularly.

Use of Antibiotics

Early in the course of infection small sores may be treated with topical antibiotic cream or ointment such as mupirocin (Bactroban) four times a day. Later stages that are spreading or enlarging will not respond well to treatment on the skin alone.

If the infection is getting bigger or more painful it may require antibiotic treatment to get it under control. Also, if there are symptoms affecting the whole body such as fever, fatigue, cough, or shortness of breath, prompt medical attention and antibiotic treatment are needed. Effective treatment of spreading infection requires antibiotics that come to the infected area in the blood. This is generally accomplished by taking antibiotic pills. In the most severe or dangerous infections, intravenous (IV) antibiotics are used in the hospital or infirmary.

People who are already sick with chronic illness (diabetes, sickle cell, liver disease, lung disease, inflammatory bowel disease), HIV infection with immune compromise, cancer chemotherapy, or take

corticosteroids like prednisone regularly are at greater risk for more serious types of staph infection. People with these conditions need prompt medical attention and antibiotics with the first signs of staph infection. It may be helpful to remind the nurse, physician's assistant or doctor that you have a chronic illness that weakens the immune system.

Not all skin infections are caused by MRSA. MRSA is not common in all communities. In areas where MRSA is not common, first line antibiotics like methicillin or a cephalosporin like cephalexin (Keflex) can be used.

Some antibiotics are not very effective for treatment of staph infections today. Macrolides like erythromycin and azithromycin (Zithromax) don't work very well against many MRSA germs. Also, fluoroquinolones such as ciprofloxacin (Cipro) may not be very effective against MRSA either. Common antibiotics that are usually effective include clindamycin, various tetracyclines including doxycycline and minocycline, and trimethoprim-sulfamethoxazole (Bactrim or Septra).

If a boil or abscess is spreading and antibiotic treatment is going to be started, it is best to obtain a specimen from the wound drainage to send to a lab to grow the germs and test them for sensitivity or resistance to various antibiotics. This information can be used to guide treatment a few days later, especially if the infection has continued to spread in spite of the treatment that was begun.

Follow-Up

Patients with spreading skin infections or those treated with antibiotics should seek medical attention promptly if they develop signs of more widespread illness, such as fever. Also, medical followup should occur about 48 hours after the initial contact with health staff to see how the infection is responding to treatment. 📄

Dr. Cohen has provided health care to prisoners in a large urban jail, a state prison and juvenile facilities. He has been a medical expert for civil rights organizations working to improve health care for prisoners, and helped produce the Prisoner Diabetes Handbook with the Diabetes Support Group at Great Meadow Correctional Facility in New York. Suggestions for future columns can be sent to him directly at: Dr. Michael Cohen, Prisoner Self Care, PO Box 116, Rensselaer, NY 12144.

Cold Case Hits Use Vastly Exaggerated DNA “Match” Statistics; Upheld by California Supreme Court

by Matt Clarke

A recent California murder trial has highlighted serious problems in the probability statistics used to determine the odds of DNA matches in cases that involve DNA database searches. However, the California Supreme Court upheld the admission of evidence regarding the process used to obtain those odds in a separate case dealing with the same issue.

In December 1972, Dianna Sylvester was raped and murdered in her San Francisco apartment. The case went unsolved for decades. Meanwhile, in 1977, John Puckett committed two rapes and a sexual assault in the Bay Area. He was convicted and sentenced to prison. Other than a 1988 misdemeanor battery charge, his record has been clean since his release from prison in 1985. The obese, 70-year-old, wheelchair-bound Puckett recently had triple bypass surgery.

In 2004, California gave San Francisco funding for DNA testing in cold case murders. A swab containing sperm taken from Sylvester’s mouth was retrieved and tested. The usual number of genetic markers used in DNA testing is 13; such markers contain less than a millionth of the information in a human DNA molecule. In Sylvester’s case, only 5 ½ genetic markers were usable, and they were mixed with markers from another person, presumably Sylvester herself. That was too little information to search California’s 338,000-person DNA database. However, an analyst added another 2 ½ markers to obtain the minimum number necessary to scan the database, by extrapolating from markers that were so faint they were inconclusive. The database comparison using the extra extrapolated markers turned up a DNA hit on Puckett.

At his trial in January 2008, there was no direct evidence to tie Puckett to the 1972 crime. The DNA hit, his criminal record and the fact that Puckett was in the Bay Area when Sylvester was killed was the only evidence linking him to the murder. None of the 28 sets of fingerprints found at the crime scene matched Puckett.

One of the prosecution’s DNA experts testified that the chances of a random match to the DNA recovered

from Sylvester was 1.1 million to one. Another gave his own “likelihood ratio” as 1 in 152 billion. The jury convicted Puckett, but only after sending a note to the court asking how he had become a suspect – a question the judge refused to answer.

At a pretrial hearing, Bicka Barlow, a DNA specialist for the San Francisco public defender’s office who has a master’s degree in genetics, had testified that the match probability statistics were wrong. The problem was that the 1 in 1.1 million statistic applied to a random match to a single individual. That doesn’t hold true when you began comparing DNA profiles with huge databases of DNA samples. Then, according to two panels of scientific experts convened by the FBI and the National Research Council, the chances of a random individual match should be multiplied by the number of samples in the database. That would change the odds of an innocent person receiving a DNA hit in Puckett’s case from 1 in 1.1 million to approximately one in three. Yes, one in three.

But the judge in Puckett’s trial never let the jury hear about this statistical disparity. He ruled it was inadmissible. He also ruled that the jury could not hear about the person the police originally suspected in Sylvester’s murder before the DNA hit on Puckett. Police had arrested Robert Baker, a street artist who had escaped from a mental institution, for a rape that occurred four blocks from Sylvester’s apartment two weeks before her murder. He was also identified as having harassed and followed a young girl and woman to their home a few houses down from Sylvester’s apartment four days after the murder. A blood-spotted parking ticket was found in Baker’s van when he was arrested. However, Baker, who died in 1978, was never charged with the murder; the parking ticket was lost and usable DNA from Baker is unavailable.

The problems with cold case hits using DNA databases are well known to experts in the field. “It’s only a matter of time until someone is wrongfully convicted because of this,” said Stanford mathematician Keith Devlin.

The concern is not merely theoretical. In 2001, a six-marker DNA profile of

Raymond Easton resulted in a cold hit in Britain’s extensive DNA database. Easton was arrested and charged with robbery; it was then learned that he lived 170 miles from the robbery and had a rock-solid alibi. He was exonerated after further testing of additional DNA markers. The chances of a random DNA hit in Easton’s case was 1 in 37 million. But it was only 1 in 57 when the size of the DNA database was taken into account.

The jurors in Puckett’s case found the DNA probability statistics convincing. They went with the 1 in 1.1 million odds as the most “credible” and conservative number, and said that was pivotal in reaching a unanimous verdict. Would the outcome have been different had they known about the one in three chance of an erroneous match?

“Of course it would have changed things,” said juror Joe Deluca. “It would have changed a lot of things.”

Meanwhile, Puckett sits in prison with a life sentence for Sylvester’s murder. And there may be many more questionable cold case DNA hits in the works. There are about 6 million DNA profiles in various databases throughout the country. They have already generated 50,000 cold case matches, most of which have not yet gone to court. And when they do, at least in California, those defendants will face tough odds.

On June 16, 2008, the Supreme Court of California considered the use of DNA in a 26-year-old murder case and the method used to calculate the odds of an incorrect match. The Court noted that the “product rule” used to determine the odds of a DNA match “has gained general acceptance in the relevant scientific community and therefore meets the *Kelly* [*People v. Kelly*, 17 Cal.3d 24, 549 P.2d 1240 (Cal. 1976)] standard for admissibility.”

In this case, the DNA match occurred in a database containing around 184,000 DNA samples. The Court held that the use of the product rule to determine the odds of a DNA match in a cold case was a “a question of relevance, not scientific acceptance,” since the product rule had already passed the *Kelly* test and had been established as admissible evidence.

The Supreme Court further found that “although the product rule is not the *only* available method of statistical analysis in a cold hit case, it is relevant and thus admissible.”

While the government had conceded in a previous case “that in a cold hit case, the product rule derived number no longer accurately represents the probability of finding a matching profile by chance,” the Court differentiated between the odds of obtaining a DNA match from a database search and the rarity of the specific match

in society as a whole. That is, the rarity odds were consistent whether the match occurred through a database search or not, and thus were relevant and properly admitted as evidence.

“The fact that the match ultimately came about by means of a database search does not deprive the rarity statistic of all relevance,” the Court ruled. “It remains relevant for the jury to learn how rare this particular DNA profile is within the relevant populations and hence how likely it is that someone other than defendant was

the source of the crime scene evidence.” See: *People v. Nelson*, 43 Cal.4th 1242, 185 P.3d 49 (Cal. 2008), *cert. denied*.

The fact remains, however, that there is a very high statistical probability of an incorrect match when using large DNA databases for comparison purposes – which is how cold case DNA matches are obtained – and that most jurors will never hear about that very relevant discrepancy. ■

Source: *Los Angeles Times*

\$885,437.24 Award for CMS Massachusetts Jail Nurse Barred for Reporting Prisoner Abuse

A Massachusetts federal court awarded \$885,437.24 in compensatory damages, punitive damages, costs, attorney fees and electronic litigation support fees to a Correctional Medical Services (CMS) nurse who was barred from the Suffolk County jail because she reported allegations of prisoner abuse to the FBI.

Shelia J. Porter was a nurse working for CMS at the Suffolk County House of Corrections, which had contracted prisoner medical care to CMS. After she informed the FBI about allegations of prisoner abuse, she was barred from the jail by Suffolk County Sheriff Andrea Cabral.

Porter filed a civil rights action under 42 U.S.C. § 1983 alleging violations of her First Amendment rights. Following a seven-day trial, a jury rendered a verdict in Porter's favor and awarded her \$360,000 in compensatory damages and \$250,000 in punitive damages.

The defendants filed a motion for new trial and remittitur. The court held that the verdict and awards were amply supported by the evidence, including multiple witnesses who testified that Cabral had

told them Porter was being barred because she went to the FBI without first seeking permission.

The witnesses included a former Assistant United States Attorney, the Chief of Staff for the Sheriff's Department, and the Chief of the Sheriff's Investigation Division. The court found Cabral's explanation (that she had barred Porter from the jail due to untimely filing of paperwork) to be pretextual, and specifically held that Porter was highly qualified and capable. The district court ruled that the compensatory award was reasonable for Porter's loss of income for the rest of her projected career at the jail, and that the punitive damages were not excessive.

U.S. District Court Judge Douglas P. Woodlock awarded \$253,264.50 of the \$287,000.00 in requested attorney fees, \$16,972.74 of the requested \$24,304.94 in costs and \$5,200.00 of the requested \$6,500.00 in electronic litigation support expenses. The total award, including damages, was \$885,437.24. Porter was ably represented by Boston attorneys Joseph F. Savage, Jr., Goodwin Procter, David S.

Schumacher and Gadsby Hannah. See: *Porter v. Cabral*, U.S.D.C. (D. Mass.), Case No. 1:04-cv-11935-DPW (2007 WL 602605). ■

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115,000 Florida Ex-Felons Have Civil Rights Restored Under New Rules

Changes to Florida's rules for restoration of civil rights were made in April 2007; since that time, 115,232 former felons have had their rights to vote, serve on juries, run for office, and obtain various business licenses restored. That number accounts for more than half of all the state's felons who have regained their rights.

This recent increase in restoration of rights is a victory for civil rights activists and Governor Charlie Crist, who fulfilled a campaign promise to end the Jim Crow era rules pertaining to former felons. Under the old rules, the Florida Board of Executive Clemency had to review every application for restoration of rights, resulting in only about 7,000 restorations annually due to the time-intensive process.

The new rules automatically restore rights for non-violent ex-offenders so long as they have completed probation, have no pending criminal charges, and have paid all restitution and court costs. The success of the rule change was touted by Gov. Crist at a Restoration of Rights summit sponsored by the Florida Department of Corrections with a grant from the Annie E. Casey Foundation.

"Once somebody has truly paid their debt to society, we should recognize it," said Crist. "We should welcome them back into society and give them that second chance. Who doesn't deserve a second chance?"

While critics have condemned the restrictions on restoring rights for violent offenders, it should be recognized that Gov. Crist tried to have the new rules apply to all ex-felons but was forced to compromise by his Cabinet. An attempt to change Florida's rules for restoration of civil rights through litigation was unsuccessful following an adverse ruling from the Eleventh Circuit in 2006. [See: *PLN*, Oct. 2006, p.41].

The new rules represent a major step forward – one that has restored rights to over 115,000 former felons in advance of the November elections. This is a monumental change from the situation in Florida in 2000, when mass purges of felons – as well as many citizens who had no criminal records – from the voting rolls was a significant factor in that year's presidential election. [See: *PLN*, May 2001, p.22; March 2003, p.11].

Gov. Crist further signed Executive

Order 08-179 in August 2008, which requires the Office of Executive Clemency and the Florida Parole Commission to use "all ... available resources to notify those whose civil rights have been restored," to ensure they know they have the right to vote. Pressure from civil rights organizations, including the Florida Rights Restoration Coalition, was a contributing factor in the Governor's decision to pursue restoration of rights for former felons.

However, some activists criticized the late action by Gov. Crist, who issued the Executive Order just five weeks before the deadline for registering to vote for the November elections. "This was a lost opportunity. Had he issued [the

Order] when we asked him to do so more than eight months ago, thousands more Floridians would have benefited," stated Muslima Lewis, director of the Florida ACLU's Racial Justice and Voting Rights Projects.

Regardless, more work needs to be done in Florida. Many non-violent former felons have not yet have their rights restored; others who have regained their rights have not been notified. According to an analysis by the *St. Petersburg Times*, only 10 percent of non-violent former felons who had their rights restored by the end of May 2008 had registered to vote. ■

Sources: *St. Petersburg Times*, *Miami Herald*, *newsmax.com*

Texas Prison Guard Files False Report, Faces 20 Years

by Gary Hunter

Former Texas prison guard Eugene Morris, Jr. was found guilty of filing a false report about a use of force incident involving state prisoner Robert Tanzini. Morris was a sergeant at the Texas Department of Criminal Justice's (TDCJ) Ferguson Unit when, in November 2002, he got into a physical confrontation with Tanzini.

According to Morris, who is black, Tanzini spit on him and made a racial slur against him and a black female guard. The two scuffled. Following the incident, Tanzini was taken away on a stretcher with a fractured skull after he was reportedly "stomped, kicked and punched" by Morris and another guard, Troy Grusendorf.

Tanzini filed suit in federal court but the case was dismissed in 2004 due to a procedural issue. In January 2007, federal prosecutors reopened the case when they deemed they had enough evidence to go before a federal grand jury, using information from Tanzini's lawsuit.

"When anyone has information that rules of law are not being followed in the prison system, we have a duty to go forward and we did," said Assistant U.S. Attorney Ruben Perez.

Morris and another sergeant, Tracy Jewett, had been named in Tanzini's lawsuit. Morris was charged with physically assaulting Tanzini and for filing a false report about the facts of the incident.

Jewett was allegedly complicit because he stood by and failed to act in Tanzini's defense, and had conspired with Morris to doctor the incident report.

Both Morris and Jewett were disciplined by TDCJ authorities for the beating and for altering the incident report. Morris was fired and Jewett resigned.

The criminal case went before a federal jury in May 2008. Morris was charged with five counts that included violation of Tanzini's Eighth Amendment right against cruel and unusual punishment. Jewett was charged with filing a false report to cover-up the incident.

The five man, seven woman jury deliberated for 18 hours over the course of three days before returning a verdict of "not guilty" on the cover-up charges against Jewett and "not guilty" on the physical assault charges against Morris. The jury apparently accepted the defense's contention that Tanzini was injured when Morris "controlled him to the ground."

The jurors did find, however, that Morris was guilty of attempting to cover-up facts about the incident by filing a false report. The conviction is punishable by up to 20 years in prison and a \$250,000 fine; Morris is scheduled to be sentenced on February 10, 2009. See: *United States v. Morris*, U.S.D.C. (S.D. Tex.), Case No. 4:07-cr-00442. ■

Source: *Houston Chronicle*

Los Angeles County Settles For \$900,000 After Unattended Prisoner Savagely Beaten By Violent Jail Gang

Los Angeles County paid \$900,000 to settle the civil rights complaint brought by the parents of a 41-year-old man who was beaten and crippled on June 7, 2005 by a known violent jail gang during a lapse of sheriff's security coverage. Ironically, the victim was in jail at his father's behest because the son had allegedly committed a minor burglary of his father's house when the parents were on vacation.

Sean McNamara was described by his father as a "kid who refused to grow up." Although he had worked earlier in his father's muffler shop, Sean was still a beer-drinking "eternal boy" who grew up in the affluent Los Angeles neighborhood of Rolling Hills Estates. When 6 ft. 200 lb. Sean broke into his father's home and attempted to make off with a baseball cap with the logo "Snap-On Tools," the father decided Sean need to learn his lesson. He pressed charges and refused to bail him out.

Sean was improperly housed in a 280-man dorm also containing known violent members from the "Southside" gang. Mistaking Sean's pre-existing

mental health disabilities for his being a child-molester, they waited for a break in coverage when on-duty deputy Timothy Schultz walked off his observation post to another one 75 feet away. In that interval, the Southsiders - known for beating other prisoners - seized the moment and climbed to the top of the three-tier bunk where they repeatedly jumped off onto Sean's head. They were so unsupervised that they were able to carry Sean's body to the shower and wash up the crime scene without staff observation. Sean was reduced to the mental state of a third-grader and today lives in an assisted living facility. After a year in the North County jail awaiting trial, where he lost 70 pounds and became despondent and unkempt, his burglary charges were dismissed because of the attack. One of the attackers has since pled guilty to attempted murder and was sentenced to six years.

In their civil rights complaint for damages, the parents sued for having a custody or policy causing a constitutional violation, for failure to train and supervise

jail staff, for general negligence and for medical negligence. The suit focused on the Sheriff's staff knowing from prior riots and attacks of the danger of leaving these violent gang members unsupervised. Schultz admitted he left his post for no compelling reason and did not ask for replacement coverage.

It was further alleged that L.A. County Sheriff Lee Baca was on prior notice of an "epidemic of inmate on inmate assaults" and related ongoing policies that created potential constitutional violations, which in fact had resulted in numerous earlier such brutal beatings and murders. Upon this undisputed record, it is not surprising that the County settled on the day of the trial in May 2008. The family was represented by Culver City attorneys Sonia Mercado & Associates, Law Offices of R. Samuel Paz. See: *McNamara v. County of Los Angeles*, Los Angeles Superior Court Case No. BC 362264 (filed May 2007). ■

Other source: *Los Angeles Times*



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Texas Prisoners Pay Parole Consultants Hefty Fees

Many Texas prisoners seeking parole are paying large fees to attorneys acting as parole consultants, in an attempt to increase the likelihood of gaining release. In 2007, 22,364 Texas prisoners were paroled. About ten percent – or 2,168 – had hired one of 769 attorneys registered as parole consultants.

One Texas state prisoner who used a parole consultant is Jon Buice, who was 17 years old when he stabbed Paul Broussard, 27, to death in a high-profile July 4, 1991 gay bashing incident that involved him and nine other assailants. Buice paid former state Representative Allen Pace \$6,000 to represent him before the Parole Board. Pace served five years as chair of the House Criminal Jurisprudence Committee before becoming a parole consultant; he earned \$280,000 for representing 85 parole candidates in 2007.

“You got a former chairman of the House Criminal Jurisprudence Committee that’s got a client list yea-long. I mean Allen Pace – you can’t tell me just looking at it on the surface that that certainly has its advantages,” said Andy Kahan, head of the City of Houston’s crime victims assistance office, who is also affiliated with Justice for All, a viciously reactionary violent crime victims advocacy group.

Kahan, a former Texas parole officer, lost his job after questionable charges were found on his expense account. After he became the director of Houston’s crime victims’ assistance office, he was accused of sexual misconduct involving a female crime victim. According to the *Houston Press*, the mayor’s office acknowledged there had been misconduct by Kahan, which had been “dealt with ... sternly.”

Justice for All has also engaged in questionable activities. Elected state district judges give the organization grants from their discretionary crime victims’ funds, in exchange for political endorsements. The funds come from fees paid by criminal defendants; additional funding is received from the state. It seems that Justice for All wants to make money off the criminal justice system, too ... they just don’t want anyone else to do so on behalf of prisoners.

Buice wasn’t released despite his use of a paid parole consultant. So what’s Kahan’s complaint? Buice is being allowed to apply for parole too often.

“There’s something that doesn’t pass the smell test,” Kahan said about the fact

that Buice has been reviewed for parole four times in nine years.

Kahan sees problems with other parole consultants as well. For example, Dan Lang, a former Parole Board member, made \$214,700 for parole consultations in 2007. Alfred Leal, the husband of former Parole Board member Mary Leal, made \$25,200 representing seven prisoners last year.

“They know the players. They know who’s who. You know, they know what to look for, so obviously it gives them a tremendous inside edge,” Kahan remarked. Then again, if the process is legal – which it is – then what’s the problem?

Lang stated that parole consultants assist overworked parole board members who don’t have enough time to thoroughly review each prisoner’s case. In fiscal year 2006, the overall parole grant rate in Texas was a paltry 26.26%.

“They’re looking for good, safe parolees. And I think, in my position, I help them find people,” said Lang, emphasizing that it is legal for a former Board member to become a parole consultant after a two-year waiting period. He should

know. The state law that required former Board members to wait 10 years before representing prisoners at parole hearings was reduced to two years in 2003, with Lang’s assistance.

The larger question, unaddressed by Kahan or the mainstream media, is why so many Texas prisoners feel the need to spend thousands of dollars on parole consultants.

The Texas parole system is broken; it is secretive, arbitrary, capricious and subject to political whims and public pressure. No Texas prisoner knows if or when he or she will be granted parole. An open, transparent system with clear requirements and expectations so prisoners are informed as to what is needed to make parole would eliminate the real or perceived need for parole consultants.

Until that happens, however, paid parole consultants fill a needed, and lucrative, niche in Texas’ criminal justice system. ■

Sources: www.click2houston.com, *The Prison Show on Radio Station KPFT*, *Houston Press*

TASER Avoids Liability in Three Deaths by Suing Medical Examiner

by John E. Dannenberg

Arizona-based TASER International, Inc. (TASER) was cleared of liability in the unrelated deaths of three drug-afflicted Ohio men who died shortly after being shocked with X-26 Taser stun guns during their apprehension by police. TASER had sued the Summit County, Ohio Medical Examiner, challenging her findings that Tasers had contributed to each of the deaths.

Common Pleas Court Judge Ted Schneiderman ruled there was no evidence showing that Taser shocks caused the deaths, and in a stunning ruling, ordered the Death Certificates and Reports of Autopsy to be amended to reflect only “accidental” or “undetermined” causes of death.

The thrust of the litigation was that it was drug overdoses combined with pre-existing cardiac disease that doomed the victims, not the multiple Taser shocks to which they had been subjected. But the fact remains that the men died after being shocked, not before. Thus, the conclu-

sion that Taser played no part in the deaths ignores the temporal inference to the contrary.

Dennis S. Hyde died while committing a burglary in Akron. He bled extensively from cuts sustained when he broke a window to gain entry to an occupied residence. Police found him hiding behind a furnace in the basement and Tasered him numerous times while trying to coax him to surrender, but he was plainly delirious. Shortly after Hyde was finally handcuffed and shackled, he died. The autopsy report listed death from multiple causes, including cardiac arrhythmia, acute drug intoxication, electrical pulse incapacitation with psychiatric disorder, and arterial blood loss. TASER, joined by the City of Akron, sued to have all references to “electrical pulse incapacitation” deleted.

Richard Holcomb was trespassing on private property, jumping up and down like he was on a pogo-stick. He was cornered by police, who observed his plainly drug-induced delirium. After they had

repeatedly Tasered him and he was lying on the ground cuffed behind his back, he went limp and had no pulse. The Medical Examiner found that Holcomb was in a state of drug-induced psychosis and had cardiovascular damage from chronic drug abuse. Although the Medical Examiner opined that the Taser contributed to his death "to some extent," she admitted, "How much, I can't know."

Mark D. McCullaugh died while in an Ohio county jail. He had a history of mental illness and was reportedly pacing his cell while naked and injuring himself. He was Tasered, handcuffed, shackled and injected with a sedative. Minutes later he died. The Medical Examiner found McCullaugh's cardiac arrest was due to asphyxia by mechanical, chemical and physical restraint.

TASER argued that no evidence supported a direct nexus between the application of the Taser shocks and the moment of death. Reviewing the evidence, the judge agreed. That is, while multiple causes contributed to each death, the Taser event was not found by itself alone to have been lethal. Accordingly, Judge Schneiderman found for TASER and ordered that the death certificates be

amended to delete any inference of causation by electric shock or "homicide."

This result is nonetheless very unsettling. Uncontroverted evidence showed the victims were under the influence of drugs. But it is no secret in the history of 300 people who have died since 1999 after being shocked with Tasers that many of those individuals were highly intoxicated at the time, too. What is disturbing is the implication of the Ohio ruling that being on drugs while having pre-existing health conditions amounts to legal authorization to be killed by Taser-wielding police officers. See: *TASER International, Inc. v. Chief Medical Officer of Summit County, Ohio*, Summit County Court of Common Pleas, Case No. CV 2006-11-7421 (May 2, 2008).

In an ideal world, the police could make a competent evaluation of each suspect before deciding if it was medically sound to Taser them. Given the exigency of police operations, this is unrealistic. But the statistics don't lie – death following Taser is all too common. [See: *PLN*, Oct. 2006, p.1]. Also, it is certainly not a capital crime to be high on drugs. The incremental risk of death in such circumstances is not worth the convenience to police of having the option to use a

50,000-volt stun weapon.

While Summit County may appeal the court's ruling, the ultimate outcome will likely be economic – when TASER's profits are tempered by losses from successful lawsuits. For example, a recent \$6.2 million wrongful death verdict against the company. [See: *PLN*, Oct. 2008, p.25]. TASER's stock has plunged almost 74% in the past year, to \$3.98 a share as of December 2008. ■

Additional sources: *Arizona Republic*, *Yahoo Finance*, *TASER press release*

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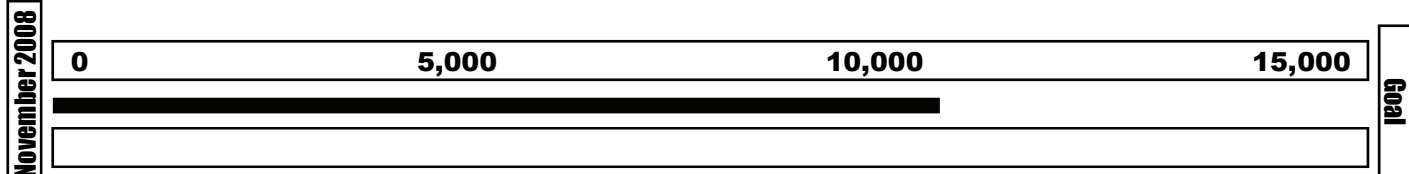
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\$3,540,402.22 Jury Award In California Wrongful Conviction Case

A California federal jury awarded \$2 million to a man imprisoned 12 years for a rape/robbery he did not commit. The court also awarded him \$1,368,834 in attorney fees, \$6,500 in fees on fees, and \$165,067.22 in costs (including \$40,363.35 in travel expenses, \$20,935.32 in jury consultant expenses and \$54,995.48 in investigator expenses) for a total award of \$3,540,402.22.

Herman Atkins was convicted of forcible rape, forcible oral copulation and robbery in 1988. He was 22. Atkins was 34 when he emerged from prison after the Innocence Project helped him get DNA testing that exonerated him. Atkins then filed suit against Danny C. Miller, a Riverside County detective Atkins alleged had falsified an arrest warrant witness statement claiming Atkins, who lived in Los Angeles, was seen in Riverside near the crime scene.

The case had a tortured procedural history after it was transferred to federal district judge Percy Anderson when he was appointed to the bench on June 12, 2002. Anderson granted the defendants' motion for summary judgment. Atkins appealed and the Ninth Circuit reversed the judgment and remanded for trial deliberate fabrication of evidence and withholding of exculpatory evidence claims.

Trial was reopened. Anderson issued orders excluding any evidence of Atkins's innocence as irrelevant and requiring Atkins to disclose to Miller privileged work product on issues that would be addressed during Miller's cross-examination. Atkins filed an emergency petition for a writ of mandamus in the Ninth Circuit (EPWM) which was granted on both issues.

Next, Anderson faxed Miller a minute order suggesting that he move for summary judgment on the fabrication-of-evidence claim on grounds already decided in the previous appeal. This resulted in a second EPWM. The Ninth Circuit ordered Anderson to respond to the EPWM. Instead, he withdrew the minute order so that the EPWM was denied as moot.

Atkins then filed a motion to recuse Anderson which was referred to and denied by Judge Florence-Marie Cooper, who noted that it was a close question. Atkins filed a third EPWM seeking judge Anderson's recusal. The Ninth Circuit denied the petition, calling it a close question.

A two-week trial ensued. Anderson polled the eight-person jury on the first

day of deliberation, asking if they thought they could reach a unanimous verdict. Six said yes. The next morning, Anderson announced his intention to declare a mistrial. Both parties objected and Atkins filed a fourth EPWM. Anderson declared a mistrial and the EPWM was denied as moot. However, the Ninth Circuit issued an opinion finding judicial bias and recusing Anderson from further proceedings.

Judge David D. Pregerson conducted a three-week trial. On May 25, 2007, the jury found for Miller on the fabrication of evidence claim and for Atkins on the suppression of exculpatory evidence claim. It

awarded him \$2,000,000 in damages. Atkins moved for attorney fees and costs. On August 27, 2007, the court granted them at the full amounts requested because of the excellent job done by the Innocence Project team--Peter J. Neufeld and Deborah L. Cornwall of New York--in briefing and presenting the case. Defendant's appeal was dismissed following an undisclosed post-trial settlement. See: *Atkins v. Miller*, USDC-CD, CA-Los Angeles, Case No. 2:01-cv-1574-DDP-E. ■

Additional Sources: *VerdictSearch National*, *Associated Press*.

PR Bonds Plummet in Harris County, Texas as Jail Overflows

by Gary Hunter

Republican judges elected on promises to be tough on crime and the absence of federal oversight have been cited as two reasons why Houston, Texas jails are once again dangerously overcrowded.

Less than a decade ago, the Harris County Jail was operating under the scrutiny of federal authorities as the result of a lawsuit; during that time the jail was forced to correct a variety of constitutional problems, including overcrowding. One way the judges dealt with the overcrowding issue was to release low-risk arrestees on personal recognizance (PR) bonds.

In 1994 about 9,000 people were released on PR bonds in Harris County. Over 1,800 of those released were facing low-level felony charges. By 2004, that figure had dropped to only 109 felony defendants released on PR bonds. Even more dramatically, the number of misdemeanor defendants who were required to post bonds rather than being released on PR bonds increased more than 30,000% (from 7 to 2,114) from 1994 to 2004.

In 2007, the Harris County pretrial services department interviewed 36,176 candidates for PR bonds. Of those interviewed, judges granted only 153. By contrast, Travis County (Austin) interviewed 31,877 candidates in 2006 and granted PR bonds to 19,218. Tarrant County (Fort Worth) and Bexar County (San Antonio) also make liberal use of PR bonds.

"I'm very aware of how our numbers

stack up against the rest of the country and how low they are," said Carol Oeller, Harris County's Director of Pretrial Services.

Harris County judges give a variety of reasons to justify why they grant so few PR bonds. Judge Brock Thomas stated he is willing to grant PR bonds to those who are willing to plead guilty at their first appearance.

Judge Jim Wallace said bonding companies are better suited for that sort of issue.

Judge Caprice Cosper blamed the defendants for coming into court with too many prior criminal convictions.

While those reasons may sound diverse, they have a common denominator: Each line of reasoning describes the plight of poor people caught up in the criminal justice system.

"What this means is that if you are really poor, you have zero chance of getting out of jail before your trial," acknowledged Pat McCann, president of the Harris County Criminal Lawyers Association. "If you're a poor person in jail, you're screwed."

In short, people with money can post bond, get out of jail and fight the charges. A person without sufficient funds must sit in jail for months waiting for a trial. By that time many have lost their jobs, their property and everything else of value. Rather than lose everything, they simply plead guilty to avoid spending months behind bars.

"It's just insidious," said defense attorney David Jones. "What's guiding [the system] now are the values of a bureaucrat."

Jones' comments allude to a rapid drop in PR bonds following a pre-election advertisement that referred to the practice as being soft on crime. The ad was placed by a conservative lobbying group and had an immediate effect on how predominantly Republican judges did business. Another contributing factor may be the influence of the bail bond industry, since fewer PR bonds translates to a greater need for paid bonds offered by bonding companies.

The result of the decrease in PR bonds and consequent increase in the Harris County Jail's population has been a return

to the draconian conditions that previously plagued the facility. As of May 2008, the Harris County Jail was holding 11,000 prisoners in a facility designed to hold a maximum of 9,400. The city is also paying the West Carroll Detention Center in Epps, Louisiana \$38 a day to house 600 prisoners, which amounts to over \$8 million annually. [See: *PLN*, Oct. 2008, p.28].

"We're rapidly approaching maximum capacity," said Capt. John Martin, spokesman for the Harris County sheriff's department.

The county had anticipated a drop in the jail population at the end of summer 2007. That decrease never materialized. Now county officials are considering sending another 130 prisoners to the Epps facility.

Inspections conducted in 2004 and 2006 determined that the Harris County Jail was out of compliance. [See: *PLN*, Jan. 2006, p.1]. Now the county is under pressure again as the Justice Department's Civil Rights Division opened a new investigation into jail conditions in March 2008.

Harris County recently paid a national research organization to assess the problems with its current jail detention practices. One of the researchers' immediate recommendations was to increase the use of PR bonds – a common-sense solution that appears to be politically infeasible. ■

Sources: *Houston Chronicle*, *grintsforbreakfast.blogspot.com*

Nurse Pleads Guilty in Death of Florida Juvenile Prisoner

A former nurse at Florida's Miami Regional Juvenile Detention Center has pled guilty to a misdemeanor charge of culpable negligence related to the death of a teenage prisoner. The guilty plea comes five years after the death of 17-year-old Omar Paisley.

While detained on a battery charge, Paisley begged guards and nurses for medical care over a three-day period. No help was forthcoming until it was too late. On June 9, 2003, Paisley died due to a ruptured appendix. His death was described by family attorneys as "agonizing but entirely preventable."

The negotiated plea bargain calls for former nurse Dianne Demeritte to serve one year on probation. She also "agrees that she will voluntarily relinquish her license to practice nursing again, and that she will never provide patient care to anyone outside of her own family," Assistant State Attorney Reid Rubin said in a letter. "Further, it is our understanding that Ms. Demeritte will apologize to the family of Omar Paisley."

Without explanation, prosecutors dropped charges against a second nurse, Gaile Coperfido. Both Coperfido and Demeritte were originally charged with manslaughter and third-degree murder. Critics were upset with the outcome. "We have an issue here of fairness," said Roy Miller, who heads the Florida Children's Campaign, the state's lead juvenile justice advocacy group. "We say to children that we will hold them accountable, but we don't hold accountable the adults who hurt children."

However, the plea agreement for a lesser charge is more punishment than has resulted when other Florida juveniles have been killed, such as 14-year-old Martin Lee Anderson. In October 2007, seven boot camp guards and a nurse were acquitted on charges of aggravated manslaughter in connection with Anderson's death. [See: *PLN*, June 2008, p.20; July 2007, p.11; July 2006, p.9].

Paisley's death, nonetheless, resulted in systemic changes. "We now know that many persons were held responsible or accountable for Omar's death," said Lorenzo Williams, the attorney representing Paisley's mother. "I think the parents of Omar would say if Omar's death will prevent similar tragedies from occurring to another person or another child, then Omar's death will not have been in vain."

In October 2004, Paisley's mother accepted a \$1.45 million settlement from the Florida Department of Juvenile Jus-

tice, plus a confidential settlement from hospital officials, in a lawsuit filed over her son's needless death. See: *Williams v. Variety Children's Hospital*, U.S.D.C. (S.D. Fla.), Case No. 1:04-cv-22079-UU. ■

Sources: *Miami Herald*, *Miami Times*



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Florida Prison Employees Awarded \$630,000 for Subjection to Prisoner “Gunners”

On May 15, 2008, a federal jury awarded \$45,000 to each of 14 former female employees at Florida’s Martin Correctional Institution, finding the women had been subjected to lewd behavior by prisoners. The women claimed the Florida Department of Corrections (FDOC) was aware of the prisoners’ behavior, but failed to stop it.

This was the second verdict against the FDOC on similar claims, but at different prisons. The first verdict, for \$990,000, awarded between \$37,500 and \$97,500 to each of twelve female prison employees on January 26, 2007. [See: *PLN*, August 2007, p.26]. Attorney Wes Pittman, who was counsel in both cases, said he is also bringing lawsuits on behalf of about 90 more prison staff from the Martin, Charlotte and Everglades facilities.

Those three prisons have one thing in common: They all had close management (CM) units, which are Florida’s version of special housing units, during the time the lewd behavior was rampant in the mid-1990’s until 2002 when the units were closed and the close management prisoners were transferred to other prisons. The Charlotte facility, however, went from having a few CM units to a full scale CM prison under a settlement that reduced CM units systemwide and improved conditions of confinement.

The lewd behavior that the female prison employees complained about has its own moniker: “gunning.” Basically, gunning is public masturbation. “Anytime a female came on the wing, someone would yell, ‘workcall,’” said prisoner David Reutter, who was housed in Martin’s CM units in the late 1990s. “That call would activate all the gunners. They were so brazen they would stand on their cell’s sink and masturbate, hoping the female [staff] would see them.”

In the most recent lawsuit, the jury believed the one classification employee and 13 nurses, who were plaintiffs in the case, when they said guards would do nothing about it. Often, they were on the unit alone. “We got abandoned in places where no one should ever be abandoned,”

said former prison nurse Paula LaCroix-Cutlip. “It was worse than I could ever imagine. I don’t think there’s anything, I don’t think there’s ever been a Hollywood movie made, that has captured how truly bad it was.”

The FDOC tried, unsuccessfully, to convince the jury that the women were disgruntled because a new agency hired to provide prisoner health care was planning to cut their pay and benefits. Instead, the jury found that employees LaCroix-Cutlip, Susan Black, Tita de la Cruz, Charlene Fontneau, Linda Jones, Joyce Meyer, Sushma Parekh, Donna Pixley, Vesna Poirier, Michelle Pollock, Lourdes Silvagnoli, Janet Smith and Lee Wascher

had been subjected to a hostile or abusive work environment, and awarded each of them \$45,000. The plaintiffs’ motion for attorney fees is still pending, after the court initially denied fees for concurrent work performed in the earlier lawsuit. See: *Beckford v. Department of Corrections*, U.S.D.C. (S.D. Fla.), Case No. 2:06-cv-14324-JEM.

Pittman called for Florida Governor Charlie Crist to act. “I think it’s really time for the governor to take a look at this situation and intervene if necessary,” he said. “These employees cannot continue to endure what they have had to endure.”

Source: *Palm Beach Post*

Ohio Court Finds Three-Drug Execution Protocol Violates Prisoners’ State Rights

On June 10, 2008, Judge James O.J. Burge of the Lorain County Court of Common Pleas has held that the three-drug protocol used by the Ohio Department of Rehabilitation and Correction (DORC) to execute prisoners violates their right under Ohio law “to expect and to suffer a painless execution.”

The ruling came upon motions filed by Ruben O. Rivera and Ronald McCloud, who face the imposition of the death penalty upon their convictions for murder. Over two days, the Court held hearings that allowed experts to testify for each side.

The three-drug lethal injection protocol includes sodium thiopental, pancuronium bromide and potassium chloride. The Court said the issue of whether an execution is painless arises from the use of pancuronium bromide, which makes a person unable to breathe, move or communicate, yet “does not affect our ability to think, or to feel, or to hear, or anything, any of the senses, or any of our intellectual processes, or consciousness,” stated defense expert Mark Heath. Thus, the Court held that the drug would “mask the body’s reaction to pain.”

It then found that potassium chloride causes excruciating pain as it travels up the arms and through the chest if the person is not sufficiently anesthetized with sodium thiopental. The parties agreed that even in a clinical setting, mistakes are made

in the delivery of anesthesia. The Court also found that circumstantial evidence exists that some executed prisoners have suffered a painful death due to a flawed lethal injection; “however, the occurrence of suffering cannot be known, as post-execution debriefing of the condemned person is not possible.”

The Court held that under R.C. 2949.22, a condemned prisoner has the statutory right “to execution without pain, and to an expectation that his execution will be painless.” The statute further requires that death will occur “quickly.” The Court distinguished this right as a greater protection than required under the Eighth Amendment to the U.S. Constitution.

Finding that the three-drug protocol failed to afford condemned prisoners the state rights to which they were entitled, the Court ordered that DORC must utilize “a single massive dose of sodium thiopental or another barbiturate or narcotic drug [that] will cause certain death, reasonably quickly.” See: *Ohio v. Rivera*, Lorain County, Ohio Court of Common Pleas, Case No. 04CR065940 (June 10, 2008).

On April 16, 2008, the U.S. Supreme Court held that a similar three-drug lethal injection protocol used by the Kentucky DOC did not constitute cruel and unusual punishment under the Eighth Amendment, and thus was constitutional. See: *Baze v. Rees*, 128 S.Ct. 1520 (2008). See: *PLN*, December, 2008.

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Demonstrators Supporting Guantanamo Prisoners in Front of U.S. Supreme Court Found Guilty of Unlawful Assembly

On May 29, 2008, thirty-four members of the civil rights group Witness Against Torture (WAT) were found guilty in the District of Columbia Superior Court of unlawful assembly for having demonstrated at the U.S. Supreme Court on January 11, 2008 against the indefinite detention of military prisoners at Guantanamo Bay, Cuba.

The WAT members included college students, religious prelates, construction workers, farmers, school teachers and professors; they came from many different states. Some were members of other non-violent activist organizations such as Plowshares and the Catholic Worker movement.

The Supreme Court protest was to bring attention to the gross injustice of the indefinite incarceration of Guantanamo detainees, both before and after sham military tribunals. Nonetheless, the protesters were surprised to be arrested in front of the U.S. Supreme Court, an "internationally known temple to free speech."

Constitutional Law Professor Michael Foley of the City University of New

York stated, "If you told me that the defendants would be arrested for 'unlawful free speech' just twenty feet from where the Justices decide First Amendment cases, I'd say you were crazy."

At trial, where they represented themselves, each WAT protestor gave their name as well as the name of the Guantanamo prisoner they represented by proxy. Their logic was to gain a trial in the name of each Guantanamo detainee who had been unable to do so despite having been held for up to six years.

Many of the protestors waived their right to speak, in solidarity with the near total denial of legal and human rights to Guantanamo detainees. Others testified that they were peacefully demonstrating before the Supreme Court regarding the then-pending cases of *Boumediene v. Bush* and *Al Odah v. United States*.

Superior Court Judge Wendell Gardner refused to admit testimony in defense of the lawful motivation of the 34 defendants from an attorney who had tried to represent twelve of the Guantanamo

detainees, deeming such testimony "not relevant." Judge Gardner did allow the protesters leeway in presenting their cases. Each defendant closed by joining defendant Arthur Laffin's plea to "end the horrors," citing the denouncement of crimes against humanity in the Nuremberg Accords (Nazi war crimes trials).

Retired Admiral John Hutson, former Judge Advocate General of the U.S. Navy, said in reference to the WAT protestors, "In the military there is the concept of 'calling in your artillery onto your own position.' It refers to heroic action taken in desperate situations for a greater good. That's essentially what these courageous Americans are doing."

The thirty-four defendants were sentenced on May 30, 2008. Twelve received jail terms ranging from one to fifteen days, while the rest received suspended sentences of 10 to 30 days. The court also imposed one-year terms of probation, stay-away orders from the U.S. Supreme Court, and \$50-\$100 in court fees on each defendant. ■

Source: www.witnesstorture.org

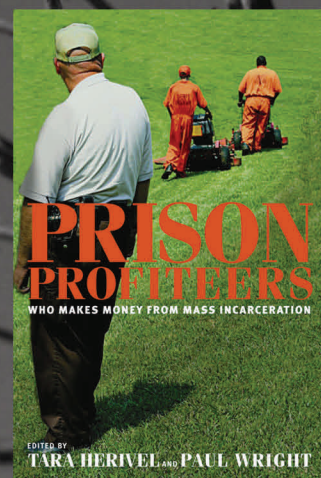
Prison Profiteers: Who Makes Money from Mass Incarceration
Edited by Paul Wright & Tara Herivel
Paperback, 324 pages, The New Press, 2008, \$19.95

This is the third and latest book in a series of Prison Legal News anthologies that examines the reality of mass imprisonment in America. [The other two titles are *The Ceiling of America: An Inside Look at the US Prison Industry* and *Prison Nation: The Warehousing of America's Poor*, both available from PLN].

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Costs for San Quentin's Proposed New Death Row Spiral Upward

by John E. Dannenberg

As delays mount, San Quentin's proposed replacement Death Row facility is growing in cost while shrinking in size. In a June 2008 report to the Governor and Legislature, the state Auditor's office made its first of two reports concerning the cost of the proposed facility being constructed at San Quentin State Prison. A second report issued in July addressed costs associated with locating the facility elsewhere.

The first report compared the original cost plan with current projections, made a reasonableness determination of the current project, estimated whether the proposed facility would meet the state's needs over the next 20 years, and assessed further cost increases that might result from continuing construction delays. San Quentin's present condemned population is housed in three buildings dating back to 1930.

The Death Row replacement project began in 2003 with a \$220 million estimate to build a 1,024-cell complex with its own infirmary, law library and visiting area. When later studies revealed problems with soil mitigation, environmental concerns and rising labor and material costs, the project was scaled back to 768 cells at an increased estimate of \$356 million. The most recent review increases that amount by another \$39.3 million (and growing by \$2 million per month), plus an activation cost of \$7.3 million. Further, estimated annual staffing expenses of \$58.8 million portend a total of \$1.2 billion in operating costs over the next 20 years.

The state recently proposed double-celling certain prisoners to maximize Death Row's capacity at 1,152 occupants. However, expert consultants voted against this approach due to confidentiality concerns during the lengthy capital punishment appeals process. Without double-celling, the new facility would reach capacity by 2014 – less than three years after its proposed opening.

Other factors to be considered include higher labor costs in the San Francisco Bay Area compared to more remote prison sites, as well as the impact on access to legal aid for appeals, which are largely conducted in the California State Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, both located in San Francisco. Because most "death qualified" attorneys work in the Bay Area, relocating

death row prisoners would increase costs for their legal aid.

The state Auditor's second report, issued in July 2008, offered little in the way of better options. The report noted that the costs of other alternatives for housing Death Row prisoners were likely to be even higher than the current option, because "a significant amount of work has already been conducted" to prepare the new facility at San Quentin. Thus, the state – and taxpayers – are stuck with the expensive San Quentin replacement Death Row facility, which may not even meet California's needs for death-sentenced prisoners.

At present, some of the state's 662 male condemned prisoners are dying of natural causes while awaiting the 20-year cycle of their appeals. With execution by lethal injection still clearing the last hurdles for reinstatement at San Quentin, the Death Row population continues to grow at 14 to 16 new commitments per year rather than stabilize or shrink. Since the death penalty was reinstated in California in 1977, there have been only 14 executions. ■

Sources: *San Francisco Chronicle*, *California State Auditor Reports 2007-120.1 and 2007-120.2*

\$170,000 Jury Verdict in Sacramento Jail Beating

In April 2008, a federal jury in Sacramento, California returned verdicts against five Sacramento County Jail deputies for beating a prisoner and denying him food and water for eight hours. Although the facts were contested, the jury's verdicts of \$20,000 in compensatory damages and \$150,000 in punitive damages indicated a rejection of the deputies' testimony. Following the verdicts, and upon motion of the defendants, the district court ordered a retrial.

Don Antoine, 41, was booked into the county jail for drunk driving in June 2004 and placed in a padded cell. When he knocked on the door to call for medical attention, a guard ordered him not to knock. When Antoine knocked again, five guards went into the cell, handcuffed him, and shackled his legs to the floor grate (the cell's toilet). They unshackled him an hour later, but gave him no food or water for eight hours. When released from the cell he was given pain medication.

Antoine filed suit for excessive force. He claimed that guards Chris Baker, Joseph Reeve, Brian Wade and Christopher Britton had assaulted him while Sergeant Daren Griem watched. He also complained that the jail policy requiring a nurse to be called when a prisoner was shackled had been violated.

Antoine's injuries, according to his expert witness, Jeffrey Schwartz, Ph.D., included a broken larynx (from being choked), bruised ribs, wrist injuries from

overtight restraints, and emotional distress. When Antoine was released from jail a few weeks later he underwent surgery to repair his larynx with a titanium plate and screws. He now has a permanent raspy voice.

The defendant guards argued that Antoine's injuries did not occur at the jail but were sustained in the car accident that precipitated his arrest, where he fought with firefighters and police. They also claimed that Antoine never asked for food, water or medical treatment while in the padded cell.

After a two-week trial, the jurors returned a unanimous verdict in one day. The jury awarded compensatory damages of \$20,000, plus punitive damages of \$25,000 against each of the four deputies and \$50,000 against Sergeant Griem, for a total of \$170,000.

On June 25, 2008, the district court granted the defendants' motion for a new trial on both liability and damages, based largely on problems with the jury instructions that were used. The re-trial has not yet been scheduled.

Antoine was represented by San Francisco attorneys Elizabeth de Vries, Darren Kessler and John Scott, all of the Scott Law Firm, and attorney Amitai Schwartz. See: *Antoine v. County of Sacramento*, U.S.D.C. (E.D. Cal.), Case No. 2:06-cv-01349-WBS-GGH. ■

Additional source: *VerdictSearch California*

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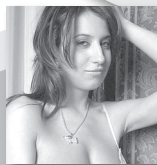


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Florida Sheriff Sued for Awarding No-Bid Health Care Contract, Receiving Gifts

Prison Health Services (PHS) has sued the sheriff of Sarasota County, Florida for awarding the jail's health care contract to rival Armor Correctional Health Services without taking competitive bids. The lawsuit also alleges that Sheriff Bill Balkwill received gifts from Armor in the time period leading up to the no-bid contract award.

One of those gifts had a specific correlation to the contract negotiations. Doyle Moore, Armor's chief executive officer, took Sheriff Balkwill on a fishing trip on Lake Okeechobee. He rented two boats with guides and plenty of bait. Balkwill caught a one-and-a-half pound bass, and Moore footed the \$748 bill with a credit card.

When Balkwill returned to his office the following Monday he e-mailed Moore, stating, "Had a great time! Give a call when you're ready to talk about the contract and what you can do." Between 2006 and 2007, Armor also treated Balkwill to hundreds of dollars in meals and other perks, according to records discovered by PHS lawyers. Moore is no longer an Armor executive; he stepped down after it was revealed that he had a criminal record for tax evasion.

Under Florida law, constitutional officers, such as sheriffs, are prohibited from accepting gifts from lobbyists worth more than \$100. The fishing trip, which included four people, came out to about \$190 per person. Although a violation of the state's gift law is not a criminal offense, sanctions can range from public censure and fines to removal from office. No one, however, filed a complaint against Balkwill with the Florida Commission on Ethics.

Despite Armor having spent over \$1,500 to obtain "access" to Sheriff Balkwill through the fishing trip, a meeting at a fancy restaurant and an evening out on the town with his wife, Balkwill said he awarded the contract to Armor because it was the cheapest. Since its founding in 2004, Armor has received over \$240 million in contracts in Florida alone. [See: *PLN*, August 2006, p.29].

The company has accomplished that not only by lavishing gifts upon public officials, but also by utilizing the "good ole boy" network. Part of that strategy has been to hire former government employees to urge their former associates to award

contracts to Armor. For example, Armor has hired ex-Hillsborough County Sheriff Cal Henderson, as well as sheriffs in Palm Beach, Brevard County and Broward County, to lobby other sheriffs for health care contracts.

Henderson participated in the Okeechobee fishing trip. "There wasn't anything to it," he said. "[Sheriff Balkwill] and I are friends. I remember we caught a couple of fish, had a good time. That's all." However, when Balkwill initially rejected bids from other firms for the county jail's health care contract, negotiated with Armor for a lower bid, and then ultimately awarded the three-year \$9 million contract

to Armor, there was more to the story for Henderson. Under his "consultant" agreement with Armor, Henderson receives a fee every time he helps the company obtain a contract.

The lawsuit filed by PHS against the sheriff's office is still pending, and Sheriff Balkwill has refused to attend depositions in the case. He has denied that he intends to work for Armor after he retires in 2008. See: *Prison Health Services v. Sarasota County*, Sarasota County (FL) Circuit Court, Case No. 2007-CA-10652-NC. ■

Sources: *Herald Tribune*, *Tampa Bay online*

Washington State's Criminal Libel Statute Held Unconstitutional; Prisoner Disciplinary Conviction Vacated

by John E. Dannenberg

The Washington State Court of Appeal, Division 2, ruled that the state's criminal libel statute was unconstitutional under U.S. Supreme Court precedent due to vagueness and for being overbroad. In so ruling, the appellate court vacated a state prisoner's disciplinary conviction that had been obtained based upon the statute.

Allan Parmelee is a Washington Department of Corrections (WDOC) prisoner who has filed numerous civil rights actions against prison officials during his multiple incarcerations. Recently, when his comments towards them were tinged with vulgar language, WDOC retorted by giving him a disciplinary violation based upon a theory of criminal libel. However, because the appellate court found that Washington's criminal libel statute was unconstitutional on its face, the disciplinary conviction was vacated.

The law on defamation was defined by the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The high court concluded that civil sanctions could not be imposed on defamatory statements against a public official unless those statements were both false and made with "actual malice." The Court expressly wanted to protect debate

on public issues, which necessarily must allow sometimes vehement, caustic and sharp attacks on public officials. The Court went on that year to decide the question of criminal libel, which it flatly declared facially unconstitutional in *Garrison v. Louisiana*, 379 U.S. 64 (1964), because Louisiana criminally punished false statements made against public officials without a showing of "actual malice."

Although many states have since thrown out their criminal libel laws, Washington has not. In Parmelee's challenge to state statutes RCW 9A.010 and .020, the Court of Appeal found that *Garrison* controlled. Because the law "permits punishment of true statements not made with good motives or for justifiable ends, it does not survive constitutional scrutiny."

The appellate court went on to decide whether Washington's criminal libel statute was fatally overbroad or vague. The Washington Supreme Court had earlier held that "a law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities." Here, because the challenged statute prohibited both true speech and false speech made without actual malice, it was uncon-

stitutionally overbroad.

A statute is unconstitutionally vague “if persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application.” With respect to the challenged statutes, the Court of Appeal found them inherently vague because they “created a potential confusion between the common law ‘malice’ standard and the *New York Times* ‘actual malice’ standard.”

As to Parmelee’s complaint that the statutes were unconstitutionally applied to punish prisoners for statements made in grievances to prison officials, the appellate court held that where, as here, a statute is facially unconstitutional, “it follows that no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” Even though Parmelee did not raise the constitutionality issue in the trial court below, the appellate court was obliged to raise and decide the question *sua sponte*.

WDOC’s argument that *Turner v. Safley*, 482 U.S. 78 (1987) should control because Parmelee was challenging a prison regulation was rejected, since Parmelee had properly challenged the statute instead. When and if a prisoner is charged with violating a prison regulation prohibiting abusive language, then *Turner* would control.

The Court of Appeal further permitted Parmelee’s retaliation claim to survive, and remanded to the trial court for further proceedings. Parmelee’s request for attorney fees under 42 U.S.C. § 1988 was denied because he had not yet won a civil rights complaint. If he eventually succeeds on the retaliation claim, fees may then be appropriate. See: *Parmelee v. O’Neel*, 145 Wash.App. 223, 186 P.3d 1094 (Wash.App. Div. 2, 2008). ■

Civil Commitment Provisions of Adam Walsh Act Held Unconstitutional

Congress exceeded its authority under the Commerce Clause and Necessary and Proper Clause of the U.S. Constitution in enacting the civil commitment provisions of the Adam Walsh Act, a Minnesota U.S. District Court ruled on May 23, 2008.

Shortly before Roger Dean Tom was about to complete his ten-year federal prison sentence for aggravated sexual abuse, the United States stayed his release by filing a petition pursuant to the Adam Walsh Act, 18 U.S.C. § 4248(a), which authorizes the Bureau of Prisons (BOP) to “stay the release” of any prisoner certified by the BOP to be “sexually dangerous.”

A stay under the Walsh Act remains in effect until a court determines, by clear and convincing evidence, whether the person is in fact sexually dangerous. If the person is found to be sexually dangerous, he or she is committed to the custody of the Attorney General.

Tom moved to dismiss the government’s petition, arguing that the civil commitment provisions of the Walsh Act exceeded Congress’ authority under the Commerce Clause and Necessary and Proper Clause of the Constitution. Joining a split among district courts that have considered the issue, Judge Paul A. Magnuson granted Tom’s motion.

The civil commitment provisions of the Walsh Act exceed Congress’ authority under the Commerce Clause, Magnuson wrote, because they seek to “regulate and prevent noneconomic criminal conduct that traditionally has been the province of the states.”

Likewise, the provisions could not be upheld based on the Necessary and Proper Clause, Magnuson decided. While courts have upheld Congress’ authority to retain DNA samples from released prisoners under

the Necessary and Proper Clause, retaining DNA samples “is fundamentally different than retaining custody of the inmate.”

Accordingly, the court dismissed the government’s petition to stay Tom’s release. See: *United States v. Tom*, 558 F.Supp.2d 931 (D.Minn., 2008).

One month later, the district court denied the government’s renewed request to stay Tom’s release pending an appeal, holding that “the Government has failed to satisfy its burden for a stay.” Citing prison records, including records from a BOP psychiatrist, that clearly indicated Tom was not deemed a risk for release and placement in a halfway house, the Court remarked that granting the stay requested by the government “would violate not only logic but the law.” See: *United States v. Tom*, 558 F.Supp.2d 942 (D.Minn., 2008).

PLN has recently reported other successful challenges to the Adam Walsh Act. [See: PLN, Oct. 2008, p.23 and 38]. ■

Additional source: *Star Tribune*

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PHS Receives Three-Year \$366 Million Rikers Island Medical Care Contract Renewal Despite Non-Performance Fines for Last Three Years

by John E. Dannenberg

Prison Health Services, Inc. (PHS) was granted a three-year, \$366 million no-bid contract renewal to provide medical and mental health care services for New York City's Rikers Island Jail, notwithstanding the company's checkered record during its last three-year contract, which resulted in \$793,000 in fines for non-performance. The contract renewal amounted to a 10% raise for PHS when adjusted for inflation.

As a result, the 100,000 prisoners admitted to Rikers Island each year can expect more of the same substandard medical care, since PHS has a long history of exacting its profits at the expense of prisoners' health. [See, e.g.: *PLN*, Nov. 2006, p.1].

Quarterly audits of PHS's performance, which revealed an average 15% non-compliance rate, were made by New York City's Department of Health and Mental Hygiene (DHMH) based on a review of 9,000 case files. Principal areas that were reviewed included HIV, asthma, sexually transmitted diseases and women's healthcare issues.

In six of the eight most recent quarters, PHS continuously failed to meet some health care standards, most notably follow-up on HIV treatment and testing. For five of the quarters, PHS failed to meet standards for taking intake prisoners' medical histories; the compliance rate was 61%. Suicide watch was rated at 95%, but only a 100% rating might have prevented the three documented suicides that occurred during the reviewed time period. In three of the last four quarters, prisoners in segregation found themselves isolated from follow-up health care services, too.

There were some 100% ratings, however. PHS was given a clean audit review for cancer screenings, prenatal care and sonograms for female prisoners. But Dale Wilker, a staff attorney for the Prisoners' Rights Project of the Legal Aid Society, said that the most serious complaints were from prisoners with the gravest ailments, including HIV, heart conditions and asthma – where failures to provide timely medication were reported.

The worst concerns came not in terms of volume, but in the seriousness of the omissions. "Since the city got away from

using teaching hospitals and went to providers that are in some way to make money and to serve their stockholders, complaints have become much more frequent and much more serious," Wilker stated.

Wilker further opined that since the contract was renewed without bidding, "that suggests to me that things weren't bad enough for the Department of Health to not want to contract with them at all, or maybe they couldn't find another provider." DHMH deputy commissioner Louise Cohen stated, "We think PHS is performing adequately. We would love to

have a local, nonprofit partner. One just isn't stepping up to the plate."

Plainly, a profit motive is inherently at odds with the interests of health care for affected prisoners. PHS is not a charitable organization, nor are prisoners generally popular subjects for adequate medical care. Prisoners do, however, provide an excellent opportunity for private companies to turn a profit.

PHS's renewed Rikers Island contract runs through December 31, 2010. ■

Sources: *Gotham Gazette*, *America Service Group press release*

Washington Jail Remodel Violated State Law, at a Cost of \$51.6 million

by Mark Wilson

King County, Washington officials violated state law by failing to get competitive bids on a security upgrade project at the King County Correctional Facility, according to a March 12, 2008 state audit. Originally slated at \$14.2 million, the cost of the project has skyrocketed to \$51.6 million.

A nationally recognized security expert inspected the jail's aging electronic security system and concluded that it was "a virtual certainty that major systems will fail in the near future," leaving the jail "inoperable." Based on this assessment, in April 2003 the County Council declared an emergency and hired Turner Construction under a \$213,437 contract to begin planning the security upgrade. The Council waived competitive bid requirements due to the emergency.

Over one year later, in September 2004, the County awarded Turner a \$14.2 million no-bid contract to complete the project. County officials claimed that putting the project up for bid would have delayed its completion, threatening public safety and disrupting jail operations. State auditors disagreed, however, finding that "typically, one year is sufficient time to solicit bids."

"Since the execution of the construction contract, the County has authorized 28 change orders," which added tens of millions of dollars to the original contract

price. County Council member Larry Phillips supported the 2003 emergency declaration and initial funding, but is now distressed by the soaring costs. "Incrementally, this project over time kept growing to the point where I stopped voting for it," he said. "I was not satisfied – and am still not – that this has been done well."

Many of the contract changes had nothing to do with upgrading the jail's security system; rather, they included remodeling the booking area, pharmacy, infirmary and administrative offices, replacing a shower, and upgrading a fire alarm system. "The cost of the work outside the security project was approximately \$14.5 million," auditors found. "The County claimed exemption from competitive bid laws for 'special market conditions.'"

County officials defended the contract changes, arguing it would have been "beyond impractical" to bring in a second contractor for remodeling projects. Officials claimed they were following the law but have since stopped the change order practice, stated Facilities Management Director Kathy Brown. She suggested, however, that the County may seek a legislative change because it often makes sense to do less urgent work during an emergency project.

County officials "certainly understand and respect the auditor's work,"

said Brown. But they disagreed with his conclusion. "I believe the County did everything they possibly could to ensure the safety of the public and do it in a sound way that reflected absolute best business practices." The auditor recommended that "the County comply with laws requiring competitive awards of public works projects, including revising its own policies to be consistent with state law."

In an unrelated audit also released

on March 12, 2008, state auditors found that offenders posting bail by fraudulent credit card transactions had deprived the King County District Court of \$30,000. "The Court did not have adequate procedures for refunds associated with credit card transactions," auditors found. In yet another audit, it was determined that inadequate controls of petty cash held by the King County Public Health Department resulted in a loss of \$9,166.25.

Even after the security upgrades at the King County Correctional Facility are completed, the jail still faces an overcrowding problem and is anticipated to stop accepting misdemeanor arrestees from neighboring cities by 2012. ■

Sources: *The Seattle Times*; *Schedule of Audit Findings and Responses*, Washington State Auditor's Office, King County (March 12, 2008)

Michigan Escape is Not "Violent Felony" for ACCA Purposes

The Sixth Circuit Court of Appeals has held that a Michigan "failure to report" escape conviction was not a "violent felony" under 18 U.S.C. § 924, the Armed Career Criminals Act (ACCA).

Anthony Collier was arrested by federal agents in Michigan and charged with being a felon in possession of a firearm under 18 U.S.C. § 992(g)(1).

After Collier pleaded guilty, the pre-sentence investigation report determined that he had three prior "violent felonies" for purposes of sentencing under the ACCA: "(1) breaking and entering a dwelling with intent to commit larceny, (2) prison escape, and (3) fourth-degree fleeing and eluding a police officer." Because Collier was being sentenced on a felon in possession of a firearm conviction, the ACCA required a minimum 15-year sentence if he had been previously convicted of three "violent felonies."

At sentencing, Collier's attorney conceded that breaking and entering was a violent felony, but argued that the other convictions were not. The sentencing court found that all three convictions were violent felonies and sentenced Collier under the ACCA.

On appeal, the Sixth Circuit noted that whether an offense "is a 'violent felony' turns on whether it 'involves conduct that presents a serious potential risk of physical injury to another.'" Additionally, "the government bears the burden of proving that the defendant qualifies for a sentence enhancement under the ACCA."

Collier's prison escape conviction was a "walk away" where he simply stepped "off a public Greyhound bus – where he was unaccompanied by correctional officials – and failed to report to the facility to which he was being transferred." The appellate court expressed "doubt that a statute covering this 'failure to report' variety of escape necessarily involves conduct that presents a serious potential risk of physical injury to another." While making it clear that jail-break escapes would involve conduct that presents such a risk, the Sixth Circuit found

that a "failure to report" escape is not categorically a "violent felony."

The Court then determined "that Collier's Michigan conviction for escape does not qualify as a 'violent felony' under the ACCA." As to his eluding conviction, the appellate court noted that it had previously found such convictions to be ACCA violent felonies in *United States v. Martin*, 378 F.3d 578, 582-84 (6th Cir. 2004); *United States v. McGhee*, 161 Fed.Appx. 441, 448-450 (6th Cir. 2005) (unpublished) and *United States v. Foreman*, 436 F.3d 638, 643 (6th Cir. 2006). See: *United States v. Collier*, 493 F.3d 731 (6th Cir. 2007). ■

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\$7 Million in Settlements in Colorado Jail Prisoner's Death from Medical Negligence

by David M. Reutter

The Denver Health Medical Center has settled a claim of negligent care for \$4 million after releasing a prisoner with internal injuries who later died. Six months later, the Denver City Council approved an additional \$3 million settlement.

Emily Rae Rice, 24, died at the Denver City Jail on February 19, 2006 – only 20 hours after she was released from a hospital and booked into the facility. She had been arrested on outstanding traffic warrants after crashing her car, and was suspected of being intoxicated.

Rice was taken to the Denver Health Medical Center for evaluation. That evaluation only found a shoulder contusion; consequently, she was given Ibuprofen and released into the Sheriff's custody. Despite repeated complaints of pain over the next 20 hours, jail guards did not return her to the hospital or provide medical care. Rice died in her cell of internal bleeding caused by a lacerated spleen and liver.

Her estate then sued the City and County of Denver and the Medical Center. On May 30, 2008 the Denver Health Medical Center settled the suit for \$4 million "to avoid protracted court proceedings that could have lasted for years," the hospital said in a statement. In addition to the monetary settlement, the Medical Center also agreed to provide more training, establish a protocol to identify patients heading to jail who may need monitoring, and require nurses to check vital signs every four hours for 24 hours after a patient is discharged to the custody of the Sheriff's office.

The hospital's position was in stark contrast to that of city and county officials, at least initially. "There has been a significant cover-up," said attorney Darold W. Killmer, who represents Rice's estate. "There have been so-called investigations which were designed to whitewash the problem. Every investigation officially launched by the city of which we are aware has been designed to help them defend themselves rather than to find the truth."

Internal investigations by the Sheriff's office resulted in three-day suspensions for two deputies who did not make required checks in Rice's unit, and then falsified re-

ports claiming they had. Another deputy resigned after lying to investigators.

Portions of the video that tracked Rice's movements within the jail on February 18, 2006 were missing. "The city's excuse is that it was an equipment malfunction," said Killmer. "But the compelling evidence is that it wasn't a malfunction. It was much more likely a product of intentional editing." The city also had refused to produce documents critical to the case, according to Killmer.

The Denver City Council, apparently acknowledging problems in defending against the lawsuit, approved a \$3 million settlement on behalf of the city and county on November 17, 2008. As part of the settlement the jail will annually discuss

Rice's death at a roll call meeting, and will reform the employee disciplinary system. The Sheriff's office has already installed a new video system as well as a system that tracks guards to ensure they make their rounds. "We call those 'Emily's rights,'" said Killmer.

Of the city and county's \$3 million settlement, \$1.9 million will go to Rice's parents, \$100,000 to Rice's estate and \$1 million to Killmer's law firm, Killmer Lane & Newman LLP. See: *Estate of Emily Rice v. City and County of Denver, Colorado*, U.S.D.C. (D. Co.), Case No. 1:07-cv-01571-MSK-BNB. ■

Additional sources: *Associated Press*, *Denver Post*

Jail Nurse Guilty of Forging Doctor's Order; Forged Orders Common Jail Practice

by Mark Wilson

On August 28, 2008, a Multnomah County, Oregon jury convicted a former jail nurse of forging a drug prescription for a prisoner who died hours later.

Jody Gilbert Norman, 43, was arrested on February 19, 2005 and taken to the Multnomah County Detention Center (MCDC) at 3:00 a.m. According to a district attorney's investigation, Norman, who had a history of drug abuse and heart problems, complained of chest pains to jail staff.

Rather than calling a doctor as jail procedure required, MCDC nurse William Lee James falsified forms to make it appear that a doctor had authorized him to give Norman a prescription anti-anxiety medication called Ativan. Hours later, Norman died in his cell from complications related to his heart condition.

The prosecutor's office was first alerted to Norman's death nearly three years later by the Oregon State Board of Nursing, in late 2007. James was then charged with forgery.

During a two-day trial, Deputy District Attorney Glen Banfield argued that if James had called the doctor as he was required to do, Norman likely would

have been sent to an emergency room. "Unfortunately, Mr. Norman never had the opportunity," observed Banfield.

James testified that the jail physician, Dr. Todd Engstrom, told him not to disturb him in the middle of the night to administer Ativan. James admitted circling "T.O." for telephone order on a jail form, and writing that Engstrom had ordered Ativan for Norman when he had not. Other MCDC nurses called by James to testify stated that forging the doctor's orders was a common practice at the jail.

Engstrom testified, however, that he never told James not to disturb him in the middle of the night, and other MCDC employees testified that James' conduct was not common acceptable practice.

Defense attorney Dan DiCicco argued that although James admitted to falsifying the medical form, "he thought he was doing the right thing." The jury disagreed. While the jurors found that James had forged the prescription, they declined to find that he had violated the "public trust or his professional responsibility" – which would have exposed him to a stiffer sentence.

After the guilty verdict, Judge Adri-

enne Nelson sentenced James to 18 months probation and 320 hours of community service. In a post-verdict interview, DiCicco said MCDC medical staff feel the need to administer drugs quickly in urgent situations, but “the doctors all leave at 5 p.m.”

James was fired as a jail nurse. One year after Norman died, James’ nursing license was suspended for 21 months. DiCicco said James accepted the suspension and received additional training, including training on how to respond to patients complaining of chest pains. “That’s professional behavior, to acknowledge a

mistake, pay your dues and move on,” said DiCicco.

While on suspension James let his license lapse, but that was not the end of his 34-year nursing career. He moved to California and landed a registered nursing position in that state. In light of the Oregon incident, however, an official complaint was filed with the California Board of Registered Nursing by the state Attorney General’s office, which resulted in James’ license being placed on probationary status on March 17, 2008. ■

Sources: *The Oregonian*, www.rn.ca.gov

Ohio Jail Guard’s Excessive Force Conviction Affirmed

The Sixth Circuit Court of Appeals has affirmed a former jail guard’s criminal convictions for using excessive force on three prisoners.

Michael J. Budd, once second-in-command of the Mahoning County, Ohio Sheriff’s Department, was charged in a four-count indictment with subjecting prisoners to excessive force. Count one alleged conspiracy to deprive pre-trial detainee Tawhon Easterly of his constitutional rights under color of law, in violation of 18 U.S.C. § 242, and witness tampering in violation of 18 U.S.C. § 1512(b)(2). The remaining counts charged Budd with violations of § 242 with respect to Easterly, sentenced prisoner Brandon Moore, and pretrial detainee Stephan Blazo.

A jury convicted Budd of count one but deadlocked on the remaining counts. He was then retried and convicted of each of those counts. On appeal, Budd challenged count three, “because the indictment referred to a Fourteenth Amendment basis for the right to be free from excessive force, while the jury instructions referred to an Eighth Amendment basis for the right.” Budd claimed this amounted to an improper constructive amendment of the indictment.

Although it was “a close question,” the Sixth Circuit found that the difference in language was merely a variance rather than a constructive amendment. In reaching that conclusion, the Court observed that “the indictment and jury instructions describe the same actions, and they specify an offense against the same statute, 18 U.S.C. § 242.” The instruction merely referred “to different standards under which

a violation of § 242 can be evaluated.” It was “most reasonable to conclude that the ... excessive force standards describe two alternative methods by which one crime could be committed, rather than two crimes.” Additionally, Budd was not prejudiced by the change.

The Court also rejected Budd’s argument that the jury instructions on counts one and two constructively amended those counts. Finding that Budd had waived his claim and that it lacked merit, the Court also refused to find the jury instructions on counts two and four deficient for failing to instruct the jury that Budd’s conduct needed to “shock the conscience” to violate the Fourteenth Amendment.

Finally, the appellate court rejected Budd’s argument that he was entitled to judgment of acquittal on counts three and four because Blazo’s injuries were *de minimis* and insufficient to support a constitutional violation, and because Moore had failed to identify Budd as his assailant or establish that Budd acted without penological justification.

The Sixth Circuit found that Blazo’s injuries were comparable to those of the prisoner in *Hudson v. McMillian*, 503 U.S. 1 (1992). Additionally, the Court determined that “a rational factfinder could have concluded that Budd acted without penological justification and therefore unnecessarily and wantonly inflicted pain on Moore, in violation of the Eighth Amendment.” Moreover, Budd’s failure-to-identify argument was “totally meritless” because two other guards had identified him as Moore’s assailant. See: *United States v. Budd*, 496 F.3d 517 (6th Cir. 2007), *cert. denied*. ■

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\$1,100,000 Settlement in Juvenile Prisoner Suicide in Union County, New Jersey

On November 15, 2007, Union County settled a lawsuit over the suicide death of a juvenile prisoner at the 42-year-old Union County Juvenile Detention Center (JDC) in Elizabeth, New Jersey. The county agreed to pay \$780,000 in damages plus \$230,000 in attorney fees. Four private companies, including Correctional Health Services, settled their liability separately for undisclosed amounts.

Yolanda Padilla was 34 when her 17-year-old son, Edward Sinclair, Jr., committed suicide shortly after being admitted to the JDC on May 10, 2003. Sinclair was arrested for missing a court date while on probation for bicycle theft. He had previously made suicide threats, expressed suicidal ideation and revealed a prior suicide attempt to his probation officer. Sinclair hung himself from an exposed sprinkler head. The sprinkler head cover was damaged seventeen months earlier by two juvenile prisoners who were charged with deliberately destroying county property. It was last reported as a safety hazard six months before the suicide. There was no record of a work order being filled out to have it repaired. Padilla, representing Sinclair's estate, filed suit in federal district court.

JDC routinely "locked down" newly-arrived juvenile prisoners for days pending medical evaluation. Over four years before the suicide, the New Jersey Juvenile Justice Commission (JJJ) criticized JDC practices including isolating newly-arrived juveniles, "locking down" juveniles in their cells for excessive amounts of time and only allowing juveniles out of their cells in rotation groups called "splits". In 2000, the JJJ specifically warned JDC that the first few hours of confinement were the most dangerous for juveniles acting out suicidal thoughts and that they should not be isolated, but kept in the population and engaged in program activities to allow acclimation to confinement. JDC officials told the JJJ multiple times that they had discontinued the policies of "locking down", isolating and "splits".

One month before the suicide, the Acting Attorney General sent JDC a letter advising it to immediately discontinue the practice of "splits" and "lock downs," which he had discovered JDC was still practicing. When Sinclair was processed into JDC, he was given a mattress to

put on the floor of a filthy, cockroach-infested 8' x 10' cell occupied by two other juveniles. As a new arrival, Sinclair was "locked down" while his cellmates were let out for recreation and other activities when their "splits" came up. He had been alone in the cell for over an hour when a guard discovered his body.

The New Jersey Office of the Child Advocate issued a report following Sinclair's death which stated that "[t]he county's persistent violation of applicable laws and JJC and Attorney General directives over several years, which suggests a fundamental disregard of basic human rights, led directly to the conditions that allowed E.S. to commit suicide on May 10, 2003."

Overcrowding and understaffing also

played a part in the suicide. The JDC is no longer allowed to exceed its capacity of 34 while a new \$38 million juvenile jail is under construction in Linden. A \$20 million new juvenile jail was originally proposed in 2000, but the plan was scrapped after the county spent \$2 million on it. Since then, the cost to the county has been \$2,465,952 for the Sinclair settlement, state-mandate updates at JDC and maintaining the JDC population cap, plus the life of one troubled teen. See: *Estate of Sinclair v. County of Union*, USDC, D. NJ, No. 2:05-cv-55-KSH-PS. ■

Sources: State of New Jersey, Office of the Child Advocate, Findings: Matter of E.S.; *Newark Star-Ledger*; www.thehill-sider.com.

Will California's \$11 Billion Prison Outlay Survive State Budget Cuts?

by Marvin Mentor

As California deals with a projected \$28 billion budget shortfall over the next 18 months, it remains to be seen if the requisite two-thirds of the state legislature has the political courage to make cuts to the Department of Corrections and Rehabilitation's (CDCR) proposed \$11 billion annual operating budget.

Democrats lean towards decreasing the prison population from the current 172,000 to 132,500 (based largely on reducing returns to custody for "technical" parole violations), while Republicans want every prisoner to remain behind bars for as long as possible. The shortsighted result is that state budget cuts may suck \$5 billion out of education funds, increasing the chances that California's marginally educated children (at an \$8,000 annual education cost) will grow up to become future prison residents (at a \$43,000 annual incarceration cost).

Three decades of "tough on crime" rhetoric has quintupled California's prison population to 172,000 prisoners. An additional 123,000 parolees provide fodder to fill empty prison bunks at the discretion of parole agents, who are members of the CCPOA, the state's powerful prison guards union. There is no incentive for the CDCR to reduce the prison population, which remains maxed out at about 190%

of "design capacity." In past years, bonds were floated to build more prisons and the CDCR's growth went unchecked.

Until now. With a federal three-judge court considering a total takeover of CDCR to stem unconstitutional medical care and preventable prisoner deaths, state legislators are staring down the gun barrel of having to cut the prison population. But fears of being labeled "soft on crime" haunt every politician in Sacramento.

Estimating \$1 billion in annual savings, Governor Schwarzenegger proposed reducing the number of low-risk prisoners by 22,000 (and cutting 4,000 prison guards), but the CCPOA and his own Republican party raised such a stink that he backed down. The CCPOA, not one to forgive such an attack on its members, even launched a short-lived recall campaign against the Governor.

The legislature eventually passed a \$7.9 billion prison construction bill (AB 900), but that money has not been allocated due to high borrowing costs. On top of the prison construction expense is a demand by the federal healthcare receiver, J. Clark Kelso, for \$7 billion over a three-year period for new prison hospitals and treatment centers. Kelso is clamoring for the funds while the legislature retches and glowers.

Meanwhile, CDCR's prisoners con-

tinue to get older and sicker. Yet the obvious cost savings from releasing non-dangerous infirm prisoners has so far not moved CDCR bureaucrats or a reluctant parole board. A wheelchair-ridden 95-year-old prisoner who had nine prior parole hearings was refused release by Governor Schwarzenegger. In July 2008, high-notoriety Manson follower Susan Atkins was denied compassionate release while she was dying of brain cancer. Her medical care has cost the state an estimated \$1.15 million, plus \$308,000 in incarceration costs.

Approximately forty percent of CDCR prisoners carry the hepatitis-C virus; a significant number are infected with HIV. As these prisoners spread their diseases inside prison, both the human and medical treatment costs will grow exponentially. Further, CDCR projects that by 2017, elderly prisoners will require nearly 6,000 beds for long-term care plus another 4,300 beds will be needed for the severely mentally ill, at an annual cost of billions of dollars.

Regardless, state Representative Todd Spitzer, a Republican, led his party's charge to scuttle any early release plan. "This budget plan [with the early release of 22,000 prisoners] is a forfeiture of AB 900 principles, which was supposed to change how we treat criminality in California," he said. Republican political consultant Ray McNally, whose clients include the CCPOA, opined that if the prison population reduction proposals actually go through, "Schwarzenegger's political career will be all but over."

On December 1, 2008, Gov. Schwarzenegger declared a financial emergency and called the legislature into another special session to deal with the budget crisis. Previously, on July 31, 2008, Schwarzenegger had issued an executive order that temporarily reduced the pay for 200,000 state workers to minimum wage as a cost-cutting measure. He also imposed a hiring freeze, halted overtime, and fired thousands of part-time state employees.

It is uncertain how California's budget will be balanced given the financial strain of its overburdened prison system, an anticipated federal takeover of the state's prisons, and a lack of political will among state lawmakers to realistically address the problem. ■

Sources: *Sacramento Bee*, *Los Angeles Times*, *Associated Press*, *Reuters*, www.cdcr.ca.gov

Second Circuit Recognizes Attorney-Client Privilege in Prisoner's Journal in Prosecution of Rapist Guard

The Second Circuit Court of Appeals held that a female prisoner did not waive attorney-client privilege with respect to certain writings in her prison journal.

Nicholas DeFonte, a former guard at the Metropolitan Correctional Center in Manhattan, was facing criminal prosecution for raping female prisoners at the jail. Federal prosecutors intended to call former prisoner Francia Collazos as a witness against DeFonte.

Collazos kept a journal during her confinement, recording incidents involving DeFonte and conversations with prosecutors and her attorney. "The Government became aware of ... Collazos's journal when her possessions were mistakenly taken from her cell and transferred to the Federal Correctional Institution in Danbury, Connecticut. Once the mistake was realized, the journal was delivered to the United States Attorney's Office."

DeFonte's attorney learned of the journal just before trial and moved for its disclosure. Collazos moved to intervene and sought "a protective order, arguing that the writings in the journal are protected by the attorney-client privilege." The district court denied the motion, "finding that the documents were not protected by the attorney-client privilege and that Collazos had no expectation of privacy in the contents of her cell."

On appeal, the Second Circuit explained that a prisoner "does not ... knowingly waive an attorney-client privilege with respect to documents retained in her cell simply because there is no reasonable expectation of privacy in those documents for Fourth Amendment purposes. Rather, the two inquiries are independent of each other."

The appellate court noted that the attorney-client privilege extends to incarcerated individuals. As such, "it was error ... for the district court to rely on the diminished

expectation of privacy in a jail cell in concluding that the attorney-client privilege could not be asserted."

Collazos' journal contained two types of entries: memorialized private conversations between Collazos and her attorney, and various events in her daily life, including incidents involving DeFonte and discussions with prosecutors.

The Court found that the former writings were protected from disclosure by the attorney-client privilege. There was no evidence that Collazos had consented to the journals being taken from her possession, or had shared or intended to share those entries with any third party. Therefore, "absent a finding ... that Collazos waived the privilege, her record of conversations with counsel are not subject to discovery by DeFonte." The Second Circuit found the law less clear with respect to the second category of journal writings.

The Court remanded with instructions "to conduct a hearing to decide which of the writings contained in the journal fall within the scope of the privilege," and whether "there were compelling or overwhelming Sixth Amendment concerns involved in its decision[.]" See: *United States v. DeFonte*, 441 F.3d 92 (2nd Cir. 2006).

DeFonte was convicted in February, 2007 of engaging in sexual acts and sexual contact with a female prisoner, and of making false statements. He was acquitted of two other charges. His convictions were upheld on appeal by the Second Circuit on July 15, 2008. See: *United States v. DeFonte*, Case No. 07-0516-cr (2nd Cir. 2008); 2008 WL 2740859. ■

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Rape of Child by Former Washington DOC Director's Son Spawns Departmental Crisis

by John E. Dannenberg

The Washington State Court of Appeals has upheld the firing of the Department of Corrections' (WDOC) chief personnel counselor for violating the department's privacy policies while counseling staff during a crisis caused by salacious publicity surrounding the WDOC Director's son having been charged with child rape.

The internal hubbub over unfolding news reports concerning the arrest and guilty plea of Joseph Lehman, Jr., son of then WDOC Director Joseph Lehman, Sr., ultimately resulted in the October 2003 firing of Cyndi Walters, director of WDOC's Staff Resource Center, for indiscretions in dealing with crisis counseling over the incident. Although Walters had won relief in the superior court, the appellate court reversed and found ample evidence of her having violated confidentiality rules and having neglected her duties.

The Court of Appeals focused on investigative interviews by Walters of WDOC staff, and her subsequent discussions about those interviews with other WDOC employees – including statements in which she falsely implied that she had provided counseling services to Director Lehman. Walters was bound by a duty of confidentiality, which the WDOC claimed she violated.

Also brought up were past indiscretions by Walters in the performance of her duties. In June 2002, she was the subject of a whistleblower's complaint by the state auditor over misconduct for using her office to exploit state resources for personal gain. In September 2002, she was called on the carpet by her supervisor for alleged travel expense abuses. In May 2003 she was reprimanded for failing to follow orders to answer a public disclosure request. One month later, she was directed to improve her job performance in areas of communication, accountability and credibility. And in August 2003, she received a letter of reprimand for refusing to respond to her supervisor's request for information concerning work activities.

In reversing the superior court, the Court of Appeals found that the record was more than sufficient to support Walters' eventual firing, particularly since her discussions of the counseling interviews regarding Lehman's son's crime had vio-

lated WDOC's confidentially policy. See: *Walters v. Department of Corrections*, 144 Wash.App. 1032 (Wash.App.Div.2, 2008) (unpublished); 2008 WL 2026133.

Joseph Lehman, Jr., then 38, pleaded guilty to charges of raping his two-month old daughter, and received a four-year prison sentence in December 2003. As part of his plea agreement, Lehman Jr., admitted having "oral and manual sexual contact" with his two month old daughter for "about ten minutes." The crime was discovered and reported by his fiancée, Roxanne Crowder.

At the time, state sentencing guidelines called for an 8 year sentence, the sentencing court imposed a sentence below the guidelines which is unusual. Prosecutors had recommended only six

months in jail plus sex offender treatment – which would have been highly unlikely for any other child rape defendant who was not the son of a high-ranking state official. Moreso when one considers that Lehman Jr., confessed to Washington police that he had raped a ten year old girl in Maine in 1997, while his father headed that state's prison system. Lehman Jr. had previously been involved in a 1989 Tacoma bank robbery where he masterminded the armed robbery of an armored car for \$35,000. Lehman Jr. was sentenced to one day in jail for that crime. For someone whose father runs prison systems, the son seems to do a fairly good job of avoiding them. ■

Additional source: *Associated Press*

Ex-Con Exposed – Had Posed as a Lawyer

by John E. Dannenberg

A former prisoner who posed as an attorney in at least 16 cases in ten federal courts since 2004 has admitted to a federal judge that he is not a lawyer and didn't graduate from law school as he had claimed. The effect of his faux "legal representation" may provide the basis for overturned cases should his unsuccessful clients file appeals based on ineffective assistance of counsel.

Howard O. Kieffer, 53, of Santa Ana, California, and Duluth, Minnesota (he maintains a mail drop address in the former and lives in the latter) has a criminal record that includes a 1989 conviction for filing false tax returns – for which he served three years of a five-year federal sentence. He also had prior California state convictions for forgery and grand theft.

Following his release from prison in 1992, Kieffer gained respect in the legal community through deceit and misrepresentation; he was "known" as a capable attorney specializing in federal sentencing issues and post convictions. He worked with Federal Defense Associates (www.afda.org), where he served as executive director, and acted as a consultant for defense attorneys. He also maintained a highly respected Internet listserv, BOPWatch, which tracks federal prison-related issues and news.

But a July 1, 2008 investigative report by the *Denver Post* revealed that Kieffer had a rap sheet, did not attend the Antioch School of Law in Washington D.C., was not licensed to practice law anywhere in the United States, and was not a member of the American Bar Association or the National Association of Criminal Defense Lawyers as he had claimed.

Soon after the *Post* article was published, Kieffer's carefully built reputation fell apart. Upon questioning by North Dakota U.S. District Court Judge Daniel Hovland, who demanded proof of Kieffer's legal standing, Kieffer admitted he was a phony. Other federal judges have demanded that he prove his legal certification.

Kieffer had gained "approval" to practice *pro hac vice* in jurisdictions other than California by obtaining sponsorships from unsuspecting local attorneys who knew him from his presentations at various legal conferences. "He acted very lawyerly, so to speak," said attorney Lynn Fant, who had sponsored Kieffer for admission to a federal court in Georgia.

Kieffer's undoing came following his representation of Gwen Bergman in Colorado on murder-for-hire charges. Bergman found Kieffer through an Internet search; he charged her \$50,000 and reportedly

\$5 Million Settlement For Illegal Strip Searches In Las Cruces, NM Jail

asked her mother to sign over her house as collateral. Bergman was convicted and received a nine-year sentence; she is now seeking a mistrial based upon Kieffer's fraudulent legal representation. Daniel Recht, a Denver defense attorney, opined that all of Kieffer's clients have a basis to challenge their cases.

Kieffer faces federal charges in North Dakota that carry up to five years plus a \$250,000 fine for each time he made false statements to the courts. He was released on \$25,000 bond. See: *United States v. Kieffer*, U.S.D.C. (N.D. ND), Case No. 1:08-cr-00054-PAC.

California authorities are investigating him for possible state law violations, and he also faces at least one lawsuit – Gwen Bergman has sued, seeking damages and a return of the attorney fees she paid.

Kieffer was self-taught, having learned his legal skills perfecting his own appeal in 1992 in the Ninth Circuit U.S. Court of Appeals while he was serving federal time. Since his release from prison he has been retained to handle cases (mostly federal sentence modifications) in Alabama, Minnesota, Missouri, Georgia, Florida, Tennessee, Illinois, Kentucky, Ohio and Colorado. He reportedly lost all of his cases.

Even so, if Kieffer is convicted of his many new offenses, he may lawfully represent himself – using his extensive courtroom experience – to seek a sentence reduction. The question is whether the federal courts will be sympathetic, given that he successfully duped them for years.

In November 2008, federal prosecutors sought to have Kieffer's bond revoked, alleging he had violated conditions that prohibited him from representing himself as an attorney or legal consultant. "The ink was likely not yet dry before Howard Kieffer violated that condition," stated the U.S. Attorney's office, which claimed that Kieffer made "legal calls" to a federal prisoner in Kentucky and told a prison employee he was an attorney.

Rather than go to jail after the court found he had violated the terms of his release, Kieffer agreed to home confinement. He was also barred from accessing the Internet or using a cell phone, and agreed to take down the Federal Defense Associates website. He is scheduled to go to trial on January 6, 2009 on charges of mail fraud and making false statements.

He has retained counsel to represent him. ■

An estimated 11,000 Doña Ana County Detention Center detainees who were illegally strip searched between March 7, 2003 and March 7, 2006 have settled their class action suit against the county for \$5 million. Included in the class are all Doña Ana prisoners who were strip searched prior to arraignment, except for those being held on charges involving violence, drugs or weapons. Of the \$5 million, \$175,000 was reserved for incentive awards of \$25,000 to each the seven class representatives. An additional \$1,666,667 was allocated for attorney fees and costs. The remaining \$3,158,333, less claims administration costs, will be divided among the number of claimants who file, with individual estimated payouts ranging between \$1,200 and \$2,400.

The seven class representatives, selected because of their absence of conflict of interest, were Jesus Lira, Ben Garcia, Graciela Martinez, Stephen Cutler, Cynthia Archer, Frederick Garcia and Douglas Beider. They were specially remunerated in recognition of their personal efforts to gain a meaningful benefit to the class, and the risks they incurred during the course of litigation.

The proposed class was certified under Fed. Rules Civ. Proc. Rule 23, after considering class numerosity (class so large that joinder of parties is impracticable), common questions of law and fact, typicality (defenses against all claimants

are typical) and fairness of representatives so as to adequately protect class interests. After a fairness hearing to receive any objections to the settlement and to permit any dissenting class member to opt out, the settlement was approved.

Claims procedures were adopted. Each qualifying class member may make up to two claims (for separate incidents of illegal strip searches). Any class member who fails to timely file his claim will be forever barred from relief. Class members who opt out in favor of their own private litigation must do so within a specified time. Claims must be filed on the proper form, executed under penalty of perjury, and mailed in. Disputes not resolvable with the administrator may be brought to the attention of the court.

The stipulated agreement also included a change of policy at Doña Ana. As of March 7, 2006, pre-arraignment detainees pending prosecution for charges not involving violence, drugs or weapons will not be strip searched unless there exists reasonable suspicion that a search would be productive of contraband or weapons. The class was represented by Santa Fe attorney Robert Rothstein, Albuquerque attorney Kurt Wihl and Las Cruces attorneys Michael Lilley and Raul Carrillo, Jr. See: *Lira v. Doña Ana County Board of Supervisors*, U.S.D.C. (D. N.M.), Case No. CIV-06-0179 WPJ/WPL. ■

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Sources: *Denver Post*, *Associated Press*

PEW Report: 1 in 99 Adult Americans Behind Bars In 2007

by John E. Dannenberg

The venerated PEW Center on the States reported in February 2008 that one in every 99.1 adult Americans was presently behind bars. For males between ages 20 and 34, the number is 1 in 30. Racially, the numbers are even more disturbing: one in 36 Hispanic adults is locked up, as is one in 15 black adults. The number increases to 1 in 9 for black males between the ages of 20 and 34, which portends a devastating discontinuity in familial upbringing and support for black children being raised by young single mothers. Indeed, the projection is that for male African-American babies born today, fully one in three will suffer incarceration at some time in their lives.

The report also studied female prisoner statistics. While only one in 355 white women between ages 35 and 39 is behind bars, the rate rises to 1 in 100 for black women of that age.

Across the nation, the prison population grew by 25,000 in 2007, bringing it to 1.6 million. Including the additional 723,000 ensconced in local jails, one in 130 of America's 300 million people is thus incarcerated.

All of this imprisonment is costing states about 7% of their annual budgets. State spending varied widely, from \$13,000 per prisoner in Louisiana to \$45,000 in Rhode Island. The national average was \$23,876. Overall, states spent \$44 billion last year to lock up their citizens, skyrocketing from only \$10.6 billion in 1987. And that does not include bond financing, which saddles future generations with reimbursement for today's carceral cost excesses. By 2011, the report projected, the states would be throwing another \$25 billion onto the \$44 billion figure.

Because California's prisons were full, and court orders resulted in 4,000 being transferred to out of state private prisons, the population fell to 170,000, dropping to #2 behind Texas' 172,000. Both Texas and California are looking at options for alternative treatment for non-violent offenders to cut the population.

Many states have exorbitant "recidivism" rates. California tops them all, with a 70% rate of return to custody within three years. The large variance depends upon what constitutes "recidivism." The normal definition implies parolees reoffending with new crimes. But this norm

has been transmogrified by "tough on crime" California politicians and job-incentified state corrections workers into an artifact grounded in "technical" parole violations (e.g., late to a meeting). Thus, the number of "returns to custody" has been turned over to the discretion of those who most benefit from its increase. Indeed, while California's prison population consisted of 50% technical parole violators in 2000, the fraction is down to about 25% today. The drop is attributed to longer sentences and fewer than 1% lifer paroles, leaving the fixed number of bed spaces more occupied by term-serving prisoners.

The PEW report proffered its own recommendations that would divert non-violent offenders from straight incarceration towards options aimed at rehabilitation. PEW encourages states to look into rehousing low-risk offenders in lower cost community-based facilities instead of formal prisons. Here, where

prisoners would consist largely of parolees and probationers, the programs could include day-reporting centers, treatment facilities and community service. High on the list would be substance abuse treatment programs. The effect of being in these less rigid settings would be to aid in reintegration by keeping these people in contact with the real world while yet closely monitoring their daily progress. Cost savings would come from fewer fully incarcerated prisoners and from a reduction in recidivism, both true and artificial.

Failure to accomplish such programs would likely result in even higher annual prison budgets and in the social disaster attending ever-increasing incarceration rates in the "Land of the Free." In any event, the continued exponential growth of the prison population is likely to continue for the foreseeable future. See: *One in 100: Behind Bars in America 2008*, PEW Center on the States (February 2008). ■

New Jersey Court Enters Preliminary Injunction Barring Women Prisoners at Men's Prison

A New Jersey Superior Court has issued a preliminary injunction that prohibits prison officials from transferring women prisoners to the New Jersey State Prison (NJSP), a men's maximum-security facility. The Court also entered orders certifying the lawsuit as a class action and denying prison officials summary judgment.

The suit was filed on December 12, 2007 by the American Civil Liberties Union of New Jersey (ACLU) on behalf of prisoners Kathleen Jones, Lakesha Jones, Sylvia Flynn and Helen L. Ewell. The action ensued after prison officials transferred the four plaintiffs and 36 other female prisoners from the Edna Mahan Correctional Facility (EMCF) to NJSP in March 2007. The Court's class action order defines the class as "all general population women prisoners who are now or in the future will be confined in New Jersey State Prison."

Before those transfers, the only women who were sent to NJSP from EMCF were those who had committed serious violations of prison rules. They were provided a hearing and returned to

EMCF after completing their stint in the disciplinary segregation unit at NJSP. The March 2007 transfers, however, affected women prisoners who had violated no rules. The purpose was, instead, to create an open population unit for women prisoners at NJSP.

The ACLU lawsuit asserted violations of the plaintiffs' rights under the Fourteenth Amendment and the state constitution. While the Court said it could not review the prisoners' procedural due process complaint based on failure to give notice of the transfers to NJSP, because that claim must be decided by the Appellate Division, it had to determine whether the transfers violated their substantive due process rights, which required making a fact-finding record. The Court also held that discovery must ensue to determine what, if any, of the prisoners' constitutional or civil rights were violated.

The 40 women prisoners who were transferred to and housed at NJSP alleged they were subjected to living conditions that were dangerous, filthy and inhumane. They could only clean their cells once a

week and had to share bucket water with ten to twelve other cells. The women received inadequate medical and psychiatric care, and insufficient educational and rehabilitative programming. Exercise opportunities were not meaningful and their cell windows were frosted over.

The women prisoners were confined to their unit, which prevented them from using the law library or having equal visitation, recreational and job privileges. In contrast, male prisoners at NJSP are allowed to freely exercise their rights.

When the women were allowed into their small recreation area, they were viewed by male prisoners who exposed themselves or yelled crude remarks. Privacy issues were also a concern, as male guards were present while women prisoners received medical care, took showers, and undressed or used the toilet in their cells. The medical area was a small, filthy closet that had been cleared out. The women were not provided a sufficient supply of sanitary napkins or toilet paper.

Prison officials painted a different, and rosier, picture. That picture, however, turned out to be somewhat abstract. In March 2008, evidence emerged that James Drumm, the Assistant Administrator of NJSP, offered reductions in disciplinary sentences to women prisoners in exchange for making false statements describing conditions at NJSP as being better than they were. After one prisoner told the ACLU about the offer she was beaten by a prison guard, according to her own statement and those of three other prisoners.

In later statements to the Court, women prisoners described a campaign of intimidation designed to punish and silence prisoners who spoke out. Other sworn statements detailed bullying and intimidation carried out by the internal affairs unit of the New Jersey Department of Corrections, the Special Investigations Division.

The Court's preliminary injunction prohibits prison officials "from transferring any general population women prisoners to the NJSP" during the pendency of the lawsuit. The ACLU was pleased with the Court's rulings, which were issued on July 21, 2008.

"These rulings amount to a sweeping victory for women prisoners who have suffered grossly unfair and inhumane treatment at the hands of the Department of Corrections," said Mie Lewis, lead ACLU counsel in the case. "We are delighted that after thoroughly analyzing the arguments on both sides, the Court

has vindicated the rights of women prisoners." The case is ongoing. See: *Jones v. Hayman*, Superior Court of New Jersey, Mercer County, Case No. C-123-07. The

pleadings and rulings in the case are on PLN's website. ■

Additional source: *ACLU press release*

Maryland DOC Pays \$500,000 for Detainee Beaten to Death By Guards

In May, 2008, the State of Maryland settled for \$500,000 a lawsuit brought by the family of a detainee who was beaten to death by jail guards at Baltimore's Central Booking and Intake Center.

Raymond Smoot had been arrested in May 2005 on a minor charge and jailed for want of \$150 to post bail. He got into some sort of altercation with guards who inflicted severe injuries that proved fatal. Smoot's family – he was survived by one adult child and three minor children – alleged that guards used excessive force in violation of Eighth Amendment

protections against cruel and unusual punishment. They sued for constitutional violations and intentional tort claims.

The matter was so serious that Baltimore fired eight of the guards who were involved. One was tried and convicted of second-degree murder and sentenced to 20 years in prison. [See: *PLN*, Feb. 2007, p.1]. Smoot's family was represented by Baltimore attorney A. Dwight Kelly. See: *Kelly v. Woods*, Baltimore Circuit Court, Case No. 24C06000817. ■

Additional source: *2008 JAS Publications, Metro Verdicts Monthly*

\$7,025 Award in Slip and Fall From Ohio Prison Bunk

The Ohio Court of Claims has awarded a former Ohio prisoner \$7,025 for injuries related to a slip and fall from a prison bunk.

Stacy Rose slipped and fell while climbing down from his bunk at the Chillicothe Correctional Institution. Rose suffered injuries to his lower back, left ankle, and right shoulder. Rose was given ibuprofen by the prison infirmary after the fall, but continued to experience pain.

After his release, Rose sued the Ohio Department of Rehabilitation and Corrections. Rose claimed that the pain from his injuries prevented him from working jobs, like construction, that he used to work before the incident. Tapeka Turner, Rose's girlfriend, confirmed Rose's pain.

Based on the evidence, the court awarded Rose \$7,025. The court found that Rose suffers "some pain" on a daily basis as a result of the fall. The court, however, found Rose's pain to be neither, debilitating or severe. See: *Rose v. Ohio Department of Rehabilitation and Correction*, 2008 Ohio Misc. LEXIS 53 and 2008 Ohio Misc. LEXIS 110. ■

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Beleaguered Oregon Sheriff Steps Down

by Mark Wilson

Flamboyant and controversial Multnomah County Sheriff Bernie Giusto, head of Oregon's largest county jail, has retired in the face of an overwhelming vote to strip him of his badge.

Giusto, a lightning rod for criticism, has been under constant fire for the better part of two years. A 2006 investigation by the Multnomah County District Attorney found systemic problems in the jail and heaped most of the blame on Sheriff Giusto [See: *PLN*, Jan. 2008, p.12].

A 2007 Department of Justice corruption probe cleared Giusto of breaking the law, but laid the foundation for the largest and most expensive investigation into an Oregon law enforcement officer's ethics by the Board on Public Safety Standards and Training (BPSST).

Over a year after commencing its investigation, on May 13, 2008, a BPSST Police Policy Committee – comprised of sheriffs, police chiefs and officers from across Oregon – voted overwhelmingly to strip Giusto of his badge, ending his “colorful” 24-year law enforcement career on a very sour note.

The Committee's unprecedented action was based upon a finding that Giusto had lied nearly 20 years ago when he told his Oregon State Police supervisors that he wasn't having an affair with the wife of then-Governor Neil Goldschmidt, while working on the governor's security detail. He also knew, while serving as Governor Goldschmidt's driver, that the governor had repeatedly sexually abused a young teenage girl, and later paid her hush-money to keep the abuse a secret. Giusto, then an Oregon State Police Lieutenant, did nothing to stop the abuse.

Giusto lied in at least one sworn statement, in violation of moral fitness standards required of all Oregon police officers. “I'm certain there was gross misconduct by Lieutenant Giusto at the time and certainly lapses in judgment throughout his career,” said Washington County Sheriff Rob Gordon.

The committee's decision carried significant weight; the full Board has never overruled a committee recommendation. After learning of the unexpected decision on a Tuesday, Giusto told his staff that he was taking the rest of the week off to reflect on his future. The following week he announced

plans to step down on July 1, 2008.

Prior to Giusto's announcement, sheriff's office commanders had been asked to issue a vote of no confidence in Giusto at their June meeting. Many corrections deputies were also pushing to take a vote of no confidence or spearhead recall efforts. Giusto was further facing a separate inquiry by a state ethics commission. Just days after his retirement announcement, on June 12, 2008, the Oregon Government Ethics Commission found that Giusto had violated state law in September 2006, when he drove a county-owned SUV on a weekend get-away to Seattle with his girlfriend and her daughter.

Sergeant Phil Anderchuk, president of the jail guards' union, said he hoped Giusto's departure would end the turmoil. “We can take a collective sigh of relief as an agency,” said Anderchuk. But taxpay-

ers won't be joining in that relief, as they will have to spend between \$350,000 and \$400,000 for a special election to fill the remainder of Giusto's term, according to county officials. “We have to ramp up the whole elections operation for one position,” explained County Chairman Ted Wheeler. “But rules are rules and we have to follow them.”

Commissioner Maria Rojo de Steffey was upset about the cost. “I think this could have been better timed by the sheriff in order to save taxpayer money,” she said. “After all, he has known he would resign for some time now.” Then again, protecting and serving the taxpayers does not appear to be high on Giusto's list of priorities. Giusto has since been replaced as Multnomah County Sheriff by Bob Skipper. ■

Sources: *The Oregonian*, www.opb.org

Georgia Sheriff Must Give Revenue from Prisoner Phone Calls to County

by David M. Reutter

The Georgia Court of Appeals has held that a sheriff must turn over to the county all revenue from a profit-sharing prisoner telephone contract. The ruling upholds an order of declaratory relief granted to Lincoln County against Sheriff Gerald S. Lawson.

In 2003, former Sheriff Edwin Bentley entered into a contract with Evercom Systems, Inc. to provide telephone services to prisoners at the Lincoln County jail. In return, Evercom agreed to pay the sheriff a commission of 38% of the revenue derived from the prisoners' collect calls, which amounted to \$15,000 to \$16,000 a year.

Bentley turned these proceeds over to Lincoln County's general fund, which the County Commission used, in part, to pay for the prisoners' care and for the operation and maintenance of the jail. The anticipated revenue was used to calculate and partially fund the sheriff's budget.

When Lawson took office in 2005, he continued that practice. In January 2006 he amended the phone contract to allow him to purchase pre-paid calling cards to sell to prisoners. At some point in early 2006, Lawson stopped turning the phone commissions over to the county and began

to deposit them into an account under his exclusive control.

There were no allegations that Lawson was improperly using the money for his personal benefit, but the Lincoln County Board of Commissioners demanded he turn the money over to its general fund. After Lawson refused, the County sought declaratory relief in superior court. The court granted the County's petition, ordering Lawson to turn over the phone revenue. Sheriff Lawson appealed.

Although Lawson “is an elected, constitutional officer [who] is subject to the charge of the General Assembly and is not an employee of the County Commission,” the county has “original and exclusive jurisdiction” over certain matters, the Court of Appeals held. Specifically, “the law grants to a county commission a broad discretion to exercise control over public property, and dictates that this discretion will not be interfered with by the courts absent clear abuse.”

Under Georgia law, the county has a duty to maintain and furnish the jail, and “to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention.” To fulfill that respon-

sibility, the county commissioners have “a duty to adopt a budget making reasonable and adequate provision for the personnel and equipment necessary to enable the sheriff to perform his duties of enforcing the law and preserving the peace.”

The question in this case was whether a sheriff may use county property, facilities or other resources to earn revenue independent from the county budgeting process, then keep that revenue for use by the sheriff’s department. The appellate court held Sheriff Lawson had no such authority.

“First, revenue generated using coun-

ty property, facilities, or other resources is itself county property.” The Court also said that “although a sheriff is authorized by the legislature to collect certain fees, such as fees for transporting prisoners, summoning witnesses, attending court, etc., the relevant Code section provides that ‘all such fees shall be turned over to the county treasurer or fiscal officer of the county.’” Thus, the appellate court affirmed the superior court’s order.

While the County Commission was pleased with the result, it was upset that it will have to pay Lawson’s attorney’s

fees in addition to its own estimated fees of \$20,000. “In these uncertain economic times, it is unfortunate that the sheriff forced tens of thousands of hard-earned tax dollars to be spent on a lawsuit and an appeal, dealing with an issue already clarified by law,” said Commission Chairman Walker Norman.

Not satisfied with the adverse appellate ruling, Lawson sought certiorari review in the Georgia Supreme Court, which was denied on October 27, 2008. See: *Lawson v. Lincoln County*, 292 Ga.App. 527, 664 S.E.2d 900 (Ga.App. 2008). ■

Violence at Oklahoma Prisons Leaves Two Dead, Twenty-Five Injured

by Matt Clarke

On May 19, 2008, at approximately 12:30 p.m., a fight broke out between Native American and black prisoners at the Oklahoma State Reformatory (OSR) in Granite. When the skirmish ended five minutes later, two prisoners were dead and twelve others injured – three of them critically. No prison employees were hurt.

Three days earlier there had been a spitting incident involving a black prisoner and a Native American at the 800-bed medium-security facility located 144 miles southwest of Oklahoma City. Details of that incident were unclear, but the two prisoners decided to wait until the following Monday to settle their differences so as not to interfere with weekend visitation.

True to their intent, on Monday they met on a recreation yard to fight.

“One fight started in the housing unit,” said Department of Corrections (DOC) spokesman Jerry Massie. “They could be seen by the inmates on the other rec yard, and that triggered a second round of assaults. It looks like two inmates initiated a fight, a couple more jumped in and then it broke out into a larger fight. That’s when it broke down with combatants along racial lines.”

At least some of the prisoners engaged in the brawl used homemade knives and other weapons. As soon as guards ordered them to stop, they complied. No shots were fired and no gas used to quell the disturbance. Which makes one wonder why the guards didn’t order the prisoners to stop fighting sooner.

Larry J. Morris, 24, and Tyrone W. Miller, 23, both black, were stabbed to death during the fight. One of them had been involved in the original spit-

ting incident. Eight other prisoners were transported to area hospitals, and four were treated at the prison.

That same day a fight broke out at the GEO Group-run Lawton Correctional Facility, which houses Oklahoma prisoners. Three prisoners were injured.

There was another surge of violence at three state prisons on June 30, 2008 that resulted in lockdowns. Nine prisoners suffered non-fatal injuries in those incidents, which occurred at OSR, the Oklahoma State Penitentiary and the Dick Conner Correctional Center. Two days earlier a prisoner was stabbed at the Mack Alford Correctional Center. Again, no prison staff were hurt. Racial motivation may have been involved in two of those fights, according to DOC officials.

The lockdowns were partially lifted in August; 16 prisoners were transferred to out-of-state facilities, while others were sent to a maximum security unit.

Oklahoma has one of the highest rates of incarceration in the nation. The prison population is 54 percent white, 30 percent black and about 9 percent Native American. The Oklahoma DOC suffers from overcrowding (it operates at 98.5% capacity) and a severe guard shortage, which the prison guards union blames on low pay and a high turnover rate. This makes the prison system unsafe for both prisoners and guards alike. Scott Barger of the Oklahoma Public Employees Association, which represents state prison guards, described DOC facilities as “ticking time bombs.”

Earlier, on April 4, 2008, a sergeant at the maximum-security Oklahoma State Penitentiary in McAlester was assaulted by a prisoner who had been discovered with a cell phone. The prisoner, who injured the

guard seriously enough to require emergency room treatment, was shackled and chained at the time of the incident.

Massie was careful to say the deadly May 19 fight at OSR was not a riot because the prisoners didn’t assault staff, destroy property or try to escape.

“I think the term riot implies a lot more dangerous situation than what this was,” he said. “It’s not like they took over the facility and burned the place down or assaulted staff.”

Then again, two prisoners died. It seems that prisoners’ lives must not count for much in Massie’s world. ■

Sources: *Associated Press*, www.koco.com, *McAlester News-Capital*, www.kfor.com

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News in Brief:

Arkansas: On July 24, 2008, Joshua Albright, a prisoner in the Johnson county jail, was being transported to the Oklahoma Department of Corrections to serve a 40 year sentence for armed robbery. Deputies stopped at the Johnson county jail so Albright could use the bathroom and he escaped from the jail's bathroom and fled in the jail's transport van which still had the keys in it. Albright was recaptured the next day in Arkansas.

California: On August 29, 2008, several hundred prisoners in the Lerdo Minimum Security Facility in Bakersfield rioted and fought each other, injuring 24.

California: On July 18, 2008, Jose Rivera, 22, a guard at the United States Penitentiary in Atwater was stabbed to death by two prisoners armed with home-made shanks.

Colorado: On July 24, 2008, Edward Davidson, 31, shot and killed his wife and three year old daughter and then himself after escaping from the minimum security Federal Prison Camp in Florence, Colorado. He also shot a teen age girl, who survived. In April 2008 Davidson had been sentenced to 21 months in prison after he pled guilty to falsifying header information on e mails in order to send spam. He escaped from prison on July 20 when his wife drove him away.

England: On August 23, 2008, British media reported that PA Consulting, a company using prisoner data to track prisoners through the criminal justice system lost the records of 84,000 prisoners in England and Wales. They also lost 33,000 records of arrestees from the national police computer system.

Florida: On August 21, 2008, the Orange county sheriff's department in Orlando announced no criminal charges would be filed against four jail guards who ran a "fight club" that allowed prisoners to fight against each other, sometimes along racial lines. The sheriff's department claims no criminal violations occurred and because the prisoners fought voluntarily there was no basis for assault charges. In one case, jail guard Samuel Cruz allowed prisoners out of their cells to fight each other and in one case held a prisoner while another hit the "victim" or loser in the fight. The fights were witnessed by other guards who did nothing to stop them or

report them to supervisors.

Florida: On July 24, 2008, Paul Tillis, 43, a guard at the Florida State Prison in Starke was indicted by a federal grand jury in Jacksonville for pouring hot water on a prisoner in 2005, causing serious injury. Earlier in the year Tillis had been fired by the prison system.

Florida: On October 21, 2008, Cedric Webb, 25, was charged with introducing contraband into a detention facility. During a search the 6' 2", 290 pound Webb was found to have bags of marijuana and tobacco concealed in his rolls of stomach fat. The arrest report describes his build as "heavy."

Honduras: On June 4, 2008, 16 policemen and a soldier were found guilty of charges related to the 2003 massacre of 67 prisoners at the La Ceiba prison. A fight between gangs at the prison escalated into a riot and when the prison began to burn prison and police officials did nothing to evacuate prisoners from their burning cells; instead they shot prisoners inside their cells as the fire spread through the prison. Sixteen prisoners in charge of prison security were also convicted on related charges.

Illinois: On July 31, 2008, Elizabeth Hudson, 61, the supervisor of the Cook County Jail S Inmate Trust Department was arrested on charges that she stole more than \$370,000 from the trust accounts of jail prisoners between September, 2004 and June, 2008. The Cook County Sheriff's Office of Finance handled the investigation that led to her arrest.

Maryland: On August 21, 2008, two prisoners at the Jessup Correctional Institution were stabbed during a fight in the prison's recreation yard.

Maryland: On July 27, 2008, Alfred McMurray Sr., the director of the Prince George's County Department of Correction was fired after four 9 mm Beretta handguns were reported missing from the jail's locked armory. Problems earlier in the year included two prisoners with handcuff keys; a jail guard charged with smuggling cell phones into the jail for prisoners to use; a jail guard being arrested on armed robbery charges and two female guards being charged with sexually assaulting male prisoners in the jail. In February, 2008, Rose Merchant, the jail's deputy director was charged with impersonating a law enforcement officer by

Virginia authorities.

Massachusetts: On August 20, 2008, two prisoners in the Worchester county jail were diagnosed with chickenpox and 70 prisoners and six jail employees were quarantined as being susceptible to the disease.

Massachusetts: On July 25, 2008, Dennis Hadley, 52, was convicted of manslaughter for the 2005 beating death of his cellmate Daniel McMullen, when both men were prisoners at the Worchester County Jail and House of Correction. The men argued and fought over a deck of cards that McMullen borrowed and refused to return. At the time of the incident Hadley was awaiting trial on burglary charges and McMullen was in jail for violating his probation from a drunken driving conviction. McMullen died from a ruptured spleen, a medical examiner testified that advanced liver cirrhosis and an enlarged spleen made him more vulnerable to such an injury.

Mexico: On July 24, 2008, unidentified gunmen shot and killed Chihuahua state prison director Salvador Barreno and his bodyguard while he was driving in Ciudad Juarez.

Minnesota: On July 16, 2008, Sarah Despiegelaere, 36, a nurse at the Hennepin county jail, was charged with stealing methadone from the jail medical center. A search of her home also uncovered illegal narcotics. Her husband Steven is employed as a court security officer by the Hennepin county sheriff's office and he was also arrested but not charged.

Paraguay: On June 20, 2008, prisoners in the Esperanza (Hope) prison in Asuncion rioted for four hours demanding an end to abuse by guards and longer conjugal visits with their girlfriends and spouses. Conjugal visits are allowed during the day, when some prisoners work, and they want the visits extended to evening hours as well. The riot ended when prison officials agreed to investigate the claims of abuse and end strip searches of visitors. No report on extending the conjugal visits was provided.

Pennsylvania: On June 4, 2008, Bedford county public defender Bradley Bingaman, 32, was sentenced to 14-28 years in prison after pleading guilty to molesting a 7 year old girl over a four


year period.

Vermont: On October 18, 2008, 13 prisoners at the Marble Valley Regional Correctional Facility in Rutland staged a protest for two hours by knocking on emergency escape doors and refusing to return to their cells. Police and jail guards used pepper spray and stun shields to force the prisoners back to their cells. The protest was in response to a behavioral system implemented in the jail which imposed collective punishment at the whim of guards. A guard told a prisoner to get out of bed and when he refused ordered him to stay in his cell. In handwritten signs held up during the incident prisoners stated they were being mistreated and needed case workers.

West Virginia: On August 5, 2008, Clarissa Johnson, 35, a guard at the Mount Olive Correctional Complex pleaded guilty to assisting prisoner Robert Brady escape from prison by allowing him to pretend to be sick and then escape from the prison's minimum security work camp. Brady remained at large for two months before being recaptured and was then sentenced to five years in prison after pleading guilty

to escape. Johnson was sentenced to an indeterminate 1-5 year sentence for her role in the escape.

Wisconsin: On October 21, 2008, the

Oshkosh Correctional Institution in Wisconsin began construction of an electrified "stun fence" as part of a \$4 million dollar security upgrade. 

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Sixth Circuit Now Permits § 1983 Complaint to Proceed Even If Prisoner Did Not Initially Plead Exhaustion Below

The Sixth Circuit U.S. Court of Appeals has vacated its precedent which held that a prisoner had an affirmative burden to plead exhaustion of administrative remedies in a § 1983 complaint. Following the U.S. Supreme Court's ruling to the contrary in *Jones v. Bock*, 127 S.Ct. 910 (2007) [*PLN*, May 2007, p.36], the Sixth Circuit granted a prisoner's Fed.R.Civ.P. 60(b)(1) motion to abate the district court's dismissal of his complaint for having failed to affirmatively plead exhaustion.

Michigan prisoner Raphael Okoro had sued prison authorities in *pro per*, alleging violation of his constitutional

rights related to a prison policy declaring court documents to be contraband and requiring their immediate destruction. His case was dismissed without prejudice in the U.S. District Court (E.D. Mich.) for his failure to expressly plead exhaustion of administrative remedies. Okoro's Rule 60(b)(1) motion to correct this error of law was denied and he appealed.

In the meantime, the U.S. Supreme Court decided *Jones*, which expressly held that failure to plead exhaustion was not grounds for dismissal, but must instead result in a remand where the defendants could raise failure to exhaust as an affirmative defense. Accordingly, the Sixth Circuit

reversed and remanded, noting that while prison officials may yet proffer a failure-to-exhaust defense, Okoro must be permitted to proceed on any properly exhausted claims rather than simply being procedurally tossed out of court. See: *Okoro v. Hemingway*, 481 F.3d 873 (6th Cir. 2007).

Upon remand, on November 7, 2007, the district court granted the defendants' motion to dismiss all of Okoro's claims due to insufficient service of process and because Okoro had failed to exhaust administrative grievances as required by the PLRA. See: *Okoro v. Krueger*, U.S.D.C. (E.D. Mich.), Case No. 05-cv-70269; 2007 WL 3333472. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

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The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Gay & Lesbian Prisoner Project

Provide limited pen pal services and information for GLBT prisoners, and publishes Gay Community News several times a year, free to lesbian and gay prisoners. Volunteer-run with limited services. G&LPP, P.O. Box 1481, Boston, MA 02117

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrong-

ful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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Prison Profiteers, edited by Paul Wright and Tara Herivel; \$21.95. This is the third and latest book in a series of PLN anthologies that examines the reality of mass imprisonment in America. [The other two titles are The Ceiling of America & Prison Nation shown below]. Prison Profiteers is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

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Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$29.95. Exposes the dark side of U.S.'s 'lock-em-up' political and legal climate. 1041

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The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

The Blue Book of Grammar and Punctuation, Jane Straus, 208 pages, 8-1/2 x 11. \$13.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

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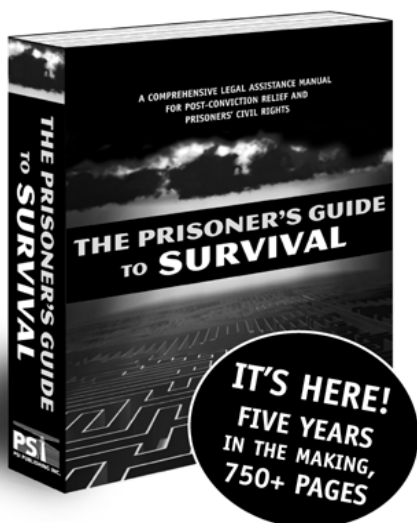
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Dedicated to Protecting Human Rights

February 2009

Corruption in Orange County, CA Sheriff's Department Revealed; Sheriff Resigns, Convicted on Criminal Charges

by Marvin Mentor

Former Orange County, California Sheriff Michael S. Carona and many of his staff at the Theo Lacy jail have resigned or been fired after widespread misconduct was exposed.

A 2007 Special Criminal Grand Jury investigation revealed systemic abuse and cover-ups ingrained in jail practices under Carona's leadership. The investigation was triggered by the hour-long torture, sodomy and beating death of a pre-trial detainee by 20 other prisoners in the jail's F-West barracks. Nine prisoners have been charged with first-degree murder in connection with that incident, but no deputies were prosecuted despite evidence

that they sanctioned the assault.

Separately, Carona was indicted on federal witness-tampering, mail fraud and conspiracy charges; he went to trial in October 2008 amid a lurid backdrop of multiple extramarital affairs. His wife, Deborah, is being tried on a count of conspiracy. Carona resigned from the Sheriff's Department in January 2008 to "fight the charges" [See: *PLN*, July 2008, p.30]. He was largely, but not completely, successful.

Horrific Jail Murder

On October 5, 2006, computer technician John Derek Chamberlain, 41, was brutally tortured, sodomized and beaten to death by about 20 other prisoners while Sheriff's deputies in a nearby guard station – who allegedly arranged the attack – watched TV, sent text messages and ignored required jail walk-throughs. They then lied to investigators to cover-up their ineptitude and complicity in the murder.

Chamberlain was a pre-trial detainee charged with possession of child pornography. But while at the jail he was not under the watchful care of the guards; rather, he was in the hands of gang-affiliated prisoner "shot-callers" whom the deputies used to maintain order. That is, the deputies literally turned over their job of enforcing jail discipline to the prisoners they were charged to control, and rewarded them for their ruthless acts with special privileges.

One of the "duties" assigned by guards was to direct beatings of child molesters. They did so by leaking confidential case information about such prisoners to

their loyal enforcers, then giving them free rein to do their dirty business. While Chamberlain was not charged with child molestation, the deputies lied to one of the shot-callers by saying he was, for the intended purpose of having him assaulted.

Reports from the Grand Jury and District Attorney's office provide many of the sordid details. Deputy Kevin Taylor was on duty in a nearby glass-walled guard station during Chamberlain's murder, bravely watching "Cops" on TV while exchanging 22 flirtatious text messages with internal affairs investigator Monica Bagalayos. He was joined in the guard station by deputies Jason Chapluk and Phillip Le. All testified they did not notice the attack on Chamberlain until it was over. Jail rules required only one officer to man the station while the others roam the housing area.

Between 5:50 and 6:50 p.m., Chamberlain was dragged to Cubicle D, a blind spot in the unit, where he was severely beaten by successive waves of prisoners. The violence was incredible. While Chamberlain screamed and pleaded for his life he was stripped naked, sodomized, scalded with hot water, and brutally assaulted. His assailants spat and urinated on him; he was kicked and stomped when he was down.

The Coroner counted 43 displaced rib fractures alone. Some of the assailants made repeat trips to and from the bathroom to bring water to wash the bloody crime scene. One hit Chamberlain in the head so hard that he broke his hand. No one was confronted by the deputies on duty, who were only alerted to Chamber-

Inside

From the Editor	8
Secret Immigration Deaths	10
DC Jail Population Cap	12
U.S. Ignores Vienna Convention	14
DOJ Issues Prison Rape Report	16
Prison Slavery Revived In Washington	21
Utah Sex Offender Internet Law Enjoined	26
Writ Writer Review	32
Idaho Transsexual Injunction	42
Ohio DNA Not Retroactive	44
Kentucky Jail Fees Upheld	48
News in Brief	50
No to Prisoner Experimentation	55

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Orange County Corruption (cont.)

lain's lifeless body after other prisoners called "man down."

A review of the guard station's log entries showed "barracks secure" at 6:00 p.m. and "barracks secure, no problems" at 6:30 p.m. It was later determined that jail officials made a retroactive phony entry in the log stating that at 2:30 p.m., Chamberlain had told the guards he was not in fear for his life. The first part of a videotape of the barracks area taken after the fatal assault was recorded over by Deputy Le.

According to testimony from several prisoners involved in the incident, Taylor had told a shot-caller that Chamberlain was a child molester who should be assaulted. In return, the prisoners would receive extra time out of their cells.

Grand Jury Report Slams Sheriff, Jail Staff

An 86-page Special Criminal Grand Jury report (with 8,000 pages of transcripts), released in February 2008, revealed what really went on in Orange County's jails while Carona was Sheriff. The report described the Theo Lacy jail as being "in disarray," where deputies routinely busied themselves with sleeping, watching TV or DVDs, playing video games and text messaging on their cell phones. Such misconduct was widely known, with supervising sergeants and lieutenants indifferent to this state of affairs.

Even more egregiously, Carona flouted his duty as a public servant to ensure transparency into jail operations by trying to keep the Grand Jury's report a secret. The truth came out only after determined investigative journalists from the *Orange County Register* and *Los Angeles Times* obtained a court order to get a copy of the report.

The report revealed that Carona had taken the Fifth Amendment, refusing to answer the Grand Jury's questions. He even refused to admit he was sheriff at the time of Chamberlain's death. The report concluded that jail guards had failed to check F-West barracks for five hours on the day Chamberlain was murdered. Worse, they found this was not an isolated act of laziness or ineptitude by the deputies, but rather stemmed from a business-as-usual policy condoned by Carona's entire jail staff.

To protect itself, the Sheriff's Department arrogantly declared it would manage its own internal "investigation" instead of the District Attorney's office, in violation of long-standing county protocol. All ranking Sheriff's Department employees who were called to testify claimed they had no idea how Chamberlain's death occurred, which seriously hampered the probe.

As a result, "not enough evidence" was obtained to criminally charge any of the Sheriff's personnel. This was despite four prisoners telling the Grand Jury that deputies had informed them Chamberlain was in for child molestation – which would in theory support at least conspiracy charges.

In fact, Chamberlain's public defender had called jail officials just hours before the murder, urging them to put Chamberlain in protective custody. Deputy Taylor said he told Chamberlain to destroy any records of his charges, but claimed Chamberlain had refused to be moved for his own protection. Such a refusal was highly unlikely, since Chamberlain had earlier called a former girlfriend and asked her to tell his attorney to "get me out of here," stating he was afraid "something is going to happen to me."

Taylor admitted to investigators that he knew who the shot-caller was in the unit, though he denied telling other prisoners that Chamberlain was a child molester.

District Attorney's Office Also Critical

The Orange County District Attorney issued a press release on April 7, 2008 after the Grand Jury report was released by court order. The DA's office acknowledged the report's findings that floor checks in F-West barracks were required every 30 minutes, but were "seldom" performed by jail staff. Rather, the deputies "largely remained in their guard station, where they were regularly seen watching television, full length movies, playing video games, browsing the Internet, [and] chatting on-line."

The guards sometimes left their posts for up to an hour to visit the gym. They also slept on duty at night, draping blankets over the control panels to cut out the light, and either breaking the backs of their chairs so they could recline or sleeping on mattresses. But they were not totally asleep at the switch. When supervisors approached, the guards warned each

Orange County Corruption (cont.)

other by calling out code "10-12." Even when awake, some deputies would go as long as 30 minutes without even looking out the windows of the guard stations.

Perhaps the most damning admission in the Grand Jury report was that deputies routinely utilized prisoners to enforce discipline at the jail by inflicting punishment on other prisoners, a practice called "taxing." Guards rewarded the shot callers – with separate enforcers for each racial group – with new uniforms, extra meals, additional hygiene products, unrestricted movement and a free ride when they violated jail rules. The deputies intimidated prisoners who acted as enforcers by destroying their property if they failed to get other prisoners "back in line."

The report further found that deputies were not only lazy in regard to their work duties, but also routinely denied prisoners medical treatment because they didn't want to fill out the required paperwork. Instead, the guards used shot callers to "dissuade" sick or injured prisoners from seeking medical attention.

The District Attorney was highly critical of the fact that Carona's office prevented an independent investigation into Chamberlain's death. The Grand Jury found that some Sheriff's Department witnesses gave suspect testimony, and some violated secrecy rules by disclosing their testimony and the questions they were asked to other witnesses, who then proceeded to provide false testimony themselves. The Grand Jury accused the Sheriff's Department of substantially impeding its investigation.

Jail Staff Resign, Suspended or Fired

On April 8, 2008, Acting Sheriff

Jack Anderson suspended five employees with pay and called for a review by the FBI based on the findings in the Grand Jury report. Anderson had temporarily replaced Carona following the Sheriff's resignation in January due to unrelated federal corruption charges.

Anderson launched the largest internal affairs investigation in the history of the Sheriff's Department, extending to potentially hundreds of present and former Theo Lacy jail employees.

On April 15 he fired internal affairs investigator Monica Bagalayos, who was allegedly pressured by Sheriff's investigator Jose Armas to reveal her Grand Jury testimony. Bagalayos, who was previously romantically involved with Armas, was the recipient of the 22 text messages sent by Deputy Kevin Taylor while Chamberlain was being beaten to death nearby.

Armas and Taylor were suspended with pay, as were deputies Jason Chapluk and Phillip Le. Le, who acknowledged "inmates do run the jail system," was given immunity from criminal prosecution for his candid testimony. Armas, who later admitted he lied to the Grand Jury, quit in September 2008.

Anderson also fired jail guard Sonja Moreno, who had lied to the Grand Jury, and Undersheriff Jo Ann Galisky, a jail operations supervisor. Assistant Sheriff Steve Bishop and Captain Bob Blackburn had previously resigned in early 2008.

As to the Chamberlain murder, Anderson conceded at the outset that deputies' use of cell phones at work was "certainly a distraction," and that the deputies were "not doing their core responsibilities." His corrective actions included banning cell phones and other personal electronic devices on the job and providing secure housing for at-risk prisoners. The TV sets in the guard stations were removed.

Wayne Quint, president of the union that represents Orange County deputies, said the county's jails were safe and that it would be "unfortunate" if Chamberlain's death was used to vilify the entire department. He noted that the jail had only one guard per hundred prisoners, whereas the ratio should be about one to fourteen. "Our deputies do a great job in a very, very difficult and violent environment. They're dealing with bad people ...," he said.

From the Grand Jury's report, this appears to be embarrassingly true – as all too often those "bad people" were other deputies.

Tasering Restricted After Two Prisoners Die

In August 2008, the Sheriff's Department announced it had banned guards from using Tasers on restrained prisoners unless they could not otherwise subdue "overtly assaultive behavior." The ban was imposed in response to a June 2008 Orange County Grand Jury report (unrelated to the report on Chamberlain's murder) that referred to the deaths of two Tasered prisoners as "cause for alarm." The report covered 437 prisoners Tasered by deputies between 2004 and 2007.

Jason Jesus Gomez died on April 1, 2008 following a week-long coma after being Tasered by deputies at the Orange County jail in Santa Ana. He was serving a 90-day sentence for violating probation; his original charges were gun possession and growing marijuana. When deputies entered Gomez's cell after he began behaving erratically and injured a nurse's arm, a struggle ensued. He allegedly spit at staff and bit someone's finger. Based upon an independent autopsy paid for by his family, Gomez died due to blunt force injury to the head. "They punched his lights out," said family attorney Stephen Bernard.

Previously, in October 2007, jail prisoner Michael P. Lass died when he was Tasered by deputies while being restrained. Lass, who was jailed for drinking in public, had refused to return to his cell; after being shot with a Taser he lost consciousness and was pronounced dead at the hospital a short time later.

The jail's Tasering policy was called into question after the *Orange County Register* obtained surveillance video showing deputies Tasering prisoners Matthew R. Fleurett and Liza Munoz in separate incidents. Fleurett was strapped into a restraint chair at the time; Munoz was being held down on the floor. Both appeared to be subdued and in considerable pain. The Grand Jury noted there was "a major debate amongst experts as to whether the use of the Taser causes heart failure or death." [See: *PLN*, Oct. 2006, p.1]

However, it was a feline, not a felon, that put Tasers at the Theo Lacy jail in the spotlight after two rookie deputies, Joseph E. Mirander and Duy X. Tran, were accused of Tasering a cat. While a cat's carcass was found on jail property, the cause of death could not be determined and the inquiry was dropped, though both deputies were fired.

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Most Deputies Earn Over \$100,000

Watching TV, sleeping and text messaging on the job don't come cheap at the Orange County jail. Two-thirds of the Sheriff's Department's deputies pulled down over \$100,000 in 2007, their salaries bloated by excessive overtime pay. According to data obtained by the *Los Angeles Times*, 27 deputies each received over \$75,000 in overtime. Acting Sheriff Jack Anderson opined that such sums could only result from the deputies violating overtime rules.

Number one at the trough was Sheriff's investigator Theodore Harris, who earned \$120,000 in overtime. His total pay was \$221,000, exceeding that of former Sheriff Carona and members of the County Board of Supervisors. To earn that amount would require more than 30 hours of overtime a week, every week. Harris, one of four Sheriff's Department employees who received more than \$100,000 in overtime, said most of his extra duty was on patrol assignments; i.e., away from his investigator's duties.

Anderson noted that department policy limits overtime to 24 hours per week, and he couldn't explain why supervisors were not enforcing compliance. There is good reason for the limit on overtime — deputies need to be alert and not tired from too many work hours when performing security-related duties at the jail.

Factoring in overtime pay, 1,122 deputies earned over \$100,000 in 2007, a three-fold increase since 2003. Overtime went predominantly to jail staff, who took in \$18.3 million in 2007 compared with \$8.4 million four years earlier. Theo Lacy jail personnel alone received \$7.8 million in overtime.

Union president Wayne Quint remarked that \$100,000 per year for a peace officer was not unreasonable. "I think they should make

more. They put their lives on the line. They're filling a public safety position every time they work overtime," he stated.

John Chamberlain, who lost his life while jail guards watched TV and otherwise neglected their public safety positions, might posthumously disagree.

The hefty overtime payments could be reduced by hiring more deputies, which would also provide more security at the jail. This was the solution recommended by a consulting firm in a report released on November 14, 2008. "Adding custody staff in the jails is the most immediate, essential and expeditious step that can be taken to reduce the level of violence," the report stated. With Orange County facing \$86 million in budget cuts in 2009, however, additional hiring for the Sheriff's Department is unlikely.

Lawsuits Mount Against Carona and County

The alleged sins of former Sheriff Mike Carona continue to be challenged in court. George Jaramillo, a former Assistant Sheriff and one of Carona's best friends until his firing in 2004, filed suit against the County claiming he had been improperly terminated. Jaramillo's name also repeatedly surfaced at Carona's corruption trial, though he was not called as a witness.

Former Lt. Bill Hunt had tried unsuccessfully to unseat Carona in the 2006 elections by alleging misconduct in the Sheriff's Department. The day after the election, Carona put Hunt on administrative leave and mounted an administrative attack against him. Hunt chose to resign, then sued in federal court claiming Carona's actions were retaliatory and violated his First Amendment rights.

Lt. Jeff Bardzik filed a federal suit alleging Carona had abused his office

by discriminatorily reassigning and not promoting him because he had supported Hunt in the election.

Retired Lt. Darrell Poncy also fell victim to being a Hunt supporter. A former commander of the Sheriff's Academy, he alleged in a state Superior Court lawsuit that he was fired for his political views. He also contended that Carona handed out badges and concealed weapon permits to his supporters as part of a "reserve deputy" program, even though such "reservists" weren't required to undergo training. "It looks like Carona was dispensing favors," said Poncy's attorney, Dale Fiola. "A sheriff does not just have to enforce laws, but also comply with [them]."

The Sheriff's Department's reserve deputy program had been criticized by the state Commission on Peace Officers Standards and Training, which decertified

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Orange County Corruption (cont.)

some of Carona's reservists due to their lack of training and qualifications.

As a case in point, Marcelo Bautista and his uncle Gustavo Resendiz are suing the Sheriff's Department and Carona in federal court after a reserve deputy flashed his badge and threatened them with a gun during a golf course dispute in July 2005. The reservist, Raymond K. Yi, was Carona's personal martial arts instructor; he was later convicted on a state charge of making a criminal threat.

\$2.5 Million in Settled Claims Thus Far

The family of John Chamberlain filed a wrongful death suit against Orange County, and settled in February 2008 for \$600,000. The family's attorney acknowledged that the low settlement amount was partly because a jury might not be sympathetic due to Chamberlain's child porn charges – even though he hadn't been convicted.

The Chamberlain lawsuit is only one of many legal actions the County has faced arising from mistreatment of jail prisoners. In fact, 47 such claims have been settled for an aggregate \$2.5 million since 1997.

Notable payouts include those involving Gilbert Garcia, a prisoner who died of head injuries after an altercation with guards in 1998 (\$650,000); Leonard Mendez, for bruises he suffered from deputies

while being booked into jail (\$95,000); German Torres, who was assaulted by deputies in 2002 after trying to stop another beating (\$75,000); Joshua Wilson, after being pepper sprayed and Tasered in 2005 (\$49,999); Jorge Soto, who was beaten by deputies and suffered permanent injuries while being booked for DUI (\$49,999); an unnamed transsexual prisoner identified as John Doe, who experienced bleeding and extreme weight loss after being refused court-ordered testosterone shots (\$49,000); and Ryan Epperson, who suffered strained shoulders after deputies beat him in 2002 when he asked for toilet paper (\$45,000).

Other, lesser settlements reveal a continuing pattern of abuse and misconduct by Orange County jail guards. Roman Washington was beaten and Tasered on February 26, 2005 after he refused to answer deputies' questions and asked to speak with his lawyer. He received seven stitches and, later, a \$15,000 settlement. See: *Washington v. County of Orange*, U.S.D.C. (C.D. Cal.), Case No. 8:06-cv-00211-DOC-RNB.

Edward Hadley accused jail guards of ordering other prisoners to attack him for making "smart" remarks in an April 19, 2005 incident that foreshadowed Chamberlain's beating death. Hadley suffered broken ribs; his subsequent lawsuit settled for \$17,500. See: *Hadley v. Kopp*, U.S.D.C. (C.D. Cal.), Case No. 8:06-cv-00347-JVS-AN.

In a case that went to trial, a jury awarded \$177,000 to jail prisoner Robert

Carter for inadequate medical care in 2003. The verdict was assessed against Sheriff Carona. [See: *PLN*, Feb. 2004, p.23].

Most recently, Liza Munoz, who was Tasered at the Orange County jail in Sept. 2004, was awarded \$25,000 by a federal jury. The jurors found she had been subjected to excessive force in retaliation for exercising her First Amendment rights. Following the June 2008 verdict, the parties reached an undisclosed settlement. See: *Munoz v. County of Orange*, U.S.D.C. (C.D. Cal.), Case No. 8:05-cv-01179-JVS.

Pending lawsuits include those filed by Matthew Fleurett, who was Tasered while in a restraint chair at the jail; by Blaine Bowker, who alleges he was kicked and punched by a guard; and by the surviving families of Michael Lass and Jason Gomez – both of whom died after jail Taser incidents.

"What has come to light has been glaringly known to the Orange County Sheriff's Department for years," stated Los Angeles civil rights attorney Sonia Mercado. "They've known of the physical abuse at the jail, and have decided to settle these cases or argue them before a judge, instead of taking remedial measures to improve the jails."

Carona Charged with Federal Crimes

During his trial in U.S. District Court in Santa Ana, California, which began in late October 2008, the criminal prosecution was billed as a "case of two Mike Caronas." See: *United States v. Carona*, U.S.D.C. (C.D. Cal.), Case No. 8:06-cr-00224.

On one hand, Carona was portrayed by his attorneys as a dedicated public servant. On the other, he allegedly schemed with two Assistant Sheriffs and his mistress to get rich at taxpayer expense. One plan was to transfer jail prisoners to a private facility that a well-known Republican fundraiser would build, which would then receive lucrative per diem fees from the county.

Conversations involving Carona, secretly recorded by former Assistant Sheriff-turned-informant Don Haidl, were entered into evidence during the trial. Carona's former mistress, co-defendant Debra Hoffman, was charged with conspiracy, mail fraud and failure to report money she received from Haidl during a 2001 bankruptcy filing. It was alleged that Haidl, a millionaire businessman, gave money to Carona and George Jaramillo,

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an Assistant Sheriff who had previously served as Carona's campaign manager, "to ensure power and influence."

Haidl testified that he laundered \$30,000 for Carona's first election campaign for Sheriff in 1998, paid him \$1,000 monthly cash bribes, and gave him a power boat among other items. He also paid \$65,000 to Hoffman at Carona's request, plus monetary loans. In total, Haidl said he provided over \$420,000 in cash and gifts to Carona and his mistress, either directly or indirectly.

In return Carona appointed Haidl to the position of Assistant Sheriff, which let him enlist friends and relatives as reserve deputies, complete with badges and weapon permits, in a pay-to-play scheme. "We talked about a get-out-of-jail free card, we talked about owning the Sheriff's Department," Haidl testified.

Carona also ensured that Haidl's teenage son, Greg, received preferential treatment in a drug-related case, and tried (unsuccessfully) to intervene in a separate case when Greg was charged with – and eventually convicted of – sexual assault.

The recordings of Carona and Haidl's conversations revealed how the cash payments were "untraceable" and how no one would know about them without "a pinhole [camera] in [Haidl's] ceiling." Carona knew well about such cameras, as he had four in his own office. On tape, during profanity-laden discussions, Carona agreed to match his testimony with Haidl's when they appeared before a federal grand jury.

Meanwhile, Jaramillo pleaded guilty to unrelated state corruption charges and was sentenced to a year in jail; he also pleaded guilty to federal tax and mail fraud charges. Haidl accepted a plea bargain for tax fraud and agreed to testify against Carona in exchange for leniency.

At mid-trial in November 2008, jurors in the Carona case were given a look into the former Sheriff's sexual escapades. He and his attorney-mistress Debra Hoffman had a love nest, took getaway trips to Las Vegas in private jets, and maintained a secret bank account. Lisa Jaramillo, George's wife, cried and apologized to Deborah Carona as she testified about the former Sheriff's mistress. Lisa testified that Carona also had an affair with her sister, who was on his campaign staff.

This was part of the prosecution's case to show that the two-faced Sheriff Carona did not fit the public persona of a "conservative Christian crime-fighter." The courtroom atmosphere was tense, with Carona and Hoffman, his former mistress, sitting at separate defense tables while Carona's wife sat stoically in the gallery.

The federal trial lasted ten weeks and concluded on January 16, 2009, with Carona's attorneys referring to the former Sheriff's friends who testified against him as liars and snitches. Carona, who had refused a plea bargain, didn't testify on his own behalf.

After six days of deliberations the jury returned not guilty verdicts on the charges of mail fraud, conspiracy and one count of witness tampering. Carona was found guilty on a second count of witness tampering. He put his head on the defense table and cried when the verdict was read – thus ends the career of a man once described as "America's Sheriff." Carona will be sentenced at a later date; his wife and mistress were to

be tried separately. The prosecution later dropped charges against both.

A New Sheriff In Town

Damage control could not save the Orange County Sheriff's Department, which was irrevocably tainted under Carona's tenure. Any attempted replacement leadership from the existing ranks of the Department simply would not withstand further public scrutiny.

Accordingly, the County Board of Supervisors appointed an outsider as the new Sheriff – retired Los Angeles County Sheriff's Dept. division chief Sandra Hutchens. "She is the anti-Carona," stated Supervisor John Moorlach.

The 53-year-old Hutchens will have to be tough indeed to clean up the many years of institutionalized misconduct and the stygian stench of abuse and corruption in the Orange County Sheriff's Department. We wish her luck. She'll need it. ■

Sources: *Los Angeles Times*, *Orange County Register*, *Sacramento Bee*, *San Francisco Daily Journal*, *San Jose Mercury News*, *Associated Press*, *www.badcopnews.com*, *OC Weekly*, *LexisNexis Jury Verdicts and Settlements*

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From the Editor

by Paul Wright

This is the first issue of PLN published during the Barak Obama presidency. Hopefully we will see change for the better. Even before he took office Obama and Biden were making good on their promises to provide billions of dollars to local police departments to put another 50,000 cops on the streets. To bypass the senate they are planning to take funds from the bank bailout "stimulus" package and use it for more cops. Since every major police and prison guard union and law enforcement association had endorsed Obama and Biden's campaign this appears to be the immediate payback. Bush had ended that federal subsidy to local law enforcement which was a Clinton project dating to the 1994 Crime Bill which Senator Biden authored. We shall see what happens. To date, as we report in this issue of PLN, the Second Chance Act, which was passed by congress last year to help the reentry of released prisoners into society has yet to be funded. Billions for cops, nothing for reentry. We will continue to hope for change. Change for the better.

I would like to thank those who donated to PLN's annual fundraiser. We will tally and report the results in the next issue. But it looks like we will meet our \$15,000 goal.

Each week PLN gets a lot of mail from our prisoner subscribers. Please do not send us documents or pleadings related to your criminal cases as we are unable to provide any assistance on that. If you win court decisions on the merits and win or settle cases for damages we want to report those, all we need is the ruling or settlement/verdict sheet with the complaint or claim which lays out the underlying facts of the case. And we thank readers for sending us newspaper clippings as on prison and jail news as well. We are able to cover the major media (*New York Times*, *Wall Street Journal*, *USA Today*, etc.) online, so please do not send us those articles. What is especially useful are the news articles that appear in the small newspapers of prison towns related to local prison news as this is often not available online or via the internet.

When writing to PLN, please be brief and to the point. We often get five and ten page letters from prisoners on topics where there is nothing we can do to help and then in the last paragraph it says "by the way,

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Note our subscription rates increased on February 1, 2009 to \$24 a year for prisoners; \$30 a year for non prisoners and \$80 a year for professionals and institutions. All subscriptions and renewals that we receive postmarked after February 1 will be pro rated at the new rate. Enjoy this issue of PLN and please encourage others to subscribe. 📧

Second Chance Act Signed Into Law, But Not Yet Funded

by Brandon Sample

On April 9, 2008, President Bush signed the Second Chance Act into law. The Second Chance Act (P.L. 110-199), a bi-partisan effort, was designed to expand and improve prisoner reentry programs with the goal of reducing recidivism.

The Act authorizes the expenditure of \$362 million during 2009 and 2010 for a variety of initiatives, most of which are targeted at state prisoners. For example, the Act includes grants for mentoring and job training programs by nonprofit organizations for offenders released from prison; for the creation of state, local and tribal reentry courts; for drug treatment alternatives to incarceration, including family-based treatment for incarcerated parents; and for improvements in educational programs, including the establishment of a career project to train prisoners for technology-based jobs during the three-year period before their release.

The Act also calls for the development of a federal reentry initiative and pilot program that allows certain elderly federal prisoners to serve the remainder of their sentences on home confinement. Sex offenders are not eligible for this program.

Further, the Act amends 18 U.S.C. § 3624, authorizing the Bureau of Prisons (BOP) to place a prisoner in a halfway house for up to one year before the end of their sentence, instead of the previous limit of six months. Unsurprisingly, the BOP is using this new authority very sparingly, limiting placement beyond six months to only those offenders who can demonstrate compelling and extraordinary circumstances.

The passage of the Second Chance Act comes at a time when the "number of ex-felons in the United States is at the highest in our history," said Chris Uggen, a sociology professor at the University of Minnesota. Uggen estimates there are about 12 million former felons living in the United States.

If existing statistics hold true, many of those ex-offenders will return to prison or jail within three years of their release. That is why "acquiring employment is crucial," noted U.S. Rep. Danny K. Davis, a co-sponsor of the Act. "If they don't get employment, many of these individuals will be back on the corner hollering 'crack and blow.'"

The federal government offers em-

ployers a tax incentive of \$2,400 to hire ex-offenders through the Work Opportunity Tax Credit, and some municipalities, such as the City of Philadelphia, are following suit. In April 2008, Philadelphia announced a program offering employers a \$10,000 tax incentive for every former prisoner they hire. "We need employers to set up and give them an opportunity to show everyone they can be good employees," stated Everett Gillison, the city's deputy mayor for public safety. "These people are trying to turn their lives around and stay crime free."

Despite such incentives, most employers remain reluctant to hire ex-offenders. And there are generally few, if any, employment protections for former felons, according to Diana Johnston of the Equal Employment Opportunity Commission. "Some courts have ruled that an employer that has a broad practice of excluding people from all jobs because they have had an arrest or conviction has a disparate impact on African-Americans," she explains. "A similar impact may apply to Hispanics." In most cases, though, employers can discriminate against job seekers with criminal records.

The Second Chance Act, through the National Adult and Juvenile Offender Reentry Resource Center, will study barriers to reentry like those encountered by ex-prisoners seeking employment. However, the work of the Reentry Resource Center, along with many of the Act's other provisions, has yet to benefit anyone. While the Act was passed by Congress and signed into law, it has yet to be funded.

On September 26, 2008, over six dozen national and local organizations, ranging from the American Jail Association and Human Rights Watch to International

CURE and Prison Fellowship, issued a joint letter urging Congress to fund the Second Chance Act. [PLN was one of the signatory organizations]

"I will be working with my colleagues on the Appropriations Committee to make certain that the Second Chance Act has the funding to enable community and faith-based organizations to deliver needed services," stated U.S. Senator Sam Brownback.

By the end of the last fiscal year in October 2008, however, funds for the Second Chance Act had not been appropriated. But there is still hope, as both the House and Senate have included funding for the Act in their current appropriation bills, in the proposed amounts of \$45 million and \$20 million, respectively. Those bills must be considered before March 2009.

Should the appropriation bills fail to pass and Congress instead issues a continuing resolution for federal funding, then the Act would not receive funds during the first year of its two-year authorization. If funding is appropriated, the U.S. Department of Justice plans to release grant solicitations to state and local governments beginning in March, followed by grants available to non-profit organizations.

While the Second Chance Act has been praised by advocates for criminal justice reform, if Congress fails to fund the Act, or provides only minimal funding, then it will be a largely inconsequential feel-good gesture. Meanwhile, the BOP has requested an additional \$67.1 million in fiscal year 2009 to expand available prison capacity. ■

Sources: www.reentrypolicy.org, www.jointogether.org

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Private Prison Companies Not Forthcoming About Immigration Detainee Deaths

by Matt Clarke

The private prison industry has benefited from a recent influx of contracts from the federal government to incarcerate immigration detainees. Such contracts are more lucrative than those for imprisoning state prisoners. However, questions have been raised about the quality of medical care provided to immigration detainees, and neither the federal government nor private prison contractors have been forthcoming about details related to the deaths of 66 detainees between January 2004 and November 2007.

There wouldn't even be a public list of immigration prisoner deaths had Congress not demanded one from Immigration and Customs Enforcement (ICE). Congress became involved after relatives of deceased detainees complained about the lack of information they were given about the deaths, and how they had not been told their relatives were sick or in the hospital.

One example was the death of Boubacar Bah, 52, a native of Guinea who had a successful New York business creating handmade clothes. Bah had overstayed his tourist visa. He returned to Guinea to visit his family; while he was abroad his application for a green card was denied, revoking his permission to reenter the country. He was detained by ICE when he returned to the U.S. His friends hired an immigration lawyer who tried to reopen Bah's application while he was held for nine months at the Corrections Corp. of America (CCA)-run Elizabeth Detention Center in New Jersey.

According to internal CCA records labeled "proprietary information – not for distribution," which were not given to Bah's relatives, other detainees witnessed Bah fall near a toilet and strike his head on the floor. He was taken to the infirmary where he became incoherent and agitated, pulling away from doctors and grabbing at staff, then vomiting. Instead of recognizing this as a textbook symptom of brain hemorrhaging, a physician's assistant approved of Bah being handcuffed, shackled and placed in solitary. Medical staff determined that Bah's "screaming and resisting" was due to "behavior problems," and questioned his "unwitnessed" fall.

Bah was taken to a solitary confinement

cell where he remained in shackles on the floor, breathing heavily and foaming at the mouth. A guard recognized the severity of his condition and contacted the medical department, but a nurse refused to come to the solitary confinement unit.

Fourteen hours after Bah's fall and head injury, the nurse finally made rounds in solitary and observed his serious condition. He was transported to a hospital where brain scans revealed hemorrhages, swelling and a fractured skull. Emergency surgery was performed, but it was unsuccessful. A medical examiner's report listed Bah's cause of death as an "unattended accident."

The list of other immigration detainees who died in custody also cited cryptic causes of death. Some were designated "undetermined" or "unwitnessed arrest, epilepsy." Fourteen listed heart problems, while thirteen stated suicide. Details of the deaths, including where they occurred and the nationality of the deceased prisoners, were omitted.

Part of the problem is that ICE uses federal facilities, local jails and privately-run prisons to incarcerate immigration detainees. Critics, including some in Congress, say this hodgepodge approach and a transient population allow ICE to cover up questionable detainee deaths by transferring or deporting witnesses. It also hobbles the investigation of complaints about poor medical care, inadequate suicide prevention and abuse.

Ironically, ICE is the savior of the private prison industry, which overbuilt capacity in the late 1990s. The price of a share of CCA stock plummeted from a high of \$70 to under \$1.00 amid industry scandals involving riots, escapes and prisoner abuse, plus ill-fated business decisions related to a CCA real estate investment trust spin-off called the Prison Realty Trust. [See: *PLN*, Aug. 1998, p.5; July 2000, p.1].

With CCA on the verge of bankruptcy, the federal government stepped in with a series of contracts for private prisons to house the growing population of immigration detainees. The first such contract was for CCA to incarcerate foreign national Bureau of Prisons (BOP) prisoners in a California City facility. Then came an

immigration detainee contract that paid CCA \$89.50 per diem to house up to 1,000 prisoners at the San Diego Correctional Facility in Otay Mesa, California.

By 2007, federal contracts with ICE, the U.S. Marshals Service and BOP accounted for 40% of CCA's nearly \$1.5 billion in annual revenue. With the company's net profit reaching \$133 million in 2007, CCA's stock has recovered nicely.

ICE maintains a close and friendly relationship with the private prison industry. The agency spends an average of \$119.28 a day to incarcerate prisoners in federal facilities, while its private prison contracts average \$87.99 per diem. The question is how such savings – and resultant profits for the industry – are achieved.

Is it by providing inadequate medical care and poorly trained staff which contribute to preventable deaths, such as that of Boubacar Bah? Or is it through cut-rate housing such as the windowless tent-like structures used by Management & Training Corp. (MTC) to incarcerate 2,000 immigration detainees in Willacy County, Texas? [See: *PLN*, Sept. 2007, p.1]. That prison has been so profitable that a 1,086-bed expansion was completed in July 2008 at a cost of more than \$50 million.

Large profits are also being generated from the lucrative practice of incarcerating immigration detainee families and children who have not been charged with any crimes, such as at CCA's 512-bed T. Don Hutto "residential" facility in Williamson County, Texas. [See: *PLN*, Jan. 2008, p.1; Aug. 2007, p.10]. Despite widespread criticism and protests, on December 23, 2008 the county commissioners voted 4-1 to extend a contract with CCA to operate the controversial prison for another two years.

The substantial financial incentives in the immigration-driven private prison industry have sparked a rush to build detention facilities not seen since the boom-bust cycle of the late 1990s. This expansion is compounded by a lack of transparency from private prison contractors and the federal government.

While oversight is clearly needed for the sake of both immigration detainees and their families, CCA lobbied against

legislation (H.R. 1889) that would have required the company to comply with the Freedom of Information Act to the same extent as federal agencies such as ICE.

Meanwhile, following extensive coverage of immigration detainee deaths by the *New York Times* and *Washington Post* last

year, Julie Myers, Assistant Secretary of ICE, informed a Congressional subcommittee on June 4, 2008 that ICE would provide more detailed information about in-custody deaths to the Dept. of Justice. She said the change would result in "more transparency" – a worthy objective that

private prison companies should likewise embrace, particularly in cases where immigration detainees die under questionable circumstances at for-profit facilities. ■

Sources: *New York Times*, *Union-Tribune*, *Washington Post*

BOP Suspends Use of Ion Spectrometry Drug Detection Devices

by Brandon Sample

On April 10, 2008, the federal Bureau of Prisons (BOP) discontinued the use of all ion spectrometry drug detection machines, more commonly known as ion scanners. According to a memo from BOP assistant director Joyce K. Conley, "the software for these machines requires correction and we have contacted the manufacturers to ensure they make the necessary modifications."

The memo further stated that any BOP visitor whose visiting privileges were suspended as a result of the ion scanners could request reinstatement of their privileges by contacting the warden of the institution. Prisoners could request reinstatement on behalf of visitors affected by the ion scanners by contacting their unit team.

Most federal prisoners and their family members have long known that the BOP's ion scanners were less than accurate. The devices, which use little wands waved over the hands and clothes of potential visitors, are supposed to detect the presence of narcotics. If drugs are detected the visitor is not allowed to visit.

Chris Dehmer, a federal prisoner at FCI Pekin whose visitors repeatedly tested positive for drugs, sued the BOP in federal court in 2007. He argued that the scanning procedures used by prison officials violated his constitutional rights.

Dehmer alleged that the ion scanners often produced false-positives, reacting to things like casual contact with "contaminated currency, perfume, prescription drugs, Robitussin, diet pills, migraine medications, anti-depressants and gasoline."

The BOP contended in response to Dehmer's suit that the ion scanners had "less than a 1% rate of false positive results." However, this conflicts with a study by Kay Lumas, a doctoral candidate at Capella University in Minneapolis, who examined the efficacy of ion scanners and

other trace detection devices.

Lumas' research, published in 2007, determined that "ninety-one percent (91%) of the positive results, on confirmation, would be found to be false." That is, almost all of the positive results from the ion scanners were actually false-positives.

The district court, on an initial merit screening of Dehmer's lawsuit, found he had failed to state a claim under Fed.R.Civ.Proc. 12(b)(c)(6). "However," the court noted, "it is possible that the plaintiff may be able to claim that the way the scanning procedure has been used to prevent the plaintiff from receiving visitors ... violates his constitutional rights." The court therefore allowed Dehmer to amend his complaint. See: *Dehmer v. Gonzales*, U.S.D.C. (C.D. Ill.), Case No. 1:07-cv-01218 (2007 WL 3348377).

After Dehmer filed an amended complaint, the district court conducted another merit screening. The court noted that Dehmer had alleged specific incidents when his family was denied visitation due to false-positive results from the ion scanners.

For example, Dehmer wrote that

"his mother, who is on a number of medications, has tested positive on four occasions and has been denied visitation a total of 304 days. His father, a former air traffic controller, tested positive on three occasions and has been denied visitation a total of 124 days."

The court dismissed most of Dehmer's claims in a Sept. 22, 2008 order, but held he had stated a claim to the extent that "the repeated denials of the plaintiff's visitation ... violated the plaintiff's First Amendment Freedom of Association and Fifth Amendment Due Process rights." The case was allowed to proceed, and is currently pending. See: *Dehmer v. Gonzales*, U.S.D.C. (C.D. Ill.), Case No. 1:07-cv-01218 (2008 WL 4414377). ■

Additional sources: www.november.org, www.prisontalk.com

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Officials Agree To Cap Population at D.C. Jail

by Michael Rigby

After decades of fighting lawsuits, skirting court orders, and defying legislative decrees, the District of Columbia Mayor's Office has finally agreed to a definitive population cap at the notoriously overcrowded and dangerous D.C. Jail.

Under the terms of the settlement, the jail will hold no more than 2,164 prisoners—a number arrived at more than four years ago by the District's own correctional consultants.

In two rulings spanning a decade, the Superior Court of the District of Columbia held in 1975 and again 1985 that the jail's continuous overcrowding regularly violated the Eighth Amendment rights of convicted prisoners and pretrial detainees to be free from cruel and unusual punishment.

This chronic overcrowding, the court held in a 1985 contempt hearing, resulted in prisoners being forced to stay in their cells with no water or basic supplies, hazardous laundry service, and substandard medical care. Not surprisingly these base conditions led to regular assaults and stabbings. Noting the unwillingness of officials with the D.C. Department of Corrections (DCDC) to remedy the constitutional violations, the court imposed a population cap of 1,694 based on testimony of the then-Assistant Director of the DCDC who testified that the jail was designed to hold 1,356 prisoners but could safely hold 25% more, or 1,694 prisoners.

Still, the District continued to violate the court's orders. In 1993 the court appointed a Special Officer to oversee the District's efforts to comply with the court order. The Special Officer reported to the court in 1994 that the District remained in "substantial noncompliance" with the court's order. Consequently, with the Mayor's Office agreeing to be held in contempt, the court imposed in 1995 a structured remedial plan with a specific timetable to bring the jail into compliance. Still, no definitive action was taken and the jail remained noncompliant.

Then, in 1996, in a triumph to tyrannical prison and jail autocrats everywhere, the U.S. Congress enacted the Prison Litigation Reform Act (PLRA). The PLRA drastically reduced the authority of federal courts to oversee prison and jail reform and subjected ongoing actions—except in rare instances—to immediate vacatur upon a motion by the defendants. Defendants

in the DC jail case proffered such a motion 2002, and, in an order dated October 5, 2002, the court nullified the previous court-approved consent decree imposing a population cap at the jail.

Following the dissolution of this decree, overcrowding at the jail skyrocketed while safety and security conditions careened out of control. In December 2002—when the jail population exceeded 2,400 prisoners—two pretrial detainees were stabbed to death. Another prisoner was stabbed but survived.

Responding to the increased violence, members of the D.C. Council introduced a bill—ultimately known as the "Jail Improvement Act"—aimed at rectifying the deteriorating conditions at the jail, which included overcrowding.

After negotiations with the Mayor's Office, it was agreed that "the population cap would be determined on the basis of findings by an independent corrections consultant to be appointed by mutual consent of the Mayor and the Council." On April 12, 2004, the consulting firm issued its final report, based on the American Correctional Association's Adult Local Detention Facility Standards, determining that jail's optimum "operational range" was between 1,958 and 2,164 prisoners.

During the time of the consulting firm's study, population at the jail ranged between 2,300 and 2,400 prisoners. When the findings were presented, the DCDC offered no objections and later even endorsed the report's recommendations.

The Mayor's Office, however, was a different story. The District's Deputy Mayor defended the jail's population of 2,300 by arguing that "the concept of establishing a jail's capacity is not an exact science" and promised only that the Mayor's Office would "establish the recommended operational capacity only as a long term goal."

On June 29, 2005, plaintiffs Garry Anderson, Georgene Greenfield, Melvin Hucks, Darryl Mayo, Terri Meade, Brian Patterson and Donnell Williams filed a Complaint for Declaratory and Injunctive Relief. The document filed in Superior Court sought to force compliance with the Jail Improvement Act of 2003, D.C. Law 15-62, D.C. Code. Ann. Sec. 24-201.71.

Dismissing the District's arguments that the 2003 law was not binding on the Mayor, the Court affirmed that District's compliance was long overdue. On October 6, 2007, the *Washington Post* ran a story quoting presiding Judge Melvin R. Wright saying he was ready to hold the District of Columbia Mayor in contempt of court. "There have been numerous judges who have come and gone, who have died, who have been unable to get the District to establish a cap," the paper reported he said. "I don't want to bring the mayor in here, but what choice do I have? ... Am I supposed to turn my head?"

Rather than proceed to trial, the Mayor's Office agreed to settle the case by promising to establish a population cap at the jail of 2,164 prisoners—the number recommended by the mayor's hand-picked consultants in April 2004. This agreement was reflected in an October 12, 2007 court order formally requiring the District to comply with the population cap. Additionally, since there is an exception to the population cap for exigent circumstances, such as, but not limited to, mechanical failures or natural disasters, the Defendants must notify attorneys for the Plaintiffs in writing in the event of such circumstances. The notice must also contain a description of the circumstances necessitating the temporary suspension of the cap and the anticipated time the defendants believe it will be necessary to exceed the cap.

Judge Wright retained jurisdiction over the case to make sure that all the necessary rulemaking procedures were followed and that the District continued to act in accordance with the Order. The city published the official order of a population cap for the D.C. Jail in the January 18, 2008, edition of the D.C. Register, 55 D.C. Reg. 492 (Jan. 18, 2008). On October 28, 2008, the Judge dismissed the case without prejudice, but also included a provision that the attorneys could file any objection of counsel before January 19, 2009. The average daily population at the Jail for September 2008 (the last month for which statistics are publically available) was 1,933. Anderson and the other plaintiffs were represented by Deborah M. Golden of the D.C. Prisoners' Project in Washington, D.C. and Theodore A. Howard of the Washington, D.C. law firm of Wiley Rein LLP. See: *Anderson v. Fenty*, Superior Court of the District of Columbia, Civil Division, 2005 CA 005030 B. ■

Sixth Circuit Upholds Partial Denial of Qualified Immunity for MI Jail Guards' Failure to Protect Sex Offender; Case Settles for \$190,000

The U.S. Court of Appeals for the Sixth Circuit has affirmed in part and reversed in part a Michigan district court's denial of qualified immunity to two guards in a case involving failure to protect and excessive force.

On February 11, 2000, Shawn Leary, 21, was arrested for raping a nine-year-old girl and taken to the Livingston County Jail. During intake, Denis McGuckin, a guard at the facility, hit Leary on the back of the neck after calling him a "sick prick." Later that evening another jail guard, Scott Stone, told Leary that once other prisoners "found out what he did ... there would be no protection from anyone here at the jail."

Stone then proceeded to tell other prisoners that Leary "was in for raping a nine-year-old girl." Leary was severely beaten, choked and kicked by a group of prisoners several days later; he suffered facial and skull fractures.

Leary sued Livingston County, Stone,

McGuckin and other defendants, alleging excessive force and deliberate indifference to his safety. After the district court denied Stone and McGuckin's requests for qualified immunity, they filed an interlocutory appeal.

On appeal, Stone argued that he was entitled to qualified immunity because Leary had failed to demonstrate that he subjectively ignored a serious risk of harm to Leary's safety. The Sixth Circuit disagreed in a June 10, 2008 opinion.

Stone, the appellate court wrote, "was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that he drew the inference." Stone had told Leary that "once other [prisoners] found out what he did," he would need "protection ... at the jail." Nevertheless, in spite of that knowledge, Stone "persisted in telling other [prisoners] about Leary's charges."

Such actions, if true, constitute deliberate indifference to a prisoner's safety,

the Court of Appeals held. Accordingly, the district court's denial of qualified immunity as to Stone was affirmed.

However, the Sixth Circuit reached a different conclusion in regard to McGuckin. Unlike Stone, McGuckin was entitled to qualified immunity because the force used when he struck Leary was *de minimis*. The appellate court found that Leary had confirmed the *de minimis* nature of the force when he testified during his deposition that McGuckin's actions "didn't hurt or nothing." Consequently, McGuckin's conduct, "while rude and unprofessional, did not rise to the level of a cognizable constitutional claim." See: *Leary v. Livingston County*, 528 F.3d 438 (6th Cir. 2008).

On remand, the case settled for \$190,000 on July 31, 2008, inclusive of attorney fees, with the settlement paid to Leary's family. See: *Leary v. Livingston County*, U.S.D.C. (E.D. Mich.), Case No. 5:03-cv-60021. ■

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Changes in Texas Parole Laws Violate Ex Post Facto Clause

by Matt Clarke

On March 29, 2007, a federal court ruled that changes in Texas parole laws, practices and procedures violated the federal ex post facto clause when applied retroactively.

Barry Michael Wion, a Texas state prisoner, was convicted in 1985 of three sex offenses involving children and sentenced to 99 years in prison. In 1997, the Texas Legislature passed SB 45, later codified as Texas Government Code § 508.046, which singled out certain sex offenders and prisoners with capital life sentences for special negative treatment during parole hearings.

After being denied parole in 2004, Wion filed state habeas actions challenging the changes resulting from SB 45 and related changes in parole practices as being ex post facto violations when retroactively applied to his case. His state habeas petitions were dismissed. He then filed a federal habeas action under 28 U.S.C. § 2254.

As a preliminary matter, the district court found that Wion's habeas petition was timely filed. In so ruling, the court counted his request for a special review by the parole board as an attempt to exhaust state remedies, and the one-year limitations period did not begin until after the special review was denied. Alternately, the court found that the period of time before the denial of the requested special review qualified for equitable tolling of the limitations period.

Wion complained that under § 508.046 he was now required to achieve a two-thirds supermajority vote of the entire statewide parole board instead of a majority of a three-person parole panel, and that the parole board had adopted an informal "serve all" policy for multiple aggravated sex offenders that effectively changed his parole eligibility date from 2004 to 2020. Wion supported his habeas petition with voluminous exhibits.

When he attempted to submit a report by the Texas Criminal Justice Policy Council titled *Goal Met: Violent Offenders in Texas are Serving a Higher Percentage of Their Prison Sentences*, which stated that a "key goal of the Texas criminal justice reforms of the 1990's has been to increase the percent of sentences served in prison for violent offenders," the state objected. However, the district court held

that the report merely added conveniently-presented statistics to back up pre-existing claims and previously-submitted data, and did not add a new claim. Wion was thus allowed to introduce the report.

The court held an evidentiary hearing on January 10, 2007, in which Wion was represented by appointed counsel. Witnesses testified that prisoners subject to the provisions of SB 45 were now "flagged for special parole consideration in a manner they were not singled out in 1984." Wion presented evidence at the hearing that he was unlikely to ever obtain parole under the provisions of SB 45. The state court had only considered the change to the parole board voting count in making its decision, not the other changes wrought by SB 45 that were designed to prevent prisoners like Wion from ever obtaining parole.

Consequently, the federal district court found that the state court had "engaged in an unreasonable application of Supreme Court precedent" in denying Wion relief. The court held that the changes resulting from SB 45 and attendant changes in parole practices constituted an ex post facto violation as they retroactively increased the length of time that Wion would serve. The court ordered that Wion's next scheduled parole review be conducted under the laws in effect in 1985.

Both the state and Wion have since appealed to the Fifth Circuit, with Wion seeking an immediate parole hearing under the 1985 parole laws. See: *Wion v. Dretke*, U.S.D.C. (WD TX), Case No. 7:05-cv-00146-RAJ. *PLN* will report the Fifth circuit ruling when it is issued. ■

Jose Medellin Executed; Vienna Convention Controversy Lives On

by Matt Clarke

On August 5, 2008 at 9:48 p.m., the State of Texas began the lethal injection that ended the life of Jose E. Medellin. In doing so, it ignored orders from the International Court of Justice at The Hague, more commonly known as the World Court. Medellin was the lead figure in a series of World Court actions taken by Mexico against the United States that centered on the failure of U.S. officials to inform criminal defendants facing the death penalty of their right to contact their embassy, and to inform embassy officials of the detention of their citizens. Such rights are included in the Vienna Convention, an international treaty to which the United States is a signatory.

The Vienna Convention actions by Mexico resulted in the World Court ordering the U.S. to review the cases of 51 Mexican nationals on death rows in various states to determine whether their rights under the Vienna Convention had been violated. [See: *PLN*, Sept. 2004, p.12]

The governor of Oklahoma commuted the death sentence of one Mexican citizen to life without parole after the World Court ruling was handed down.

But Texas took a different approach.

"We don't really care where you are from; if you commit a heinous and despicable crime you are going to face the ultimate penalty under our laws," said a spokesperson for Texas Governor Rick Perry. "No foreign national is going to receive any additional protection than a Texas citizen would."

However, the Vienna Convention – which was ratified by the U.S. Senate and is thus the highest law of the land along with the Constitution – does exactly that. It grants rights to foreign nationals not granted to citizens of Texas or any other state. Therefore, when Mexico learned of Texas' position, it obtained an injunction from the World Court ordering the U.S. not to execute any of the 51 Mexican nationals on death row before their cases were examined for violations of the Vienna Convention.

President Bush intervened, albeit reluctantly, and directed state officials to review the Vienna Convention cases prior to performing any executions. [See: *PLN*, Jan. 2006, p.16]. However, Texas challenged Bush's executive order, and on March 25, 2008 the U.S. Supreme Court held that the order

was not binding because the President had no authority over state courts. The World Court's injunction likewise was not binding on Texas, only on the U.S. government. See: *Medellin v. Texas*, 128 S.Ct. 1346 (2008).

Texas Congressman Ted Poe provided a blunt assessment of the situation. "The State of Texas has decided that the World Court has no jurisdiction to tell the State of Texas or any other State what to do," he said on July 17, 2008. "[Medellin] deserves the death penalty, he earned it, and justice demands it, whether the World Court likes it or not. And that's just the way it is."

With all of the court actions, presidential orders and controversy, why did Texas proceed with the Medellin execution? One reason was that Medellin had been convicted in the high-profile rape, torture and murder of two teenage girls. Another reason was the upcoming November 2008 elections, which also might explain why H.R. 6481, a bill introduced in Congress to create an enforcement mechanism for World Court rulings, stalled and went nowhere.

"Somebody in Congress may see the value of protecting the treaty obligations and the national interests of the United States and also be concerned about the political fallout for voting for a statute that might be used against them because [they] are perceived as soft on crime," said Duncan Hollis, an expert in international law at Temple University's James E. Beasley School of Law.

The Medellin execution has worried some international relations experts.

"Americans who are detained abroad may well lose the critical protection of ensured access to United States consular officers," American Society of International Law president Lucy Reed told members of Congress.

But Mexico isn't just interested in enforcing its citizens' rights under the Vienna Convention; it is also interested in saving their lives. The Mexican government does not recognize the death penalty or even life imprisonment without parole, both of which are viewed as contrary to its philosophy that every person is redeemable. A philosophy enshrined in the Mexican constitution. Therefore, when Mexican citizens face the death penalty in the United States, Mexico pays for their legal defense. Thus far Mexico has hired U.S. lawyers to represent all 51 of its citizens who were sentenced to death.

"The Mexican government has an obligation to defend its citizens abroad," stated Mexican embassy spokesman Ricardo Alday.

"I truly take my hat off to Mexico for funding this program," said Denver civil rights attorney David Lane, who was hired by Mexico to defend Juan Quintero, a Mexican national charged with fatally shooting a Houston police officer. Although Quintero was convicted, he did not receive the death penalty. "Defending a death penalty case can

cost hundreds of thousands of dollars to more than one million dollars. None of these defendants had any money, and the cases fall to public defenders at taxpayers' expense," said Lane.

Lane is also assisting public defenders in Douglas County, Colorado in a capital murder prosecution involving Mexican citizen Jose Luis Rubi-Nava. In September 2006, Rubi-Nava allegedly used his pickup truck to drag his girlfriend to death. His case has not yet gone to trial.

Lane accused Douglas County District Attorney Carol Chambers of violating two international treaties by refusing to allow Rubi-Nava to consult with Mexican counsel and by sending background investigators to Mexico without first obtaining permission. "Mexico views Carol Chambers as a human rights violator," he said.

And presumably, since Jose Medellin was executed in violation of international law, the State of Texas is an unrepentant murderer. ■

Sources: *Christian Science Monitor*, *Associated Press*, www.msnbc.msn.com, www.news.bbc.co.uk, www.law.com, *Denver Post*, *The Echo*

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Fifth Circuit: § 1983 Nominal and Punitive Damages Allowed Absent Physical Injury

For the first time in a published opinion, the Fifth Circuit U.S. Court of Appeals has held that a prisoner pursuing a civil rights action against prison officials may seek nominal and punitive damages even if no physical injury is alleged.

Ronald L. Hutchins, a Texas state prisoner, filed a pro se 42 U.S.C. § 1983 civil rights suit in federal district court against Johnny B. McDaniels, a Texas prison guard, alleging that McDaniels had improperly strip searched him in violation of his Fourth Amendment rights.

Hutchins claimed that while he was waiting for a scheduled law library session, McDaniels ordered him to strip, then to “lean against a wall and stick his buttocks out as far as possible and spread his legs wide.” McDaniels told Hutchins “to step back, lift one leg up, hop on one foot, switch legs and go in the opposite direction about thirty feet.”

Hutchins protested that he couldn’t do so due to a back injury and bad ankle, but McDaniels threatened to lock him up if he failed to comply. According to Hutchins, McDaniels carried out the strip search with a “lewd smile” and in view of other prisoners and a female guard. Hutchins complied with the orders. During the demeaning search, McDaniels did not accuse him of possessing any contraband.

The district court initially dismissed Hutchins’ complaint because he failed to allege any physical injury, and the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), prohibits the recovery of damages absent physical injury. Hutchins appealed.

The Fifth Circuit first held that “the Fourth Amendment protects prisoners from searches and seizures that go beyond legitimate penological interests.” The Court then ruled that failure to allege any physical injury precluded Hutchins from recovering compensatory damages for emotional or mental injuries.

Hutchins argued on appeal that even if compensatory damages were barred, he could still recover nominal and punitive damages. The Fifth Circuit noted that it had not addressed this particular issue in a published opinion. However, it had recognized that non-prisoners may recover nominal and punitive damages for violations of the Fourth Amendment, and

that § 1997e(e) does not bar declaratory or injunctive relief.

In unpublished opinions, the Fifth Circuit had previously held that § 1997e(e) did not prohibit the recovery of nominal damages for a constitutional violation. This was in accord with published opinions from the Second, Third, Seventh, Tenth and Eleventh Circuits.

The Fifth Circuit had also previously held in a published non-prisoner case that punitive damages “may stand in the absence of actual damages where there has been a constitutional violation.” That ruling had been extended to prisoners

despite § 1997e(e) in a series of cases, both published and unpublished. Noting that the “vast majority of our sister circuits have held the same,” the appellate court concluded that a prisoner may recover nominal or punitive damages for a constitutional violation even if no physical injury is alleged.

Therefore, the Fifth Circuit reversed the judgment of the district court and remanded the case for further proceedings. The case is still pending and Hutchins has been appointed counsel to represent him at trial See: *Hutchins v. McDaniels*, 512 F.3d 193 (5th Cir. 2007). ■

Department of Justice Report on Prison Rape Elimination Act

by Matt Clarke

In September 2007, the National Institute of Corrections (NIC) of the U.S. Department of Justice (DOJ) released the annual report for calendar 2006 on DOJ’s implementation of the Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. § 15601, et seq. The report noted the methods used by the Office of Justice Programs (OJP), its subcomponents: National Institute of Justice (NIJ), Bureau of Justice Statistics (BJS), Review Panel on Prison Rape (RPPR) and Bureau of Justice Assistance (BJA); the Attorney General’s Office (AGO) and NIC to comply with the legislative mandates of the PREA.

The PREA established a zero tolerance standard for rape and sexual assault in prisons, jails, police holding facilities, including juvenile facilities (prison rape). It tasked various DOJ components as follows: BJS must collect, review and analyze reports of prison rape, including the common characteristics of victims, perpetrators and prison and prison systems with high and low rates of prison rape. RPPR must conduct hearings on prison rape and was given subpoena power to call officials from the three prisons with the highest rate of prison rape and the two with the lowest in each category of facility. NIC must offer training and technical assistance, provide a national information clearinghouse and issue an annual report. AGO is authorized to award grants, developed by BJA and administered by NIJ, to

assist in implementing PREA. AGO must also publish national standards for prison rape detection, prevention, reduction and punishment developed by the National Prison Rape Elimination Commission (which PREA established).

In 2006, NIJ awarded Dr. Barbara Owens of California State University a grant to study sexual violence among female prisoners in state prisons and local jails. Nancy LaVigne of the Urban Institute in Washington, D.C., was awarded a grant to study applying situational crime prevention theories to jail settings to assist guards in handling violent and sexually violent prisoners. NIJ also established a partnership with BJS and the Centers for Disease Control to create a surveillance system for medical and mental health indicators of sexual violence. NIJ received final reports of previously supported studies including *The Culture of Prison Sexual Violence*, the largest ethnographic study of prisoners ever conducted. That study found that prisoners perceive rape to be a rare occurrence because the prison culture has a different view of coerced and/or forced sexual behavior. NIJ also funded the development of risk assessment instruments to identify characteristics of victims and perpetrators.

In July 2006, BJS published *Sexual Violence Reported by Correctional Authorities, 2005*, (free online at www.ojp.usdoj.gov/bjs/pub/pdf/svrca05.pdf). BJS also continued developing standardized

methodology for surveying prisoners and conducted expert panel meetings.

RPPR held its first meeting in 2006, including eight panels of prison officials, victim advocates, a rape victim, medical and mental health professionals, researchers and guards' union officials. The purpose was to gather information on the effect of environmental factors, policies, practices and guard training on prison rape.

BJA awarded grants of up to \$1 million, requiring a 50% match by the receiving prison system, to help implement PREA in prison systems throughout the U.S. In 2006, 29 prison systems received grants totaling \$22.6 million. BJA also awarded \$250,000 to the Center for Innovative Public Policies to provide training and technical assistance to prison officials seeking to improve their policies; \$300,000 to the American Prosecutors Research Institute and National Judicial College to educate prosecutors on their role in eliminating prison rape; \$172,000 to the American Probation and Parole Association, International Community Corrections Association and Pretrial Service Resource Center to educate community corrections agencies; \$250,000 to Justice Solutions, a victim advocacy organization, to develop materials to help prisons assist prison rape victims; \$257,178 to various agencies to assist tribal leaders and prison officials in implementing PREA and \$500,000 to NIC to develop and provide PREA-related training and technical assistance to juvenile prisons.

NIC provided classroom training on

prison rape in multiple seminars held at American University's Washington College of Law in Washington, D.C., which received a cooperative agreement award. NIC also held regional meetings and gave an award to The Moss Group to provide training for PREA trainers who, in turn, would train prison staff. NIC also began planning for two training programs with Washington College of Law. NIC presented workshops on prison rape at five professional conferences and held videoconferences, some of which were webcast, on PREA-related topics. NIC also created and disseminated videotapes designed to inform prison officials and prisoners about PREA-related topics. NIC provided technical assistance, including workshops and customized education materials. NIC created a website entitled *An End to the Silence* as a resource to victims and prison officials. It also contracted to provide a clearinghouse for PREA-related information. A second website, www.nicic.org/PREA, provides PREA-related information. Finally, NIC created this report.

Some of the shortcomings of PREA are readily apparent. First, the data on sexual assaults is all self reported by the prisons and jails in questions and there are no audits or analysis on the numbers being correct or accurate. Secondly, there are no services provided directly to rape survivors nor are prison policies of punishing prisoners who report rapes (especially by staff addressed) and lastly, under the PREA scheme of things rape survivors have no rights or standing to pursue or seek any type of relief. In light of the Prison Liti-

gation Reform Act's barriers to prisoners obtaining court access and obtaining relief, this omission is telling. ■

Source: Report to the Congress of the United States on the Activities of the Department of Justice in Relation to the Prison Rape Elimination Act (Public Law 108-79), September 2007.

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Notwithstanding Federal Healthcare Receiver, California Prisoners Can Still Use State Habeas Corpus to Redress Medical Complaints

The California Court of Appeal, Fifth Appellate District, held that even though the California Department of Corrections and Rehabilitation (CDCR) was under the supervision of a court-appointed federal healthcare Receiver, state prisoners nonetheless retained the right under state law to seek individual redress from deficiencies in medical care. Prisoners raising such claims should file state habeas corpus petitions naming both the facility's warden and the Receiver as respondents.

Jesus Estevez, a CDCR prisoner at Kern Valley State Prison, filed a habeas petition in Kern County Superior Court alleging a failure by medical staff to provide him with long-recommended spinal surgery and follow-up treatment. The petition was denied and Estevez, still proceeding pro se, petitioned the Court of Appeal.

After requesting several informal responses from both the prison warden and the federal Receiver as to the issues of jurisdiction, mootness following Estevez's intervening surgery, and the interplay between the Receiver's authority and the warden's duty to provide health care to state prisoners, the Court determined that it had jurisdiction.

In their responses, both the warden and Receiver conceded that state courts had both statutory and constitutional jurisdiction to hear a habeas corpus petition regarding prison healthcare. They also argued, however, that the case was moot because Estevez had since received the back surgery he was seeking.

The Court of Appeal noted that inadequacy of post-surgery follow-up care was still being raised by Estevez, and, because that actual controversy remained, the matter was not moot and an evidentiary hearing was warranted. Moreover, the appellate court found that the question of federal versus state liability in matters under the Receiver's aegis was both novel and one of widespread importance to many other CDCR prisoners statewide. Therefore, Estevez's petition was not mooted by his surgery.

Following a scholarly review of constitutional authority and case law precedent, the Court concluded that "It cannot be inferred, from a broad grant of general authority, that a receiver is permitted to override state law, absent the

explicit direction, arrived at pursuant to procedures comporting with due process, of the appointing court." Indeed, the Court of Appeal noted that state sovereignty, which is concurrent with that of the federal government, is subject only to limitations imposed by the Supremacy Clause of the U.S. Constitution.

Looking to California's Constitution, the Court cited Article I § 11, which reads, "The right to file a petition for writ of habeas corpus is guaranteed by the state Constitution and regulated by statute (Penal Code § 1473 et seq.)." Further, Article VI § 10 of the California Constitution "gives the state superior, appellate and Supreme courts original jurisdiction in habeas corpus proceedings." Because the function of a habeas petition is to obtain discharge from unlawful restraint, "alleged violations of the Eighth Amendment arising from inadequate medical care may be brought to courts' attention in California by means of a petition for writ of habeas corpus."

Accordingly, the appellate court held that "despite the receivership, California

courts retain jurisdiction over the state prison system in general and inmates' claims of inadequate medical care in particular. It necessarily follows that, since the Receiver is now in charge of the California prison medical health care delivery system, California courts also have jurisdiction over him."

Indeed, to hold otherwise, the Court of Appeals noted, would have the effect of suspending the writ of habeas corpus in California. The Court went on to opine that both the federal Receiver and the prison warden were necessary and proper parties to respond to such habeas petitions, since the Receiver controls the medical care while the warden controls the prisoner.

Accordingly, the Court of Appeals granted the writ on August 14, 2008 and directed the Superior Court to vacate its earlier denial, hold an evidentiary hearing as to the need for ongoing medical care for Estevez, and enter further orders as appropriate. See: *In re Estevez*, 83 Cal. Rptr.3d 479 (Cal.App. 5 Dist., 2008), as modified on denial of rehearing. ■

Report Criticizes Conditions in U.S. Immigrant Detention Center in Tacoma, Washington

by David M. Reutter

Conditions at the federal immigration center in Tacoma, Washington, are substandard and not in compliance with national standards, "much less international human rights law." This is the conclusion drawn by a 65-page report issued by the Seattle University School of Law International Human Rights Clinic in collaboration with One America, an immigrant rights group.

The report examines conditions at the Northwest Detention Center (NWDC) in Tacoma. It is located on the Tacoma Tideflats, a former toxic waste dump site. Originally open with 500 beds in 2004, it now has 1,000 beds with plans to add another 500. The facility is operated by the GEO Group, who is paid \$95 per day per detainee.

While officials with the U.S. Immi-

gration and Customs Enforcement (ICE) say the report is "filled with inaccuracies and vague allegations," the conditions are similar to other reports on conditions operated by GEO. Moreover, the report was compiled from interviews with 46 people: 41 detainees, a family member, and four attorneys representing detainees. The investigation also made two tours of NWDC, followed by a question and answer session with ICE and GEO officials.

Immigration detention is the fastest growing form of incarceration. It expanded from 95,000 people in 2001 to over 300,000 in 2007. Multiple reports have been issued that detail continuing abuses within America's immigration detention centers. On March 5, 2008, the United Nations Special Rapporteur of the Commission on Human Rights

on the Rights of Migrants issued a scathing report against the United States and the immigration detention system.

For the most part, the conditions at NWDC coincide with the conditions at other such centers in the United States, NWDC has detainees from 80 different countries, and it admitted 8,849 people in fiscal year 2006-2007. In February 2008, it held 997 detainees.

Legal due process is a serious issue. NWDC officials do all they can to inhibit that process. Lawyers say there are numerous obstacles to represent the detainees. "Those obstacles result in many attorneys not representing detainees, even those who are able to pay," says the report. The legal consultation room is too small, lawyers are required to wait 1 to 2 hours to see detainees, guards will barge into a room, and detainees are often moved to other centers without notice to lawyers.

The detainees consistently say that they are pressured to sign papers, which are in English, whether they understand them or not. The guards use psychological pressure by way of verbal threats and even physical intimidation. NWDC guards are

frequently belligerent with detainees.

Strip searches occur after attorney visits. One female described being told to open her legs so the guard could look into her vagina. The worst tale of treatment came from a transfer of detainees on two flights to Alabama.

In preparation for a work place raid in Oregon, detainees were loaded on planes in the summer of 2007. They were handcuffed and shackled. They were not allowed to use the bathrooms on the flight. Before the plane took off, a mentally ill Cambodian detainee provoked guards by yelling at them. Four guards "began to hit and punch the detainee, mostly in the face."

The prohibition on bathroom use during the seven hour flight resulted in three detainees defecating in their seats, requiring them to sit in it during the remainder of the flight.

Medical care at NWDC is poor. "For example, when a food poisoning outbreak occurred on August 11, 2007, and over 300 detainees complained of severe abdominal cramps and diarrhea, officers told detainees they had to wait until the in-house medical clinic opened in the morning before they could receive treatment."

The detainees "labeled the food as bad, watery, tasteless, rotten, poor quality, low quantity, overcooked, repetitive and cold." They say "their food occasionally smells bad, appears rotten, has been served on dirty trays, and has even contained bugs." One detainee has lost 50 pounds of the 190 he weighed upon entry at NWDC. The doctor at NWDC "told him to stop exercising because the food he receives does not provide enough nutrition to continue daily physical exercise."

While GEO operates places like NWDC for profit and ICE wants to house detainees cheaply, they do so at the loss of things of greater value. "As Americans concerned with upholding our Constitution and assuring justice and human rights, we should remember that America is degraded when the government fails to uphold those very rights that make us a great country," said Pramila Jayapel, executive director of One America. The report, *Voices from Detention, A Report on Human Rights Violations at the Northwest Detention Center*, is available on PLN's website. 📄

Additional source: *Seattle Times*.

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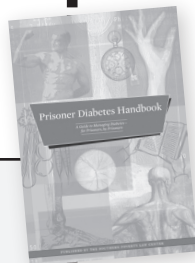
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Washington DOC Restarts Private Industry Prison Jobs Following State Constitutional Amendment

by John E. Dannenberg

After eliminating private industry prison work programs in response to a Washington State Supreme Court ruling declaring the underlying statute unconstitutional (see related article on *Talon Industries v. Washington DOC* in this issue), the Washington Dept. of Corrections (WDOC) reversed course on August 8, 2008 and began inviting private companies to hire prisoners at prevailing wages.

The about-face came after Washington voters approved a constitutional amendment specifically permitting such prison work programs for the intended purpose of reducing recidivism by better preparing offenders for post-release employment. These “Class I” jobs were distinguishable from internal prison industry Class II jobs, which are limited to filling state agency consumption needs – such as eyeglasses, furniture and food for prisoners and welfare recipients.

The WDOC’s earlier private industry prison work program had employed about 300 prisoners. A lawsuit brought by an industry association complained that those were 300 jobs not available to non-incarcerated workers. Moreover, the offer of free prison facility work space with reduced-rate utilities was an unfair advantage against companies that didn’t use prison labor.

Following the 2004 demise of the private industry prison work program on state constitutional grounds (See: *Washington Water Jet Workers Association v. Yarbrough*, 151 Wash.2d 470, 90 P.3d 42 (Wash. 2004) [*PLN*, Dec. 2004, p.22]), lawmakers and voters were asked to weigh the benefits of meaningful job training for prisoners – which would help them find post-release employment – against industry’s hue and cry of “unfair competition.” Ignoring the fact that most private industry prisoner employees are lifers unlikely to ever be released from prison.

The core difference to overcome the prior constitutional infirmity of the WDOC’s private industry prison work program was that the statutory purpose of the new program would be to benefit the state. Accordingly, it was carefully crafted to include several key provisions.

First, wages would range from the state minimum wage of \$8.07/hour to \$12/

hour, and would not undercut industry wage standards. Second, a portion of the prisoners’ earnings would be paid to the state to offset the cost of their incarceration. Third, the job skills learned would be real-world skills that would meaningfully aid in the most challenging phase of a parolee’s life – the period immediately following release from prison.

The process began with Senate Joint Resolution 8212, which passed the Senate (with a 49-0 vote) on March 12, 2007 and the House (with a 83-15 vote) on April 10, 2007. Specifically, Article II, section 29 of the state constitution was amended to provide for “the working of inmates for the benefit of the state, including the working of inmates in state-run inmate labor programs. Inmate labor programs provided by statute that are operated and managed, in total or part, by any profit or nonprofit entities shall be operated so that the programs do not unfairly compete with Washington businesses as determined by law.” The measure garnered 60% voter approval in a December 21, 2007 referendum election, following widespread support in local newspaper editorials.

Not everyone agreed with this use of prison labor. In an October 20, 2007 opinion piece, the founder of JusticeWorks!, Lea Zengage, concluded that because prisons house disproportionately greater numbers of impoverished blacks, initiatives such as WDOC’s private industry program would have the perverse effect of perpetuating the “prison slave plantation” concept by keeping blacks employed within prison but not outside of prisons. “The system is set up to cause people to fail,” she observed.

PLN has reported extensively on the issue of prison slave labor in Washington state, usually breaking the stories for other media. Among the companies that have used prison slave labor in Washington state are such notables as: Eddie Bauer, Kelly Hanson, Boeing, Microsoft, Nintendo, Starbucks, Planet Hollywood and various banks. In 1995 *PLN* broke the story that Republican congressional candidate Jack Metcalf had used prisoners employed by the Washington Marketing Group at the Washington State Reformatory to call voters prior to the 1994 election and perform a mock voter survey

telling likely voters that he supported the death penalty and lower taxes and was “tough on crime”. Metcalf won the election by 600 votes and went on to serve three terms in congress where, true to his word, he voted in favor of every anti prisoner and defendant measure to come through the halls of congress.

Washington is not the only state conjoining the prison labor force with private industry. Nationally about 5,300 prisoners are employed in such ventures, according to the National Correctional Industries Association (NCIA), an interest group that represents prison industry programs and administers the Training and Technical Assistance Project of the Prison Industry Enhancement Certification Program (PIE), 18 U.S.C. § 1761(c).

Established in 1979, PIE programs now involve over 100 companies operating in 42 jurisdictions that generate gross wages for prisoner workers of \$10.8 million annually (\$4 million in net wages after deductions for room and board, family support, taxes and victim restitution). The benefits of PIE programs for businesses include lower health care costs, reduced employee turnover expenses, no vacation time, and lower payroll taxes. Offsetting this is the specter of down time due to prison lockdowns, searches and other security needs.

Sheila A. Bedy, director of the Justice Policy Institute research foundation in Washington, D.C., criticizes prison labor as a throwback to the Reconstruction Era because it “creates a market incentive to lock people up,” which “undermines the very purpose of our criminal justice system.” But this critique must be balanced against the propaganda the supporters of prison slavery claim as the positive attributes of giving prisoners the ability to pay their restitution, fines and child support while saving money for their release and learning marketable job skills. The lie to these claims are that the more money prisoners are paid, the more they can pay for these things yet every state to have a PIE program routinely violates the provision that prisoners be paid the prevailing wage for their labor.

The Glove Corp. in Heber Springs, Arkansas gives prison labor a big thumbs up.

Prior to using prisoners from the Pine Bluff Correctional Facility, Glove Corp. struggled to keep 30 free world workers employed to fill orders for firefighting gloves. Turnover losses had amounted to \$156,000 in eight months. Now employing twenty prisoners, the firm's production is stable. "If it weren't for the prisoners, we wouldn't have a company right now," said Tony Moore, Glove Corp.'s General Manager.

Array Corp. in Portland, Oregon reported a tougher experience with its PIE-sponsored jeans manufacturing plant at the Eastern Oregon Correctional Institution. After unsuccessfully trying to correct loss factors that the company blamed on excessive inspections by prison guards, Array dropped its 11-year-old Prison Blues jeans

operation in July 2008.

Nor is the specter of unfair competition resulting from prison labor a theoretical concept – as Lufkin Industries discovered when the company was forced to shut down its trailer manufacturing division in January 2008. The closure was due to a competitor that employed prisoners in a PIE program at the Michaels Unit in Tennessee Colony, Texas. Luftkin had to displace 150 free world workers as a result. [See: *PLN*, Nov. 2008, p.12].

But some prison industry programs have good long-term prospects because the prisoners employed in those programs have no better choice. Ronita Bell, 30, serving life without parole in Arkansas, crimps and welds cable assemblies for

Actronix at a prison in Newport. While she won't be able to put those job skills to use elsewhere since she will likely never be released, she feels good about making parts that will ultimately be used in MRI units, CT scanners and X-ray machines.

"I love being part of building something in a medical field," she said. "I know that it's going to be a machine that could possibly save someone's life." Which, presumably, is a productive way to make use of her life sentence. ■

Sources: *Associated Press*, *Tacoma News Tribune*, *WA Senate Joint Resolution 8212*, *Seattle Times*, *Union-Bulletin*, *Spokane Spokesman-Review*, www.forbes.com, www.nationalcia.org

Ohio Settles Actual Innocence Claim For \$1,500,000

Ohio and Ohio prosecuting officials settled a wrongful incarceration lawsuit by agreeing to pay \$1,500,000 to a man who was imprisoned for 26 years after his conviction for a robbery and murder he did not commit.

Gary James, 55, and his friend Timothy Howard were convicted of a 1976 bank robbery during which a guard was shot execution style. They received deaths sentences which were commuted to life because Ohio's capital punishment statute was ruled unconstitutional in 1978. Their convictions were overturned in 2003 after it was discovered that the prosecutors never told defense attorneys about strongly exculpatory evidence including crime scene fingerprints that were left by the perpetrators, but did not match James or Howard, statements by eyewitnesses that contradicted their trial testimony and suppressed police reports.

Both men filed civil suits seeking a

declaration of innocence. A jury declared Howard innocent and a judge determined that James was wrongfully convicted. Both men filed wrongful conviction/ wrongful imprisonment suits in state court. Howard settled for \$2.5 million in 2006, but died of a heart attack in March 2007. James, who had lower litigation costs than Howard, settled on May 17, 2008. The settlement calls for James to be paid \$700,000 in a lump sum and have \$500,000 disbursed over 15 years. The other \$300,000 goes to his attorneys, James Owen, Richard S. Ketcham and Rick L. Brunner of Columbus, Ohio.

"He is very happy," said Owen. "He feels he can get some closure on this matter and get on with the rest of his life. Nothing could be fair. Nothing could make up for all those days he spent in prison and on Death Row."

The Franklin County Prosecuting Attorney's Office still contends that the men were not wrongfully convicted of the rob-

bery/murder. However, they maintain that reopening the case would be impossible at such a late date. See: *James v. State*, Court of Common Pleas-Columbus, Ohio, No. 04-CV-2808. ■

Additional Sources: *Associated Press*; *Ohio Trial Reporter*.

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Alaskan Prisoner in Arizona Can Enforce CCA Contract

The Supreme Court of Alaska held that state prisoners incarcerated at a private prison in Arizona can enforce portions of the contract between the Alaska Department of Corrections (DOC) and Corrections Corporation of America (CCA) that incorporate provisions of *Smith v. Cleary*, 24 P.3d 1245 (Alaska 2001) [PLN, June 2003, p.26], the seminal case that set forth the duty that Alaska owes to its prisoners.

Gus Rathke, an Alaskan prisoner, was incarcerated at a private prison in Florence, Arizona run by CCA pursuant to the CCA/DOC contract when he received a disciplinary infraction after failing a drug test. He was given 30 days in isolation, prevented from having a paying job for 90 days, and removed from CCA's substance abuse program. He consistently denied using drugs and requested retesting.

After Rathke was released from punitive segregation he filed a grievance over the drug test. His urine sample had tested positive for THC metabolites using a 20 nanograms per milliliter (ng/ml) cutoff point, the Arizona standard. The standard for Alaskan prisoners, as set forth in *Cleary* and the CCA/DOC contract, is 50 ng/ml. Rathke's urine sample was retested at 50 ng/ml and he passed. The grievance officer recommended that the disciplinary infraction be removed from Rathke's file and destroyed.

Rathke then filed a pro se complaint in Anchorage Superior Court against CCA, its employees and the testing company, alleging breach of contract and violations of his state constitutional rights. Without considering the constitutional claims, the trial court granted CCA's motion to dismiss and the testing company's summary judgment motion on the grounds that Rathke was not a third-party beneficiary of their contracts. Rathke appealed.

The Supreme Court of Alaska held that state prisoners in CCA facilities have a right to bring claims under the Alaskan constitution against CCA and named CCA employees. This includes a right to rehabilitation, which may not be denied without due process. Alaska owes legal duties to all of its prisoners, including those incarcerated in out-of-state private prisons. Such duties are detailed in the final settlement agreement (FSA) in *Cleary*, which was incorporated by reference into the CCA/DOC contract.

Many of the *Cleary* provisions are

reiterated in the contract, and the Court found that prisoners are intended third-party beneficiaries of those portions of the CCA/DOC contract taken directly from the FSA. Therefore, Rathke could enforce the contract in state court. The Supreme Court specifically disagreed with the opposite conclusion that was reached in *Miller v. CCA*, 375 F.Supp.2d 899 (D.Alaska 2005).

However, the Court held that Rathke could not hold individual CCA employees liable for breach of contract; also, the drug

testing company's separate contract with CCA was not enforceable by Rathke because he was not an intended third-party beneficiary of that contract.

The Supreme Court thus reversed the dismissal of Rathke's constitutional claims against CCA and its employees, reversed the dismissal of his contractual claims against CCA, affirmed the rest of the trial court's judgment, and returning the case to the lower court for further proceedings. See: *Rathke v. CCA*, 153 P.3d 303 (Alaska 2007). ■

Supreme Court of Canada: No Wage Loss Compensation While in Prison Caused by Sexual Assault by Staff

On February 8, 2008, the Supreme Court of Canada ruled that a prisoner cannot recover damages for lost wages that occurred while he was incarcerated.

Dean Richard Zastowny was 18 when he committed burglaries to support his crack cocaine habit. Convicted of breaking and entering, he was sent to Oakalla prison in British Columbia where Roderick David MacDougal worked as a classification officer. MacDougal twice sexually assaulted Zastowny by forcing oral sex on him, using threats and inducements.

Zastowny was released from prison a year later, became addicted to heroin, and maintained a criminal lifestyle that resulted in his incarceration for 12 of the next 15 years. While serving time for robbery seven years after his initial release, Zastowny learned that MacDougal was being investigated. He contacted the police and MacDougal was subsequently convicted of the sexual assaults.

Zastowny then filed suit against British Columbia, alleging that the government was vicariously responsible for the emotional injuries he suffered due to MacDougal's sexual abuse. A psychologist who was also an expert on heroin addicts testified that Zastowny exhibited low self-esteem, anti-social behavior and sexual anxiety as a result of the abuse, and that his resentment, rebelliousness, alcohol use, heroin addiction and poor work record stemmed from MacDougal's sexual assaults. The psychologist concluded that Zastowny would have spent much less time in prison but for the sexual abuse.

Relying heavily on the psychologist's testimony, the trial court awarded Zastowny \$60,000 in general and aggravated damages; \$15,000 for future counseling; \$150,000 in past lost wages, which included the time he spent in prison; and \$50,000 in future lost wages. The defendants appealed.

The British Columbia Court of Appeals held that Zastowny could not receive compensation for lost wages for the time he was incarcerated. However, the appellate court settled on the theory that Zastowny would have made parole sooner had it not been for his bad conduct which had its genesis in the sexual assaults.

Therefore, the Court held that Zastowny could recover lost wages for the time he spent in prison after becoming eligible for parole, reducing the past lost wages award by 40%. The Court of Appeals also reduced the future lost wages award by 30% because the psychologist had opined Zastowny was at high risk of returning to prison. The defendants appealed again, and Zastowny cross-appealed.

The Supreme Court of Canada held that the doctrine of *ex turpi causa non oritur action* (no right of action arises from an immoral cause) prevented the recovery of damages for any period of incarceration except one caused by wrongful conviction. The *ex turpi* doctrine is only applied to preserve the integrity of the legal system.

In this case, the forfeiture of all wages a prisoner could have earned but for his imprisonment, which is a consequence

of his criminal conduct, clashes with the civil law's allowance for recovery of past lost wages. The *ex turpi* doctrine operates to prevent recovery of past wages for any legitimate period of incarceration, regardless of whether the prisoner was eligible for parole or not. Under this analysis, the

Supreme Court held the reduction in past lost wages should have been 80%.

Furthermore, the Court of Appeals was correct in reducing future lost wages based upon the psychologist's belief that Zastowny had a high risk of being returned to prison. Therefore, the award for

past lost wages was reduced to \$30,000 and the award for future lost wages was reduced to \$35,000. The other awards were unaffected, for a total judgment of \$140,000. See: *British Columbia v. Zastowny*, Supreme Court of Canada, Case No. 2008 SCC 4. 📖

\$1.5 Million Settlement in Alabama Probation Officers Sex Scandal

A \$1.5 million dollar settlement has been reached in a lawsuit claiming an Alabama probation officer raped a female probationer and made inappropriate sexual advances towards eleven other female probationers.

The complaint in the action made claims against probation officer Anthony Baker. His employment in that capacity was short-lived, lasting from June 14, 2004 to his termination on August 11, 2005. Baker became emboldened by his authority in early 2005.

The combination of his authority and marital problems led Baker to prey upon female probationers under his supervision for sexual favors. By March 2005, Baker reached a level of invincibility that led him to rape probationer Jeni Hodge.

When Hodge appeared for her scheduled visit at the probation office in Winston County, Baker commented on her physical appearance and made inappropriate, invasive and personal comments about her marital status. At another visit, Baker touched Hodge on the shoulder. When she jumped away and protested, Baker ordered her to take a urine test.

He then followed her to the restroom, ordered her to keep the stall door open and told her to urinate for the test. After urinating in the cup, Hodge tried to stand up but Baker trapped her in the stall. He then put his hands between her legs to prevent her from pulling up her underwear. Baker ignored her pleas to leave and he then raped her.

While Hodge's case is the most extreme, Baker had a pattern of pushing his female probationers to have sex with him. Upon transferring from another county to Baker's supervision, Tracee Shields was taken into custody after a traffic stop because Baker had placed a hold on her so he could meet her.

After a week in jail, Baker visited Shields, telling her he wanted to see what she looked like, which is why he placed the hold on her. He then told her she was attractive, advising her he could wait another month or get her a revocation hearing in a few days. At another meeting, he exposed and fondled his penis, asking her to expose her breasts if she wanted out of jail. When she got out of jail, Baker told her he would waive fines and urine tests for sexual favors.

He then ordered Shields to strip down to her panties and bra. Afterwards, he reached into her panties, pulled his pants down and ordered her to give him oral sex. Baker became enraged when he could not get an erection and ordered her to sit on the desk while he masturbated. Once he ejaculated, he ordered her to clean it up while in her panties and bra.

The claims of the other ten female probationers were similar in the remarks and requests of a sexual nature, of Baker exposing himself, sexually groping or touching their genitalia or breasts and doing so under threat of sending them back to jail.

On April 10, 2008, the women settled the lawsuit for \$1.5 million. They were represented by Birmingham-based attorneys Ethan R. Dettling, Jon C. Goldfarb and Maury S. Weiner. See: *Hodge v. Alabama*, USDC, N. Dist. Alabama, Case No.: 6:06-CV-1644; 6:06-CV-2320; 6:06-CV-2321; 6:06-CV-2322; 6:06-CV-2323; 6:06-CV-2324; 6:06-CV-2325; 6:06-CV-2326; 6:06-CV-2327; 6:06-CV-2328; 6:06-CV-2329; 6:06-CV-2330; 6:07-CV-0144; 6:06-CV-0145; 6:06-CV-0146. 📖

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GAO Report Critical of BOP's Methodology for Comparing Costs Between COP and Private Facilities

by *Brandon Sample*

In October of 2007, the U.S. Government Accountability Office (GAO), the audit, evaluation, and investigative arm of Congress, issued a report criticizing the Federal Bureau of Prisons' (BOP) methodology for comparing the costs of housing low and minimum security offenders in private facilities as opposed to BOP-run facilities.

Proponents of private prisons argue that they are cheaper; others question whether they are really a low-cost alternative. Congress sought to help settle the dispute with a little-known provision in the Science, State, Justice, Commerce and Related Agencies Appropriations Act of 2006 that required the GAO to compare the costs of confining federal prisoners in BOP and private low and minimum security facilities.

However, after meeting with officials from the BOP and seven private prisons, GAO determined that it was unable to conduct a "methodologically sound" cost comparison because BOP does not collect comparable operational data from private facilities.

BOP attempted to defend its data collection practices arguing that (1) Federal Acquisition Regulations (FAR) do not require comparative cost-analysis and (2) imposing such a requirement on contractors "might" cause higher contract prices.

GAO agreed that FAR do not require comparative analysis. However, "without such analyses," GAO concluded, "it is difficult to know whether BOP is deciding on the most cost-effective alternative for acquiring low and minimum security facilities to confine [prisoners], including whether to contract, build, or expand."

Consequently, GAO recommended that the Attorney General direct the Director of the BOP to "develop a cost-effective way to collect comparable data across BOP and private law and minimum-security facilities...and design and conduct methodologically sound analyses that compare the cost of confining" prisoner in such facilities compared to other alternatives.

Not surprisingly, BOP disagreed with the GAO's recommendation. According to the BOP, there was no point in developing data collection methods to compare the costs of confining prisoners in private facilities with other alternatives because

funding for construction of new low security facilities was unexpected. Further, BOP reiterated that requiring contractors to provide comparable data would potentially increase current contract costs.

In response, GAO agreed that contract costs might increase by requiring the collection of comparable data. However, there was no way to tell, GAO concluded, what those costs were, or whether they "would outweigh the benefit of being able to determine the most cost-effective alternative for confining [prisoners] in low and minimum security facilities."

Finally, it was inappropriate for BOP not to collect comparable data on the assumption that Congress would not provide funding for the construction of new facilities. If com-

parable data was collected and lower-cost alternatives were shown to exist, Congress, GAO explained, may very well choose to provide funding for the construction of new minimum and low security facilities.

Accordingly, GAO stood by its recommendation that the Attorney General direct the Director of the BOP to develop a cost-effective way of collecting comparable data between the BOP and private low and minimum security facilities. Source: GAO Report – 08-06. The report is posted on PLN's website.

From 1996 to 2006, BOP's budget for contract confinement has increased from \$250 million to \$700 million. This is in addition to immigration detention contracted by ICE. ■

\$400,000 Award in Failure to Protect Connecticut Suicidal Prisoner

A Connecticut judge has awarded a prisoner's estate \$403,164.30, finding the City of Hartford police were liable for the prisoner's suicide death. At a bench trial, the Court held the arresting officer had a duty to advise the jail marshals that the prisoner was suicidal.

The lawsuit was brought by the estate of 25-year-old Brian Thomes, who was found passed out on a street shortly after midnight on May 9, 2004. He told the medical technicians who came to care for him, "I've taken a lot of drugs," and "my life is over."

Thomes was taken to a local emergency room, where he stayed overnight. While in the hospital, Thomes created such a commotion that he had to be subdued with a taser by an off-duty police officer. When on-duty officers arrived, they left him in the hospital's care while they went to obtain an arrest warrant for his violent behavior.

Police told the court they believed Thomes would be held for 71 hours at the hospital so a psychological evaluation could be completed. That belief, however, was not in Thomes's medical file. Instead, at 7 a.m., the hospital called the police and told them to either come pick Thomes up or he would be discharged.

The Hartford police officer who

picked Thomes up had no information about his suicidal threats. Thus, the marshals at the Judicial Department lock-up were similarly uninformed when they took Thomes into custody and placed him in a cell out of sight of their "bullpen."

By the end of the day, Thomes was found hanging from the bars of his cell. He used a blanket to hang himself. His estate sued the judicial marshals and the Hartford police for failing to take action to protect Thomes from himself.

It was quickly learned the marshals had no information about Thomes's suicidal tendency. They were dropped from the suit. The matter proceeded to a bench trial against the City. Hartford Superior Court Judge James M. Bentivegna found a duty arose from the special relationship between an arrested person and the arresting agency. That duty was breached when the city police failed to inform the marshals about Thomes's recent suicide attempt.

The Court's \$403,164.30 award is for the loss of life's enjoyment and funeral expenses. Thomes's estate was represented by attorneys Paul M. Iannaccone and Michael C. Jainchill. See *Thomes v. City of Hartford*, Hartford, Connecticut, Superior Court, Case No. HHD-CV-05-5001223-5. ■

BOP Agrees to Provide Wine to Prisoner for Religious Rituals

by Brandon Sample

On September 18, 2008, the Bureau of Prisons (BOP) settled a lawsuit brought under the Religious Freedom Restoration Act (RFRA) for wine during various religious rituals.

Brandon Sample, a federal prisoner and *PLN* contributing writer, sued the BOP under RFRA after he was denied the use of wine during his Sabbath and Passover rituals. Sample, a practicing Jew, claimed that the BOP's refusal to provide him with at least three ounces of Kedem Concord Kal, a low-alcohol content red wine, every Friday night and Saturday morning for the ritual of Kiddush, the sanctification blessing over the Sabbath, and four cups of at least three ounces of wine during the annual Passover seders violated RFRA.


After a round of summary judgment motions and two published opinions by the district court finding that (1) Sample's beliefs were sincere; (2) the BOP's refusal to provide the wine substantially burdened Sample's beliefs; and (3) the BOP had a compelling governmental interest – in the form of maintaining security – for not providing the wine, the parties began discovery to flesh out the remaining question in the case: whether the BOP's outright denial of Sample's request constituted the least restrictive means.

Discovery was extensive. Sample took depositions of both high and low ranking BOP officials, obtained hundreds of documents, propounded numerous interrogatories and request for admission, and was deposed himself. Throughout discovery, BOP continued to insist that the amount of wine Sample sought was too much. BOP claimed quite ridiculously, for instance, that Sample might get drunk from consuming the wine he sought which, by volume, had a mere 3.5% alcohol.

However, following the close of discovery, the parties reached a compromise. BOP would provide Sample with non-alcoholic red wine for his rituals, challah bread each week for the Sabbath, and purchase \$500 worth of materials related to Judaism in return for Sample dismissing the suit. Non-alcoholic wine looks, smells,

and tastes like wine, but only has half of one percent of alcohol after the alcohol is removed through a filtration process.

While the settlement in Sample's case applies only to Sample, it sets the stage for the provision of non-alcoholic wine or beer to other prisoners who use alcohol in their religious rituals given BOP's admission during discovery that non-alcoholic wine does not present a security problem

for the institution as it does not induce drunkenness or alcohol abuse due to its low alcohol content. Sample was ably represented by Adam Nadelhalf of Winston and Strawn, LLP. See: *Sample v. Lappin*, No. 05-596 (D.D.C.) (PLF); *Sample v. Lappin*, 479 F.Supp.2d 120 (D.D.C.); *Sample v. Lappin*, 424 F.Supp.2d 187 (D.D.C.). The settlement is available on *PLN's* website. 

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Nominal Damages for Atlanta Georgia Jail's Ban on Magazines, Books and Newspapers

On April 17, 2008, a Georgia federal court granted a prisoner summary judgment and nominal damages in a lawsuit over a jail policy that barred prisoners from receiving books, newspapers and magazines.

David Robertson was incarcerated in the Fulton County (Atlanta) jail from April 2005 through April 2007. He filed a pro se civil rights suit against the sheriff and another jail official in federal district court under 42 U.S.C. § 1983, challenging a mail policy that prohibited prisoners from receiving newspapers, books and magazines. Robertson sought injunctive and declaratory relief plus nominal, compensatory and punitive damages.

The same mail policy previously had been declared unconstitutional in *Daker v. Barrett*, U.S.D.C. (N.D. GA), Case No. 1:00-cv-1065-RWS on July 22, 2002, but it wasn't changed until January 4, 2008 when *Prison Legal News* filed suit challenging the publication ban. Fulton County Sheriff Myron Freeman took office in January 2008. He alleged that he was unaware the policy was unconstitutional, and changed it as soon as he found out. Both Robertson and the defendants filed motions for summary judgment.

The district court found that Robertson's claims for declaratory and injunctive relief were moot because he had since been released from the jail. The court also found that Robertson was not entitled to compensatory damages, because he had failed to prove any monetary loss and was prohibited from recovering for mental and emotional injuries under the Prison Litigation Reform Act (42 U.S.C. § 1997e(e)).

The court held that Robertson was entitled to summary judgment on liability but only entitled to nominal damages. He could not recover punitive damages because he failed to show evil motive or intent by the defendants, or that they acted recklessly or with callous indifference to his federally protected rights. The court held that the 2002 ruling declaring the jail policy unconstitutional was insufficient notice to the defendants, as were two unrelated lawsuits challenging the same policy filed by another prisoner and *Prison Legal News*. [See: *PLN*, Dec. 12, p.30; March 2008, p.31].

The district court also ignored Robertson's written grievances, calling the copies of them illegible, and his claims that he had verbally complained to jail

staff about the policy. The court found that because the defendants were not employed at the Sheriff's office in 2002 and there was no evidence they knew the policy was unconstitutional prior to being served with Robertson's suit in May 2007, combined with the jail's adoption of a revised mail policy, meant there was no proof of evil intent or reckless indifference.

Thus, the court granted Robertson's motion for summary judgment as to liability and awarded him \$1.00 in nominal damages, while granting the defendants'

motion for summary judgment as to all other damages. See: *Robertson v. Freeman*, U.S.D.C. (N.D. GA, Atlanta Div.), Case No. 1:06-cv-01940-MHS.

PLN's lawsuit against the Fulton County Jail concerning the prior unconstitutional mail policy, filed on October 22, 2007, remains pending on cross motions for summary judgment. The court previously granted *PLN's* motion for a preliminary injunction enjoining the ban. See: *PLN v. Fulton County*, U.S.D.C. (N.D. GA), Case No. 1:07-cv-02618. ■

Utah Sex Offender Internet Registry Statute Violates First Amendment

by Mark Wilson

On September 25, 2008, a federal court in Utah enjoined the enforcement of an amended statute requiring the state's 7,000 registered sex offenders to report all of their Internet identifiers, including user names, passwords and website addresses.

In 2005, a Utah man identified as John Doe was convicted of sex offenses against a minor. He served 13 months in prison and was released without parole or other form of supervision. Due to his conviction, Doe was required to register on Utah's sex offender registry, which "is administered and maintained by Utah's Department of Corrections" (UDOC).

Effective July 1, 2008, the Registry Statute was amended to require sex offenders to provide the UDOC with "any electronic mail, chat, instant messenger, social networking or similar" online identifiers used for Internet communication, as well as the name and Internet address of all such websites used and any passwords associated with an online identifier. The statute made it a felony not to provide this information.

One week before its effective date, Doe challenged the amendment in federal court. He moved for a temporary restraining order (TRO), which the district court granted on June 30, 2008.

Doe then moved for summary judgment. The court found that "Mr. Doe's most compelling constitutional argument is that the Registry Statute abridges his First Amendment right to speak anonymously online."

The court noted the lack of any cases squarely addressing the question before it. "This action appears to be one of the first challenges to a registry's Internet information requirement on First Amendment grounds," the district court observed. Finding itself "in wholly untested legal waters," the court analyzed numerous First Amendment holdings in analogous contexts, and concluded that the First Amendment protects anonymous online speech.

Rather than challenge this conclusion, the Defendants instead argued that as a sex offender, Doe had relinquished that right. Drawing a distinction between sex offenders still serving sentences or on supervision and those who have completed all sentence obligations, the court held that "Doe has not given up his right to anonymous Internet speech because of his status as a sex offender."

The district court found "that the Registry Statute burdens Mr. Doe's right to anonymous online speech," by chilling his First Amendment right to engage in protected anonymous speech. Determining that the amended statute imposed a "content-based restriction," the court applied an "exacting scrutiny" analysis.

Under that standard, the government must have a compelling interest and must employ the least restrictive means of furthering that interest. The court found it was unquestionable that Utah had a compelling interest in protecting children from Internet

predators and investigating online crimes.

It concluded, however, that the statute's disclosure requirements were not the least restrictive means available to meet those goals. Therefore, the court found

that "on its face," the Registry Statute "violates the First Amendment as applied to Mr. Doe." Accordingly, the Defendants were enjoined from enforcing the amended statute against him.

The court found it unnecessary to address Doe's Fourth Amendment and *ex post facto* arguments. See: *Doe v. Shurtleff*, U.S.D.C. (D. Utah), Case No. 1:08-cv-00064-TC (2008 WL 4427594). ■

Texas Awards Prison Phone Contract

by Matthew Clarke

On August 14, 2008, the Texas Board of Criminal Justice (TBCJ) awarded a phone service contract to two companies, Kansas-based Embarq Corp. and Dallas-based Securus Technologies, Inc. Prior to this historic event, the Texas Dept. of Criminal Justice (TDCJ) was the only state prison system in the nation that did not let prisoners make phone calls. The contract was awarded during a TBCJ meeting held at a motel in Austin; prior to the contract award, details of the bids were confidential.

It is now known that Global Tel*Link and Unisys also submitted proposals, with Global Tel offering the lowest bid. But the TBCJ didn't accept the lowest bid; after all, it will be prisoners and their families paying for the phone calls, not the state. Instead, the TDCJ accepted the higher Embarq/Securus partnership bid with rates of 26¢/minute for in-state and 43¢/minute for out-of-state collect calls, and 23¢/minute for in-state and 39¢/minute for out-of-state prepaid calls. The contract will result in the installation of approximately 5,000 phones at 113 prison sites by April 2009, which will be used by about 160,000 Texas prisoners.

To be eligible to make phone calls, prisoners must have no major disciplinary violations within the past 90 days and be working, in school or in a treatment program. Phone calls will be restricted to a prisoner's lawyer, people on the prisoner's

visitation list who agree to receive calls, and free calls to Crime Stoppers. The calls will be limited to a maximum of 15 minutes each and 120 minutes total per month. The identity of the callers will be verified by voice confirmation and a personal identification number.

The seven-year TDCJ prison phone contract is predicted to generate up to \$85 million in annual revenue, of which 40% will be kicked back to the state in the form of "commission" payments. At the end of the contract, Texas will keep an estimated \$28 million worth of installed telecommunications equipment. The first \$10 million in profits paid to the state and half of all subsequent state profits will go to "victims' rights" groups as a blatant bribe to quell their long-standing opposition to phones in Texas prisons.

The idea of allowing prisoners to make phone calls was so politically toxic that candidates for governor in the 1990s swore it would never happen, while prison staff predicted a crime wave should it ever occur. TDCJ officials now say that technological advances permit the

safe use of prison phones by making it possible to positively identify the prisoner making the call and to digitally record and review the conversations. In fact, they anticipate a crime-fighting intelligence bonanza from the calls.

Pressure to install prison phones also came from the proliferation of illegal cell phones among Texas prisoners. According to the prison system's Inspector General, in the 18 months preceding the Embarq/Securus contract, 600 illegal cell phones were confiscated in TDCJ facilities. Prisoners in Texas have received sentences of up to 30 years for possessing contraband cell phones – which is a very harsh wake-up call. ■

Sources: *Austin American-Statesman*, *Houston Chronicle*, *Dallas Business Journal*, www.gritsforbreakfast.com

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Jury Awards Almost \$900,000 to Dallas County Jail Stroke Victim

by Gary Hunter

After a one week trial and a day of deliberation a federal jury awarded Stanley Shepherd \$890,336 when a stroke he suffered, in the Dallas County jail, left him permanently paralyzed.

On October 4, 2003 Shepherd was admitted to Dallas County jail as a pre-trial detainee. He was still awaiting trial on January 22, 2004 when he sought medical attention for weakness and lightheadedness. Shepherd's blood pressure at the time was 189/125 and his pulse was 95. Still, he was sent back to his cell without treatment.

Later that afternoon Shepherd was discovered on the floor of his cell convulsing from what appeared to be a seizure. Guards reported his condition to the medical department. Fifteen minutes dragged by before help arrived. Shepherd's blood pressure was literally off the charts, too high to be recorded by the attending nurse. His pulse was 140.

From the time he was initially discovered it took nearly an hour to have Shepherd transferred, by ambulance, to Parkland Hospital. At 3:42 p.m. hospital attendants recorded his systolic blood pressure at over 700. Shepherd was hospitalized for 26 days after being diagnosed with an acute hemorrhagic stroke and pneumonia. During that time he suffered total paralysis to his left side and had to be fed through a tube.

Upon his release Shepherd was still being tube fed though he was able to receive some soft nourishment orally. Shepherd underwent almost four months of physical therapy before it was determined that "he had reached the maximum level of improvement attainable." Even after therapy Shepherd still suffered from partial paralysis, speech, hearing and sight impairments, impotence, and severe depression accompanied by suicidal ideation.

In his suit Shepherd presented evidence that prior to his incarceration he led an active and productive lifestyle. He also proved that the Central Intake Evaluation Form used by the jail documented that he suffered from hypertension and that he required medication to treat his condition. Yet he received no medication for over a month and a half. Only after repeated attacks of elevated blood pressure was Shepherd able to obtain

treatment in the jail.

Shepherd also presented evidence that nurses at the jail falsified records to make it appear he had received medication when he actually hadn't. In their efforts to cover their tracks nurses recorded administering medication to Shepherd, at the jail, for four days after he had already been admitted to Parkland Hospital.

Shepherd filed his claim against the Dallas jail on July 20, 2005 pursuant to U.S.C. § 1983, in the U.S. District Court for the Northern District of Dallas. Along with the general claim that he was denied proper medical care Shepherd's suit alleges that no policy exists at the jail for incoming prisoners to receive medication for chronic conditions.

Prisoners with chronic conditions are not examined by physicians until their condition becomes critical. The suit also complains of inadequate sick call procedures, inadequate staffing levels, a dearth of qualified physicians and inadequate monitoring of chronically ill patients.

Prior to his collapse Shepherd was being housed in the Lew Sterrett Justice Center which has been at the center of several past controversies. County commissioners recently paid a \$950,000 settlement to the families of three mentally ill prisoners. One portion of the settlement went to the family of Clarence Lee Grant Jr. who died in the jail in 2003.

Grant had been denied his medication for five days prior to his death.

James Monroe Mims went 60 days without medication and was found critically dehydrated and near death after the water in his cell was shut off for two weeks. Several reports indicate that the Dallas County Jail has been well below acceptable standards for at least the past five years. A report released by the U.S. Department of Justice in 2006 attributed numerous deaths and injuries to the substandard conditions of the jail. The county is presently under federal court order to improve conditions.

Before jury deliberations began on August 25, 2008 the judge instructed them that Shepherd had the burden of proving that "the level of medical care provided generally at the jail was so inadequate that it resulted in a serious deprivation of his basic human needs." The judge said that Shepherd also had the burden of proving that the "general conditions of confinement were a cause-in-fact of the damage that he suffered."

After a day of deliberation the jury found that Shepherd had proved both claims and awarded him the money. See: *Shepherd v. Dallas County*, US DC, ND TX, Case No. 3:05-CV-1442-D. ■

Additional Source: *Dallas Morning News*

Alameda County, CA Settles Jail Suicide Suit for \$800,000

Following a mistrial, California's Alameda County settled a wrongful death claim resulting from a jail detainee's suicide for over \$800,000. The federal lawsuit was brought by the prisoner's minor children.

The plaintiffs claimed that as Richard Lebon was being escorted to a jail cell after his arrest on March 10, 2004, he told Deputy Sheriff R.L. Silcocks that he wanted to kill himself. Rather than placing Lebon in a suicide watch cell, Silcocks put him in a regular holding cell at 10:15 a.m. Seven minutes later, Lebon was found hanging by a cord attached to the telephone in the cell.

Lebon died of his injuries at a local

hospital. The wrongful death suit went to a jury trial, and after four days of deliberation with no verdict, the Court declared a mistrial. On November 3, 2007, the County settled for \$500,000. The settlement also provided for attorney expenses of \$84,652, guardian expenses of \$417 and attorney fees of \$217,465, for a total award of \$802,534.

The Court authorized the children's guardian to buy a house for them to live in, and for the house to be sold or transferred to them after they all turned 18. The plaintiffs were represented by attorneys Kimberly Ann Kupferer and Laurance F. Padway. See: *Parrish v. Alameda County*, U.S.D.C. (N.D. Cal.), Case No. 3:05-cv-03140-BZ. ■

Former California Prison Doctor Admits Negligence, Gets Probation; CDCR Medical Care Issues Still Unresolved

by John E. Dannenberg

Dr. Bonifacio Esperanza, a physician formerly employed by the California Department of Corrections and Rehabilitation (CDCR), was accused of gross negligence by the Medical Board of California for his alleged mistreatment of seven prisoners at Centinela State Prison. The Medical Board filed a formal complaint against Esperanza in Administrative Law Court in July 2008.

Esperanza, 66, retired from the CDCR in 2007 pending termination proceedings; he is presently in private practice. He obtained his California medical license in 1980 following his graduation from Far Eastern University in the Philippines.

One of the Medical Board charges stemmed from a July 2006 case in which a 55-year-old prisoner complained of chest pain and shortness of breath. Even though a nurse gave him aspirin and oxygen, the prisoner's electrocardiogram detected heart beat irregularities. Esperanza, who was on call, neither examined the prisoner nor sent him to an outside hospital for emergency care.

In a second case, Esperanza had removed a fistula from the buttocks of a 20-year-old prisoner but failed to provide follow-up treatment for four months despite the prisoner's constant complaints. He never sent the prisoner to a surgeon; the prisoner subsequently developed an infection that spread throughout his lower body.

Other alleged negligent acts by Esperanza included prescribing antibiotics that were not justified and failing to order medical tests that were justified. He also failed to

screen a prisoner for sexually transmitted diseases despite signs of infection.

On December 18, 2008, the Medical Board placed Esperanza on three years probation after he admitted providing negligent care to state prisoners. During his probationary term he cannot supervise physician assistants and must enroll in education classes on medical record keeping and prescribing drugs.

In an unrelated incident, six CDCR doctors at the Salinas Valley State Prison were named in a 31-count criminal indictment that was unsealed on November 25, 2008. The physicians, including Charles Lee, Randy Sid, Pedro Eva, David Hoban, Wade Exum and Mark Herbst, are accused of billing the state for medical services that were never provided to prisoners.

Louis Patino, communications director for the CDCR's federal healthcare Receiver, stated "These are exactly the kinds of problems we are trying to fix." The Receiver was appointed by U.S. District Court Judge Thelton E. Henderson to curtail cruel and unusual punishment resulting from grossly deficient medical care in the CDCR that was termed "broken beyond repair." Although California has pledged \$7 billion to build and upgrade prison medical facilities, none of that money has yet been allocated.

Healthcare Receiver J. Clark Kelso is demanding that \$8 billion be released from the state treasury to commence such construction. After Kelso's request for an initial \$250 million down pay-

ment was refused by state officials, Judge Henderson threatened to hold Governor Schwarzenegger and the state controller in contempt. The California Attorney General's office appealed to the Ninth Circuit, which intervened on November 7, 2008 and stayed Judge Henderson's order pending further hearings by the appellate court. See: *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), Case No. 3:01-cv-01351.

Even though the CDCR must answer to a federally-appointed healthcare Receiver, the California Court of Appeal recently held that prisoners may still maintain individual state court actions against negligent prison medical staff – which, given physicians like Dr. Esperanza, may be a necessary option. [See related article on *In re Estevez*, this issue of *PLN*.]

Sources: *San Diego Union-Tribune*, *Sacramento Bee*

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No Private Cause of Action for Businesses Complaining that Competitor Unfairly Used Prison Labor

by John E. Dannenberg

The Washington Water Jet Workers Association ("Water Jet") sued the Washington Department of Corrections (WDOC), claiming the WDOC had illegally contracted with a water jet firm, MicroJet, thereby violating the Washington state constitution's prohibition on contracting for prison labor.

MicroJet had set up shop at the Monroe Corrections Center, where prisoners were employed at below-market wages. Although the Washington Supreme Court eventually held that WDOC's below-market contracting of prison labor violated state law, it remanded to the trial court to determine whether Water Jet could maintain a private cause of action against WDOC for its transgressions.

Water Jet had sued for damages, arguing that Washington state law RCW 72.09.100(1) created a duty to protect businesses from unfair competition, such as prison laborers who were not paid the local prevailing wage. Water Jet also claimed violation of rights under 42 U.S.C. § 1983, denial of due process of law, and a tort claim for violation of the state constitution. However, the trial court ruled that absent establishing that the WDOC had intentionally interfered with a contractual business relationship, used improper means or acted with improper purpose, Water Jet could not recover damages.

In 1981, Washington's legislature granted WDOC the authority to create work programs that included bringing outside contractors onto prison grounds to use prison labor. To qualify, the contractors had to pay wages comparable to those paid to local non-prisoner employees. In 1995, MicroJet arranged to use space at Monroe (with free rent and discounted utilities), with the WDOC acting as trustee for the prisoner workers.

In 1999, Water Jet sued WDOC and MicroJet for damages resulting from alleged unfair competition in the free market of water jet-related industries. [See: *PLN*, Feb. 2000, p.13].

The State Supreme Court eventually found that RCW 72.09.100(1) violated Washington's constitution, Article II, § 29, which prohibited the use of prison labor in private industry. See: *Washington Water Jet Workers Ass'n v. Yarbrough*, 151

Wash.2d 470, 90 P.3d 42 (Wash. 2004) [*PLN*, Dec. 2004, p.22].

As a result, in 2004 the WDOC began shutting down its joint ventures with prison industry contractors. However, in 2007, Article II, § 29 was amended by referendum to allow prisoners to work in Class I industry programs.

Nonetheless, the seven firms suing under Water Jet (with Talon Industries as the lead plaintiff) claimed they were entitled under the former law to damages from the WDOC-MicroJet contract, based largely on the below-market wages that MicroJet had paid for prison labor.

However, Water Jet had the burden of showing that the legislature had enacted RCW 72.09.100(1) for the "especial benefit of private businesses," or in other words, to favor certain contractors.

In affirming the trial court, the Washington Court of Appeals held that precedent favored the WDOC in this case. Under a parallel federal law, the Ashurst-Summers Act (18 U.S.C. § 1761), no private cause of action exists. Comparing the line of cases interpreting

Ashurst-Summers, the appellate court found that RCW 72.09.100(1) was created only with the affirmative intent to provide a comprehensive prisoner work program. Accordingly, it did not meet the test of having an illegal purpose of protecting only private businesses, nor did it provide for a private cause of action for damages.

For those reasons, the Court of Appeals ruled that none of Water Jet's statutory or constitutional challenges survived scrutiny, and thus upheld the denial of all damage claims. See: *Talon Industries v. Washington State Dept. of Corrections*, Washington App.Div.1, (unpublished); 2008 WL 2640146.

The Prison Industries Enhancement act purports to protect private businesses by requiring that prisoners manufacturing goods transported in interstate commerce be paid at least the comparable prevailing wage, yet after 30 years, PIE employed prisoners are not paid the prevailing wage in any industry that *PLN* is aware of. And with rulings such as this one, it is unlikely that they will. ■

More Damages, Costs & Attorney Fees Awarded in NH False Disciplinary Case

Three prisoners involved in two federal civil rights lawsuits against officials of the Hillsborough County House of Corrections in New Hampshire (the jail) were awarded nominal, compensatory and punitive damages plus attorney fees and costs.

On July 14, 2002, jail guard Cesar Rivas, working alone in a medium-security housing unit, radioed in an alarm. He claimed to have been rushed or cornered by a group of at least twenty prisoners. Rivas picked out nine pre-trial detainees from the locked-down unit whom he claimed were involved in the incident. The nine were placed in solitary confinement.

The conditions in solitary were especially harsh, and included denial of all property except a mattress, sheet, pillow and prison uniform. Prohibited items included legal papers, writing instruments and personal hygiene items such as soap

and toilet paper. The water supply to the cells was shut off and the nine prisoners had to rely on the largess of guards to turn it on briefly so they could wash their hands or flush the toilet.

They were subjected to up to five in-cell strip searches a day in which they were often required to first handle their groins, armpits and buttocks, then place their fingers in their mouths. Frequently they were not allowed to wash their hands following a strip search and prior to eating.

The prisoners in solitary were placed on a "three-day rotation," only let out of their cells once every three days for a quick shower while wearing shackles. They were not allowed telephone calls, mail or non-attorney visits, and their food was half the normal portion. The conditions were especially onerous for Palacio Paladin, a large man who lost 100 pounds while on the three-day rotation; he also suffered pain, cuts and bruises from the too-small

shackles used during the rare occasions he was allowed out of his cell.

To make matters worse, all nine prisoners claimed, and presented evidence, that the incident involving Rivas had never actually occurred but was invented by Rivas and prosecuted by jail disciplinary officer Theresa Pendleton. Pendleton allegedly ignored proof in the prisoners' favor and falsified evidence against them, relying on information from a confidential informant who later testified he didn't see a confrontation between the prisoners and Rivas.

Jail prisoners Palacio Paladin and Richard West filed a civil rights action under 42 U.S.C. § 1983 in federal district court, alleging false disciplinary charges. Another prisoner, Antonio King, filed a separate lawsuit. Three other jail prisoners settled their claims against the county, while prisoner Jason Surprenant won a \$20,503 award against Rivas and Pendleton in 2004. [See: *PLN*, Aug. 2005, p.17; June 2006, p.26; July 2007, p.28].

Following a jury trial, Paladin and West were awarded \$1.00 in nominal damages and \$50,000 in punitive damages against Pendleton. Paladin was awarded \$50,000 in compensatory damages and West received \$1.00 in nominal damages against jail Superintendent James O'Mara, Jr., who had implemented the three-day rotation policy. The jury found in favor of Rivas.

Paladin and West moved for attorney fees and costs, while the defendants moved for remittitur of Paladin's compensatory award, seeking to have it reduced to \$1.00 in alignment with West's award.

The district court held there was ample evidence to support the compensatory damage award of \$50,000, and evidence that Paladin had suffered more than West and presented a more sympathetic figure to the jury, so the difference in the awards did not require remittitur. The court granted the full requested amount of \$33,952.50 in fees and \$1,247.32 in costs for representation by attorney Michael J. Sheehan, noting his expertise in and willingness to take on prisoner litigation.

A separate jury initially awarded King \$1.00 in nominal damages and \$500 in punitive damages against Rivas, finding in favor of O'Mara and Pendleton. The court granted King's motion for a new trial on compensatory damages since the verdict was against the weight of the evidence. Following retrial, the jury awarded

King \$5,000 in compensatory damages for a total award of \$5,500.

Because King had refused a \$10,000 plus costs and attorney fees unapportioned settlement offer prior to trial, Rivas moved for costs and fees he incurred after the offer was rejected pursuant to Rule 68, Federal Rules of Civil Procedure. The court held that the \$10,000 unapportioned offer to settle with all defendants could not be compared with King's \$5,500 award against a single defendant. Therefore,

Rivas' motion was denied.

On March 26, 2008, the district court awarded costs to O'Mara and Pendleton as prevailing parties, and costs and attorney fees to King as the prevailing party against Rivas. The amounts were not specified; Rivas has since appealed the fee ruling. See: *Paladin v. Rivas*, U.S.D.C. (D.NH), Case No. 05-cv-079-SM (2007 WL 2907263) and *King v. Rivas*, U.S.D.C. (D.NH), Case No. 04-cv-356-SM (2008 WL 822236). ■

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Writ Writer: One Man's Journey for Justice

A co-production of Passage Productions and the Independent Television Service

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Directed by Susanne Mason; 2008, 60 Minutes, \$34.98 (personal use)

<http://www.writwritermovie.com/index.html>

Reviewed by David Preston

De profundis clamavi ad te, Domine.
[From the depths I cry out to thee, O Lord]

With one minor change, the opening line of Psalm 129 could have been Fred Arispe Cruz's personal motto. Cruz languished in the depths of the Texas prison system for nearly a decade before a court finally heard his cry and set him free. In the process, he almost singlehandedly invented a new legal institution: the "jailhouse lawyer." Susanne Mason's documentary, *Writ Writer*, tells Cruz's amazing story using excerpts from his autobiography, interviews with fellow prisoners, and commentary from some of the attorneys who eventually took up Cruz's cause.

In the Deep South of the early-1960s, the idea that a lone prisoner, unaided by a legal defense fund or team of media-savvy lawyers, could outflank a brutal prison warden and his minions would have seemed preposterous enough. That this prisoner could have been someone like Cruz—product of the San Antonio barrios, high school drop-out, petty thief, junkie—would have been simply incredible. Indeed, Cruz's trip was a long and strange one. "When I tell you what I did to get here," he cautions in the opening scene, "you probably wouldn't believe me . . ."

In 1960, Cruz was charged with a robbery he hadn't committed, and when he refused to cop a plea his case went to trial. Cruz wanted to fight the case vigorously; unfortunately, his court-appointed attorney didn't share his enthusiasm and mounted only a half-hearted defense. Cruz was found guilty and sentenced to a retaliatory 50 years in state prison. Determined to fight on, but with few weapons at hand, Cruz had a choice to make. "I knew [that] if I wanted to appeal and I couldn't pay a lawyer . . . I'd have to do it myself," he observed.

For Cruz, doing it himself meant filing a writ of habeas corpus with a federal appeals court. No walk in the park even today, in Cruz's era any prisoner filing a habeas writ was taking his life in hand, as

this film makes abundantly clear. But first, some legal history.

The term "habeas corpus" derives from a Latin expression meaning, "you may have the body, subject to examination." A habeas writ requires that the government demonstrate that it has a reason (such as a valid criminal complaint) for detaining the appellant. As a legal precept, habeas dates to the early days of Anglo-Saxon common law and was first codified in the Magna Carta. It is also included prominently in United States Constitution—in Article I, Section 9—and can only be suspended during times of national emergency.

A habeas writ is often the simplest and most effective way for a prisoner to secure his release from detention. Such writs are commonly used to challenge detentions without trial—as with those of US prisoners being held in Guantanamo Bay, Cuba—request new trials, or request release from confinement for prisoners who have already served their sentences. Ideally, a prisoner's lawyer would be the one to file a habeas writ, but, in the absence of competent or affordable legal representation, a prisoner may write and file a writ on his own behalf, which is what Cruz did. Alas, writs of habeas corpus are so rarely granted they are akin to winning the lottery: it happens, but not often.

Almost immediately following his conviction in 1961, Cruz began teaching himself the law and filing habeas writs for himself and his fellow prisoners. Some of Cruz's writs were in neat handwriting on prison stationery; others were not so dainty. When Cruz was tossed into solitary confinement for "agitating" or possessing "contraband literature" (that is, the Constitution), he was forced to scrawl his writs in blood or charcoal across a piece of toilet paper or some other scrap of paper.

Prison authorities regularly beat Cruz for his trouble and suppressed his writs by confiscating or destroying them, claiming (wrongly, of course) that the Constitution


did not apply in Texas prisons. One of Cruz's writs finally found its way onto a judge's desk, however, and though that request for a new trial was ultimately denied, the die was cast. From then on, the beatings and other punishments only strengthened Cruz's faith in the final outcome even more.

On his second appearance in federal appeals court, Cruz was found innocent of the robbery charge. He was released on March 9, 1972, but the implications of the writ writing tradition he'd established did not end with his release. A separate suit he had helped to inspire (*Ruiz v. Estelle*) led to a series of landmark reforms in prisons across the country and established a prisoner's right to legal assistance and protection behind bars, including the right of self-representation.

Writ Writer is one of those splendid documentaries that watches more like a Hollywood movie. And in fact the resemblance to one movie in particular (*Cool Hand Luke*) is eerie. In Cruz's story, though, the bad guy isn't some corny, strop-wielding hick, but rather real-life warden C.C. "Bear Tracks" McAdams (the mother of all bullies), with Texas Department of Corrections director Dr. George Beto playing a supporting role as the "brains" behind the operation. Interviews with McAdams and several of his victims (all associates of Cruz) create a chilling image of the Texas prison system as a modern slave state.

There's even an extracurricular love story too, complete with sordid details.

Notwithstanding the happy ending to Cruz's prison story, the man was a fragile and complicated hero, and *Writ Writer* doesn't gloss over this fact, as it easily might have. The essential tragedy of Cruz's life was not the time he wasted inside the system, but the time he wasted outside. Still, *Writ Writer* is essentially the story of a heroic man, a man who, rather than merely cursing the darkness, lights one candle.

What a beacon that faint flicker grew to be. 

Ex-Mayor Returned to Prison After Misleading BOP to Enter Drug Program

by Brandon Sample

Bill C. Campbell, the former mayor of Atlanta, Georgia, was returned to federal prison after it was discovered he had lied to gain entrance into the Bureau of Prisons' (BOP) Residential Drug Abuse Program (RDAP). Successful completion of the RDAP results in a sentence reduction of up to one year.

Campbell, who was sentenced to 30 months for tax evasion, graduated from the RDAP on December 7, 2007. Shortly thereafter he was transferred to a halfway house. He was scheduled to be released four months early on June 23, 2008 for completing the RDAP, but was sent back to prison after federal prosecutors in Atlanta protested.

Throughout Campbell's criminal trial, he consistently maintained that he did not suffer from a drug or alcohol abuse problem. According to Campbell's Presentence Investigation Report (PSI), for example, he drank "alcoholic beverages in order to participate in toasts. He has not otherwise drank alcohol and just does not like the taste of it." Campbell's attorney had stated he had "no health or substance abuse problems."

Nevertheless, shortly after entering prison, Campbell sought treatment for being a "champagne alcoholic." Initially he was denied entrance to the RDAP. But

after pleading for "help that the program would provide," he was allowed to enter the program by Beth Weinman, the BOP's National RDAP Coordinator.

To support his substance abuse claims, Campbell had submitted letters from two physicians – a cardiologist who later said his notes concerning Campbell's treatment had been lost, and an anesthesiologist who was a former college classmate of Campbell's.

Federal prosecutors sought reevaluation of Campbell's eligibility for the RDAP, arguing that his newly-asserted alcohol problem was contrived. "Not a single witness gave the slightest indication in an interview or in testimony that Mr. Campbell had an alcohol abuse problem," they stated.

Upon reexamination, the BOP found Campbell's claims of substance abuse to be "practiced and less than genuine." Accordingly, he was returned to prison to serve the remainder of his sentence without a reduction for completing the RDAP.

Campbell then filed a habeas petition, arguing that the BOP had exceeded its authority in rescinding his

early release. A week later, though, he voluntarily dismissed the petition, and the federal judge unsealed records in the case. See: *Campbell v. Bureau of Prisons*, U.S.D.C. (S.D. Fla.), Case No. 1:08-cv-20636. Campbell was subsequently released from custody in October 2008 after completing his sentence.

According to a recent *Forbes* article, a number of white collar federal prisoners have availed themselves of early release by completing the RDAP despite not having documented substance abuse problems, including former ImClone CEO Samuel Waksal, who received a nine-month sentence reduction. Waksal was scheduled for early release on February 9, 2009.

Last year, approximately 18,000 federal prisoners were enrolled in the RDAP with another 7,000 on a waiting list. ■

Sources: *Atlanta-Journal Constitution*, *www.forbes.com*

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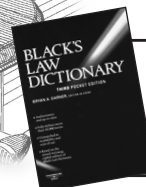
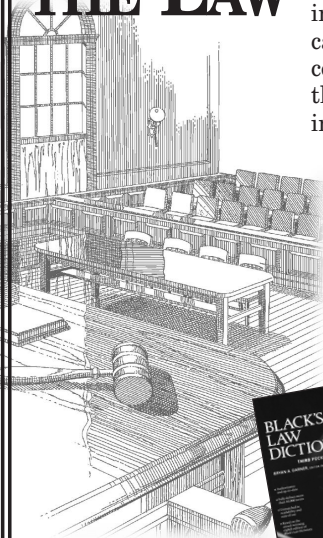
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Prisoner Litigation Swamps California Eastern District Court; Ninth Circuit Recruits Other Judges to Help

by John E. Dannenberg

The U.S. District Court, Eastern District of California, has reached a crisis stage due to excessive caseload, resulting principally from prisoner filings. Each of the Eastern District's judges handled an average of 420 prisoner petitions during fiscal year 2007, up to four times the number in California's three other federal districts.

To break this legal logjam, the Ninth Circuit Court of Appeals has taken the unprecedented step of asking federal district judges from Montana to Hawai'i to take on prisoner cases from the Eastern District.

With jurisdiction over 19 of California's 33 state prisons that house approximately 100,000 prisoners, as well as several federal facilities, the Eastern District is a hub for prisoner litigation. Indeed, 2,521 of the 5,480 cases filed in the court in 2007 – some 46 percent – came from prisoners. Such cases often consume excessive court time as they usually involve handwritten pleadings filed by prisoners with little legal acumen.

Presently over 2,500 prisoner cases are pending in the Eastern District, including civil rights lawsuits, death penalty appeals and habeas petitions. At least 60 cases have been on the court's docket for more than three years. Additionally, hundreds of lifer habeas actions challenging state parole denials bloat the court's workload.

The Eastern District currently assigns 1,200 cases per judge, including federal criminal prosecutions, immigration cases and civil lawsuits. The resultant delays in federal criminal trials, in turn, adversely impact the local criminal justice system because many federal pre-trial detainees are housed at the already-overcrowded Fresno County Jail.

"Judges bear the burden of this heavy caseload, but it is the citizens of the Eastern District who must suffer the delayed administration of justice," stated Eastern District Chief Judge Anthony Ishii.

Congress has added only one temporary judge to the Eastern District court since 1990 – a position that expired in 2004 – even though the number of prisoner filings has skyrocketed. Over the same period of time, California's three

other federal district courts received 13 new judgeships. Although a bill has been introduced in Congress to add four additional judges to the Eastern District (SB 2774), the legislation remains pending in the Senate with no action taken since last July.

On July 29, 2008, the Judicial Council of the Ninth Circuit announced plans to assist the Eastern District court with its "crushing influx of cases." The Council's solution was to farm out excess caseload to other districts within the Ninth Circuit. Accordingly, some California prisoners

may soon find their cases being heard by judges in such remote outposts as Guam, the Mariana Islands, Alaska and Hawai'i, as well as in six other western states. The Council said it would also "promote mediation and other means" to resolve prisoners' lawsuits.

Judge Ishii called the Ninth Circuit's solution helpful, "at least in the short term." But, he said, "the bottom line is we need more judges." ■

Sources: *Fresno Bee*, *National Law Journal*, www.thomas.gov, www.metnews.com

Ninth Circuit: Orange County Jail PLRA Injunction May Not be Terminated as to Ongoing Violations

The Ninth Circuit U.S. Court of Appeals has held that evidence of ongoing American with Disabilities Act (ADA) violations and inadequate access to exercise and religious services precluded Orange County, California jails from obtaining termination of injunctions under the Prison Litigation Reform Act (PLRA).

Following earlier rulings in U.S. District Court for the Central District of California in *Pierce v. County of Orange*, Case No. CV-01-00981-GLT and *Stewart v. Gates*, Case No. CV-75-03075-GLT, the district court had ordered fourteen findings of relief from conditions of confinement at Orange County jails.

The *Stewart* orders required receipt of reading materials by mail (newspapers, magazines and paperback books), as well as mattresses and beds, access to law books, a population cap, eight hours of uninterrupted sleep per night, blankets, telephone access, inter-jail communication with "jailhouse lawyers," and at least 15 minutes to eat a meal.

As to Administrative Segregation ("Ad Seg") prisoners, the court ordered access to religious services, a day room, exercise and visitors. At issue was the County's request to terminate those orders pursuant to 42 U.S.C. § 3626 on grounds that the jail was in compliance.

The *Pierce* court found that because

all of the *Stewart* orders had been or were in the process of being complied with (i.e., the County was "moving toward" compliance), no further court oversight was necessary and the motion to terminate the injunctions would be granted. On appeal, the Ninth Circuit consolidated the *Pierce* and *Stewart* orders and held that pursuant to § 3626(b)(3), ongoing ADA violations and inadequate access to exercise and religious services for Ad Seg prisoners required ongoing court oversight.

The ADA violations centered on structural barriers for disabled detainees, particularly mobility-impaired and dexterity-impaired prisoners. A survey of the areas used for housing such prisoners revealed inadequate toilets, sinks, showers, hot water dispensers, telephones and water fountains, notwithstanding that jail officials claimed they were adequate. Upon questioning, jail compliance supervisor Ron Bihner conceded that many areas were not wheelchair accessible, among other deficiencies. Accordingly, the Ninth Circuit found the district court had erred in granting termination of those provisions of the *Stewart* injunctions.

In reviewing Ad Seg prisoners' access to exercise and religious services, the appellate court found such prisoners received only 90 minutes of exercise per week, less than the two hours per week required under *Stewart*. It further found

this was based upon punitive intent and violated constitutional standards. As to religious services, access was completely denied. When prisoner Fermin Valenzuela complained, he was told by jail staff that “prisoners in Ad Seg don’t have it com-

ing.” Deputy Brian Nissen testified that he had “never seen one of our Ad Seg inmates” in the chapel. Other jail employees confirmed this total denial of access to religious services.

Accordingly, the Ninth Circuit re-

versed the district court’s termination of the injunctions issued in *Stewart* and remanded the case for reconsideration consistent with legitimate jail security needs. See: *Pierce v. County of Orange*, 526 F.3d 1190 (9th Cir. 2008), *cert. denied*. ■

Kitsap County, Washington Jail Settles Public Records Act Suit for \$125,000

On May 16, 2008, the Kitsap County Sheriff’s Office agreed to pay \$125,000 to a former prisoner for violations of Washington’s Public Records Act.

In September 2006, Jeffery McKee, then a prisoner at the Kitsap County Corrections Center, submitted a Public Records Act request to Kitsap County for a copy of a video taken of McKee while in a “crisis cell” at the jail. McKee sought the video in order to prove that he was mistreated.

After Kitsap County failed to produce the video, McKee sought assistance from Greg Overstreet, then the Open Government Ombudsman with the Washington State Attorney General’s Office. Overstreet contacted Kitsap County about

McKee’s request, but failed to receive a response. Overstreet advised McKee that he could seek relief in superior court.

In October 2007, McKee, with the assistance of Hank Balson, an attorney with the Seattle-based Public Interest Law Group, filed suit against the county.

Initially, the county responded to the suit, arguing that the video had been taped over. However, after further investigation, it was determined that the crisis cell video – which would have shown McKee being mistreated – had existed when McKee filed his Public Records Act request. The video was later destroyed in accordance with the jail’s retention policies before it could be disclosed.

“The staff member did not check to ascertain whether or not the video segment

documenting a particular area of the jail in question had actually been taped over,” Kitsap County Sheriff Steve Boyer said. “As such, we were technically not in compliance.”

Balson, McKee’s attorney, was surprised by the county’s admission. “I’ve never had a case where a public entity admitted that, ‘Yes, there were records they should’ve disclosed,’ but didn’t,” Balson said.

The county agreed to settle the suit for \$125,000. See: *McKee v. Kitsap County Sheriff’s Office*, No. 07-2-12755-6 (Pierce County Superior Court). The settlement and complaint in the case are posted on PLN’s website. ■

Additional source: *Kitsapsun.com*



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Corpus Christi Pays \$50,000 to Settle Jail Prisoner's Excessive Force Claim

The City of Corpus Christi, Texas, agreed to settle an excessive use of force claim brought by a former detainee at the City Detention Center (CDC) for \$50,000.

The claim arose from events that are alleged to have occurred after the February 18, 2006, arrest of Domingo Hernandez Leal. While arguing with his brother, Leal was taken to the ground, pepper sprayed, and arrested by Corpus Christi police.

After arriving at CDC, Leal says he asked for medical attention to treat his asthma. He claimed that he was, instead, taken to a small cell and beaten by guards Roland Arias and Jacob Garza. When released from CDC, Leal went to a local hospital and was treated for three fractured ribs.

In their defense, the guards say Leal was drunk, he put up a fight during his arrest, and he was moved from a large cell

to a small one because he caused a commotion. Nonetheless, on April 30, 2008, the City settled the claim for \$50,000. Leal claimed he incurred medical bills of \$3,000, lost three months work at \$12 per hour as a construction worker, and suffered pain from his injuries. He was represented by San Antonio, Texas, attorney Christopher J. Gale. See: *Leal v. City of Corpus Christi*, USDC, S.D. Texas, Case No. C-07-367. ■

Los Angeles Sheriff Department Report: Prisoner Lawsuits Slowed, But Payouts Grew

by John E. Dannenberg

In its July 2008 25th semi-annual report, the Los Angeles County Sheriff's Department (LASD) reviewed prisoner litigation against the county in the six-year period from 2001-2007. While the report noted a "welcome reduction" of new cases, suggesting that newer jail management practices had been fruitful, it observed that the total dollar amount of settlements had nonetheless increased.

The report compared two three-year intervals: 2001-2003 and 2004-2007. In the earlier period, the number of jail-related civil lawsuits filed averaged 300 per year, while the corresponding total payout was \$9.9 million. In the later interval, the average number of new suits dropped to 233, but payouts rose to \$10.8 million. Doing the math, the corresponding dollar cost increase per case filed grew from \$33,021 in 2001-2003 to \$44,804 in 2004-2007. While the report noted wide swings in individual years, this was attributable to the timing of settlements, not to the incidence of malfeasance. Nonetheless, the drop from 300 to 233 new suits filed per year was taken by LASD as affirmation that newer policies to reduce liability were working.

Examining the cases LASD paid out on, the report first noted that in 2001-2002, 50% of the cases were lost by LASD (either at trial or by settlement), while in 2006-2007, only 37% were lost. However, the subset of LASD prisoner suits linked solely to excessive-force complaints trended downward over the six years.

First, the number of such new cases per year declined from 67.67 per year in

2001-2003 to 62 in 2004-2007. The number of those cases per year that prisoners won dropped from 30.33 to 22.67 over the two intervals. This was attributed to LASD taking more cases to trial and winning in court. Of the 67 new cases in 2001-2002, LASD won only five at trial, whereas in 2006-2007, successes grew to seven. And payouts for the subset of excessive-force suits dropped from \$4.2 million per year in 2001-2003 to \$2.6 million per year for 2004-2007.

Specifically reviewing fiscal year 2006-2007, the report noted that LASD paid out at least something in 69 of the 233 cases, or 30%. 62 of those cases were settled, while seven went to judgment for the prisoner. Of the 69, 17 paid out over \$100,000. The average payout was \$161,000, skewed upwards by one high award of \$2.8 million. Of the 17, six involved in-custody injury or death. Other cases included auto liability, out-of-custody excessive force, sexual assault and harassment. The six highest settlements totaled \$5.635 million, or 51% of all LASD jail civil liability claims paid in 2006-2007; sexual assault cases totaled another \$2.8 million (25%).

Of most interest to *PLN* readers are the in-custody death and injury settlements. A 1998 case of a Long Beach man dying of a micro-fracture of the neck and ruptured aneurism settled for \$110,000 after the question of whether he died from a choke hold by police went unanswered. In 2002, a 71-year-old man with a long history of heart disease died in his cell after complaining of shortness of breath

and presenting symptoms of a crackling sound in his lungs. Jail personnel did not transfer him to the hospital. Failure to timely respond resulted in a \$475,000 settlement.

In another hypertension case, in 2003, LASD nurses examined a 62-year-old prisoner and found him in a state of total confusion. He received no medical follow-up and died of a heart attack during a visit with his wife two weeks later. The settlement here was \$700,000. A prisoner doing 180 days was beaten by four other prisoners over a property dispute. Lack of adequate police coverage was blamed for the man's eventual permanent severe brain injuries. He settled for \$750,000.

In the case of a 41-year-old child molester who was brutally assaulted in a dorm in the Men's Central Jail in 2003, also resulting in life-long permanent brain injuries, the settlement was \$2.8 million - by far the Jail's largest for an in-custody injury. And in a case reported earlier in *PLN* where a Men's Central Jail prisoner was beset upon brutally by 29 high-risk prisoners in an unattended room, the settlement was for \$800,000.

It would appear that failure to properly isolate known susceptible prisoners from acknowledged violent assaulters in the Los Angeles County Jails is still the leading source of the Jail's liability. Not reported was the added cost to the county of its own litigation expense in all the hundreds of annual cases. See: *25th Semiannual Report of the Los Angeles County Sheriff's Department*, July 2008. The report is posted on *PLN*'s website. ■

Washington State Deputy Sheriff Not Entitled to Quasi-Judicial Immunity

The Washington Court of Appeals held that a deputy sheriff who was negligent in transporting a prisoner from court to jail was not entitled to quasi-judicial immunity.

Anthony Reijm was taken into custody on the order of Skagit County District Judge Stephen Skelton after failing to abide by certain previously-imposed conditions of his release. Sheriff's Deputy Deanna Randall arrived to take Reijm to jail.

Rather than place Reijm in handcuffs, Randall, who was at least a foot shorter than Reijm, put her hand on his elbow and escorted him on the short walk from the courtroom to the jail. Along the way, Reijm broke free and knocked down John Lallas, a security guard at the courthouse. Reijm was later discovered hiding in a stairwell a few blocks away. Lallas was taken to a hospital via ambulance.

Lallas sued Randall and Skagit County for damages related to the injuries he sustained when Reijm escaped.

The defendants contended that they could not be sued because Randall was acting as "an arm of the court" when she carried out Judge Skelton's order to take Reijm into custody. The trial court agreed, holding the defendants were entitled to quasi-judicial immunity. Lallas appealed.

The doctrine of judicial immunity is designed to protect judges from harassing lawsuits by litigants displeased with a judge's decisions. Immunity under the doctrine is absolute; it protects judges who act within their judicial capacity from liability for both willful misconduct as well as negligence. Quasi-judicial immunity is an extension of that doctrine. It attaches to "persons or entities that perform functions so comparable to those performed by judges that they ought to share the judge's absolute immunity while carrying out those functions." *Lutheran Day v. Snohomish County*, 829 P.2d 746 (Wash. 1992).

Applying those standards to the facts in this case, the appellate court

concluded that the defendants were not entitled to quasi-judicial immunity. Randall performed an executive – not judicial – function when she "chose to take Reijm into custody without using handcuffs," the Court of Appeals explained. Accordingly, the trial court's order of dismissal was reversed. See: *Lallas v. Skagit County*, 144 Wash.App. 114, 182 P.3d 443 (Wash.App. Div. 1, 2008).

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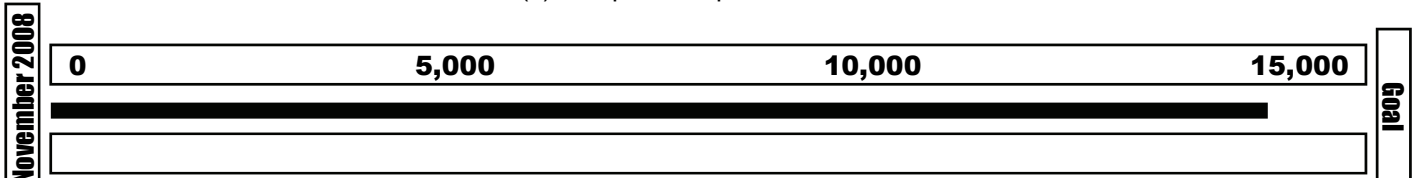
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Wisconsin Claims Board Awards Almost \$110,000 for Wrongful Rape Conviction, Attorney Fees

In 1990, Anthony Hicks was convicted of raping a woman who lived in his apartment building. He was sentenced to 19 years in prison. Central to the state's case were pubic hairs found on the victim which were "visually matched" to Hicks. Hicks maintained his innocence and, after his conviction, convinced Madison, Wisconsin attorney Stephen Hurley to take his case.

Hurley claimed that Hicks' trial lawyer, Willie Nunnery, never sought DNA testing of the hairs. Hurley secured a DNA test that excluded Hicks. The state appealed, but the DNA findings were upheld by the Wisconsin Supreme Court

in 1996. Hicks was released the following year after the state announced it would not seek another trial.

Hicks filed suit against Nunnery for failing to obtain a DNA test, and won a jury award of \$2.6 million. Nunnery appealed and the judgment was overturned when the court ruled that Hicks had not proven his innocence. A confidential settlement between Hicks and Nunnery in December 2004 precluded a retrial in the suit.

Meanwhile, Hicks had a wrongful incarceration claim pending before the state Claims Board; the claim was apparently held in abeyance while his lawsuit against Nunnery was pending. On December 13,

2006, the Board finally awarded Hicks the statutory maximum in damages – \$25,000 – plus \$53,060 in attorney fees. That was about half the fees that Hurley had requested for representing Hicks.

Upon a petition for rehearing, the Claims Board was asked to reconsider the amount of attorney fees. On December 4, 2007, the Board awarded fees to Hurley in the increased amount of \$78,591.94. The Claims Board also awarded \$6,175.70 in fees to Jeff Scott Olson, the attorney who litigated Hicks' state claim. See: *In the Matter of the Claim of Anthony Hicks*, Wisconsin Claims Board, Case No. CB-07-0001. ■

Behavior Modification Training to Become Part of Washington State DOC

Governor Chris Gregoire signed Senate Bill 6400 into law on March 20, 2008. The bill enacts a revolutionary concept designed to correct what politicians perceive to be, the morally corrupt character of its state prisoners.

The behavior bill is intended to help men and women prisoners develop prosocial behaviors that will enhance their successful reintegration into society as law abiding citizens. Educators and counselors are to be employed to teach various skills such as managing emotions, religious tolerance and ethics, and morally acceptable behavior.

Provisions of the behavior bill include the identification and integration of already existing state services, the improved collaboration of those services and the creation of new services and programs.

The program is designed to be both secular and nondenominational. Spokespersons from various groups will be included in coordinating its implementation. Prosecuting attorneys and defense lawyers, faith-based groups and victim's rights advocates, victim's family members and family members of prisoners are to be included in the program's oversight committee. Plans of the oversight committee are scheduled to be put in place by June 10, 2010.

Though the concept is secular and nondenominational prison chaplains are to be given a major role in the behavior bill's implementation. The bill places em-

phasis on prison chaplain's qualifications and is designed to operate in both juvenile and adult facilities.

The bill concludes with a disclaimer that dictates that DOC chaplains cannot be "compelled to carry liability insurance as a condition of providing these services," and are entitled to representation by the state attorney general for any "action or proceeding for damages" that may occur as a result of their participation in the program.

Sen. Mike Carrell, R-Lakewood beamed with pride at the passage of the bill.

"It's great to have two of my bills signed into law simultaneously," he said. "I'm very proud, because these pieces of legislation are going to do some really good things for Pierce County and the state of Washington."

Carrell also sponsored SB 6437 requiring more accountability for the actions of Bailbond companies and bounty hunters. ■

Source: Substitute Senate Bill 6400, 60th Leg., 2008 Reg. Session

TDCJ Employee Wins \$1,505,000 for Texas Prison System's Failure to Accommodate

An El Paso jury awarded \$1,505,000 to a former employee of the Texas Department of Criminal Justice (TDCJ) for the prison system's failure to accommodate her severe asthma by refusing to remove automatic air fresheners from an office area.

Linette Weller was a senior chemical dependency counselor at the Rogelio Sanchez State Jail, a TDCJ facility. She first suffered severe asthma attacks in 1999 when the jail distributed handheld aerosol air fresheners to office staff. Weller suffered progressively worsening symptoms until, after two weeks, she was taken to an emergency room with closed bronchial tubes.

"She basically couldn't breathe," said

her attorney, Enrique Chavez. "Her lips would turn blue; she would turn blue. It was a traumatic event for her."

At that time, the TDCJ accommodated her asthma by removing the air fresheners. However, in August 2001 the jail installed automatic air fresheners that plugged into a wall socket and released timed bursts of scented chemicals. Weller's symptoms worsened and she suffered another severe asthma attack less than a month later.

She took a week of leave and was cleared by her pulmonologist to return to work. However, before she was allowed to return, the state jail insisted on a signed assurance from her doctor that she wouldn't be affected by the air fresheners – an im-

possible condition.

Weller was laid off when her sick leave ran out. She reapplied for her former TDCJ job when it was posted, but was unable to interview because the jail refused to turn off the air fresheners before the interview or hold the interview in another area without air fresheners.

Weller filed suit in state district court

alleging the TDCJ had failed to reasonably accommodate her disability. She offered to settle for \$150,000; the TDCJ countered with a \$20,000 offer. The case went to trial.

On August 15, 2007, following a three-day trial, the jury entered a verdict in Weller's favor. For the layoff she was awarded \$200,000 in lost wages, \$225,000 in past compensatory damages, \$225,000

in future compensatory damages and \$105,000 in lost back pay. For the failure to accommodate she received \$225,000 in future compensatory damages, \$100,000 in lost back pay, \$200,000 in lost front pay and \$225,000 in past compensatory damages. The total award was \$1,505,000. See: *Weller v. TDCJ*, 169th District Court (El Paso County), Case No. 2003-3978. ■

Class Action Disability Discrimination Suit Certified Against Cook County Jail in Illinois

On March 26, 2008, U.S. District Court Judge Elaine E. Bucklo certified a class action lawsuit against the Cook County Department of Corrections (CCDC) alleging violations of the Americans with Disabilities Act (ADA) and Rehabilitation Act (RA).

Derrick Phipps, Kevin House, Kenneth Courtney and James Grant, all paraplegic or partially handicapped individuals, filed suit against Cook County, Illinois and the Sheriff of Cook County, alleging violations of the ADA and RA. According to their complaint, the CCDC discriminated against them by failing to provide adequate beds, showers and toilets for wheelchair-bound pretrial detainees between 2006 and 2007.

Phipps and the other plaintiffs alleged they had suffered bed sores, rashes and other physical injuries caused from falls while trying to use non-handicapped accessible facilities, as well as emotional distress.

The plaintiffs moved to certify a class against CCDC comprised of all current and former wheelchair-bound prisoners subjected to discrimination under the ADA and RA after July 11, 2005. Cook County opposed the motion, arguing that the requirements for class certification – numerosity, commonality, typicality, adequacy of representation, predominance and superiority – were not present. The court disagreed.

Addressing numerosity, the court found the plaintiffs' estimate that 50 or more wheelchair-bound prisoners had been housed at CCDC since 2005 was reasonable and sufficient to satisfy the numerosity requirement. Turning to commonality and typicality, the court rejected the County's attempts to distinguish between the plaintiffs' claims based on the fact that some of the plaintiffs were housed in different units. According to the court, the focus of commonality is whether the plaintiffs had alleged a common discriminatory practice,

which they had done. Likewise, the court found that slight differences in the conditions of the plaintiffs' confinement did not affect typicality.

As for the remaining requirements, the court concluded that the proposed class was adequately represented by any of the named plaintiffs, and that the class claims would both predominate and be superior to resolution of the plaintiffs' claims on an individual basis.

Accordingly, the court granted the plaintiffs' motion for class certification. This case is ongoing and in the discovery stage. See: *Phipps v. Sheriff of Cook County*, 249 F.R.D. 298 (N.D. Ill. 2008). ■

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Oregon Parolee Negligent Supervision Case Reinstated

The Oregon Court of Appeals reversed a lower court's grant of summary judgment against a teenage girl who was raped by a violent parolee.

In November 1997, 14-year-old Akilah Johnson was assaulted and raped by a stranger. More than four years later, on April 29, 2002, Ladon Stephens was arrested on charges arising from a different rape. DNA tests linked him to Johnson's rape, the rapes of three other young girls, and to the highly publicized 2001 rape and murder of 14-year-old Melissa Bittler. *PLN* has previously reported on the Bittler case [see: *PLN*, June 2005, p.6].

Johnson was not initially informed that DNA had established that Stephens was her rapist. A May 30, 2002 story in *The Oregonian* newspaper reported Stephens' "arrest for the rape of a Portland woman and similarities to the rapes of other victims." The article described details of earlier rapes, which matched the details of Johnson's rape, but did not mention her name.

When Stephens raped Johnson he was under post-prison supervision for three attempted kidnappings; he had served six years in prison. On May 31, 2002, *The Oregonian* reported that "Stephens had 'been under high-level supervision and undergoing sex offender treatment' before his most recent arrest." The article quoted a Multnomah County Department of Community Justice spokesperson as saying it was "very difficult for the supervising officers to realize this killer was one of our individuals on parole." Again, the article did not mention Johnson or that Stephens was on parole supervision in 1997. A June 1, 2002 article indicated, however, that Stephens had been on parole since his December 1996 release from prison.

On July 28, 2002, *The Oregonian* reported that Stephens had failed polygraph tests while on supervision. In December 2002 both *The Oregonian* and *Willamette Week* newspapers ran several articles critical of the state's post-release supervision of Stephens. One of those articles included his photo.

On December 30, 2002, Johnson began serving a jail sentence that lasted until October 20, 2003. While she was in jail, the Multnomah County District Attorney's Office told her that Stephens was her assailant in the 1997 rape. Johnson attended Stephens' court proceedings in July 2003.

While Johnson was still incarcerated, *The Oregonian* ran an October 3, 2003 story about Stephens' post-release supervision, in which Melissa Bittler's father said he was considering legal action.

On April 28, 2004, Johnson filed a tort claim notice against the county, expressing her intent to sue for its negligent supervision of Stephens which resulted in her rape. She then brought suit against the county in state court. The trial court granted the defendants' motion for summary judgment, finding that Johnson's action was barred because her tort claim notice was not timely. Johnson appealed.

The Court of Appeals noted that Oregon law requires tort claim notices against public bodies to be filed within 180 days of the alleged loss or injury. Under the discover rule, however, that time limit does not begin to run until the plaintiff knows or reasonably should know that an injury occurred, the injury harmed one or more of the plaintiff's legally protected interests, and the defendant is the responsible party.

The appellate court reversed the lower court's grant of summary judgment to the defendants, rejecting their argument that the "[news] coverage was sufficient to alert plaintiff to facts establishing a substantial possibility that defendant was at fault." The Court of Appeals concluded "that

plaintiff's failure to see six newspaper articles (three of which were published while she was incarcerated) and a few television news broadcasts indicating that her attacker was under defendant's supervision was not unreasonable as a matter of law. Given her age, her circumstances, and any number of other facts that could be adduced at trial (circulation figures for the media outlets involved, plaintiff's educational background, etc.), a rational juror could easily conclude that plaintiff either should or should not reasonably have seen the relevant reports. That is a triable fact for the jury."

The Court of Appeals also found "a triable question whether the facts that plaintiff actually knew—in particular, that the man who raped her also committed several other rapes and a murder—should have led her to conduct an inquiry that, in turn, would have led her to discover defendant's role prior to October 28, 2003." See: *Johnson v. Multnomah County Dept. of Comm. Justice*, 210 Or.App. 591, 152 P.3d 927 (Or.App., 2007).

On February 14, 2008, the Supreme Court of Oregon affirmed the appellate court's ruling, holding that factual issues precluded summary judgment on the 180-day time limitation for filing a tort claim notice. See: *Johnson v. Multnomah County Dept. of Comm. Justice*, 344 Or. 111, 178 P.3d 210 (Or., 2008). ■

\$4.5 Million Settlement in New Jersey Jail Strip Search Lawsuit

New Jersey's Cumberland County has agreed to pay \$4.5 million to settle a class action strip search lawsuit. This is another huge settlement in Fourth Amendment claims of this type. Like others, this case involved the strip searching of arrestees held on minor charges.

"These searches involved an inspection of their naked bodies, as well as visual inspection of their body cavities," said class counsel in a brief. "To facilitate an inspection of body cavities, detainees were required to manipulate their genitalia and buttocks, and sometimes 'squat and cough' in view of a Corrections Officer. Female detainees were also required to manipulate their breasts."

The searches occurred between Janu-

ary 9, 2004, and December 1, 2006. The class includes persons arrested in that time period for a misdemeanor, child-support payment, failure to pay a traffic ticket, or have some other outstanding fine. The class is estimated to contain as many as 10,250 people. Persons fitting within the class requirements will receive up to \$1,400 maximum. See: *Suggs v. County of Cumberland*, USDC, New Jersey, Case No: 1:06-CV-00087. ■

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Denial of Allocution Right on Supervised Release Resentencing Requires Remand

The Seventh Circuit Court of Appeals has reversed a federal prisoner's sentence because an Illinois federal district court denied his right to allocution upon revocation of his supervised release and imposition of a new sentence.

Bernard J. O'Hallaren III was required to serve 36 months of supervised release after completing his federal prison sentence on a charge of interstate transportation of stolen property. O'Hallaren did not comply with his conditions of release for long. At his first and only meeting with a probation officer, he tested positive for cocaine. The probation office then filed a special report that cited five grounds to revoke his supervised release.

At a hearing, the government agreed to O'Hallaren's alternative sentencing proposal that involved a voluntary drug treatment program, provided that it included a subsequent 120-day outpatient program that would require O'Hallaren to live at the Salvation Army. The probation office objected to this arrangement, arguing that O'Hallaren was a public

risk because he continued to use drugs, past treatment programs had not worked for him, and he persisted in disobeying the law.

The district court scheduled another hearing to allow testimony on the validity and appropriateness of the treatment program in lieu of imprisonment. At that hearing, the Court reviewed the case history and acknowledged O'Hallaren had admitted to all five violations of his supervised release. After reciting O'Hallaren's extensive criminal record and the various recommendations, the Court revoked his supervised release and imposed two consecutive 14-month sentences. O'Hallaren's counsel objected and filed an appeal.

Under Federal Rule of Criminal Procedure 32.1(b)(2)(E), a defendant is entitled to "an opportunity to make a statement and present any information in mitigation" prior to sentencing for reimprisonment following the revocation of supervised release. This allocution rule requires the court to ask the defendant if he or she would like to make a statement

for the court to consider in determining the sentence.

The Seventh Circuit found O'Hallaren was not afforded an opportunity to address the district court prior to the imposition of his new sentence. The appellate court held that it presumed prejudice when there was any possibility that the defendant could have received a lesser prison term had the district court allowed him to speak before imposing sentence.

While the Seventh Circuit could not speculate as to the persuasive ability of what O'Hallaren may have said, it did consider for the sake of argument what that statement might have been. The Court concluded that it could not say with any assurance that the denial of O'Hallaren's allocution right did not affect his sentence. The denial of that right "seriously affected the fairness, integrity, or public reputation of judicial proceedings," the appellate court held.

The case was thus remanded for resentencing. See: *United States v. O'Hallaren*, 505 F.3d 633 (7th Cir. 2007).

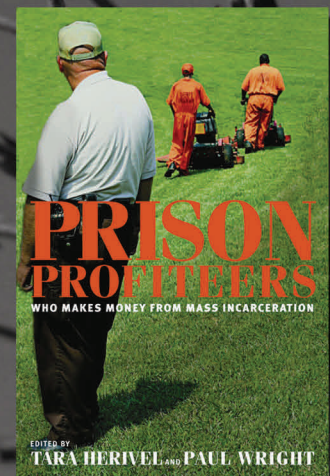
Prison Profiteers: Who Makes Money from Mass Incarceration Edited by Paul Wright & Tara Herivel Paperback, 324 pages, The New Press, 2008, \$19.95

This is the third and latest book in a series of Prison Legal News anthologies that examines the reality of mass imprisonment in America. [The other two titles are *The Ceiling of America: An Inside Look at the US Prison Industry* and *Prison Nation: The Warehousing of America's Poor*, both available from PLN].

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Contributors include: Judy Greene on private prison giants Geo (formerly Wackenhut) and CCA; Anne-Marie Cusac on who sells electronic weapons to prison guards; Wil S. Hylton on the largest prison health care provider; Ian Urbina on how prison labor supports the military; Kirsten Livingston on the privatization of public defense; Jennifer Gonnerman on the costs to neighborhoods from which prisoners are removed; Kevin Pranis on the banks and brokerage houses that finance prison building; and Silja Talvi on the American Correctional Association as a tax-funded lobbyist for professional prison bureaucracies; Tara Herivel on juvenile prisons; Gary Hunter and Peter Wagner on the census and counting prisoners; David Reutter on Florida's prison industries; Alex Friedmann on the private prisoner transportation industry; Paul Von Zielbauer on the sordid history of Prison Health Services in New York; Steven Jackson on the prison telephone industry; Samantha Shapiro on religious groups being paid to run prisons and Clayton Mosher, Gregory Hooks and Peter Wood on the myth and reality of building rural prisons.

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Transgender Idaho Prisoner Receives Hormone Therapy Pending Trial

A federal judge has ordered the Idaho Department of Corrections (IDOC) to provide hormone therapy to a prisoner with gender identity disorder pending trial.

The preliminary injunction, issued July 27, 2007, was in response to a lawsuit filed by Jennifer Spencer, 27, who was born a biological male but lived as a woman before going to prison in 2000 on charges of possessing a stolen car and escape. On the outside Spencer had taken birth control pills in an effort to develop the secondary sexual characteristics of a female. Following her imprisonment, Spencer obtained a legal name change from her original name of Randall Gammett.

In September 2003, Spencer informed prison officials that she believed she had gender identity disorder after discovering the IDOC had a policy specifying treatment options for the disorder. Prison physicians, however, refused to prescribe the female hormone estrogen. Instead they first diagnosed her with a non-specific sexual disorder, then later bipolar disorder, and recommended the male hormone testosterone.

Less than a year later, in August 2004, Spencer unsuccessfully tried to hang herself in her cell. In October 2004 she tried to castrate herself. The first attempt was unsuccessful, but she succeeded 10 days later.

Spencer sued the IDOC and prison doctors (employed by the prison's health care contractor, Correctional Medical Services, which is infamous for cutting costs at the expense of prisoner health and well-being), asserting they had violated her constitutional rights by failing to properly diagnose her and provide adequate treatment, which constituted deliberate indifference. She further contended that she had submitted approximately 75 requests for gender identity disorder treatment, all of which were ignored by prison officials.

In issuing the preliminary injunction, U.S. District Court Judge Mikel Williams acknowledged that Spencer had a good chance of winning at trial.

"While defendants seem to have identified the fact that plaintiff has a significant mental health issue regarding gender identity or confusion, there is little in the record to show that they have provided adequate psychotherapy or other counseling to address that issue. Rather,

they seem to have consciously disregarded it," Williams wrote. The court also noted that the IDOC was already providing estrogen to other prisoners with gender identity disorders, so the prison system would not be unduly burdened in terms of treating Spencer. See: *Gammett v. Idaho State Board of Corrections*, U.S.D.C. (D. ID), Case No. CV05-257-S-MHW (July 27, 2007); 2007 WL 2186896.

Shannon Minter, an attorney representing Spencer who serves as legal director of the National Center for Lesbian Rights, said Spencer was elated with the ruling. "It got her the relief which she so urgently needed without any further delay," Minter said. "The decision is just so overwhelmingly positive that we are very hopeful the department will now work out a settlement with us without insisting on going forward with an entire trial."

Unfortunately, Minter apparently had little experience in dealing with recalcitrant prison officials. The defendants filed motions for reconsideration and to ter-

minate the injunction, which were denied by the district court in September 2007. The court noted that it had reached its decision to provide injunctive relief "after an exhaustive examination of the lengthy briefs, pleadings, affidavits and medical records," and discounted the "new" evidence presented by prison officials, which alleged contradictions in Spencer's self-reported history of having lived as a woman prior to her incarceration. The defendants were ordered to provide treatment to Spencer through a non-prison physician and non-prison psychologist, at the IDOC's expense. See: *Gammett v. Idaho State Board of Corrections*, U.S.D.C. (D. ID), Case No. CV05-257-S-MHW (Sept. 7, 2007); 2007 WL 2684750.

The defendants then appealed the district court's rulings to the Ninth Circuit. By agreement of the parties, the case was stayed pending the outcome of the appeal. ■

Additional source: *Associated Press*

Governments, Not Prisoners, Must Pay Cost of Transporting Prisoner Witnesses

A federal court in Georgia held that costs taxed against an incarcerated litigant who lost his lawsuit could not include the cost of transporting prisoner witnesses to testify at trial.

Dexter Palmer, a Georgia state prisoner, filed a civil rights suit in federal district court under 42 U.S.C. § 1983 that alleged excessive use of force by prison guards. As part of the jury trial, other state prisoners were transported to the court as witnesses. The jury verdict was against Palmer.

The defendant prison officials filed a post-trial motion for costs in the amount of \$1,560.56, which included \$1,257.17 for transporting the prisoners who were witnesses. The court granted the motion and Palmer filed a motion to reconsider.

The district court noted that costs were authorized under Federal Rule of Civil Procedure 54(d)(1). However, the only costs that could be taxed were those authorized by statute. Taxable costs are set by 28 U.S.C. § 1821(f), which does not include the cost of transporting prisoners to appear as witnesses at trial. Furthermore, Congress authorized the issuance of a writ of habeas corpus ad testificandum to secure the testimony of prisoner witnesses

in federal court. That writ is issued to the custodian of a prisoner, not the prisoner. Therefore, the custodian bears the cost of transporting the prisoner to the court.

To hold costs to a minimum, courts should cull an incarcerated litigant's list of prisoner witnesses based upon relevancy, cumulativeness and the need for their testimony, the district court observed. However, governments, not prisoners, must bear the cost of transporting prisoner witnesses. Therefore, the court granted Palmer's motion and deleted \$1,257.17 from the costs award, leaving a balance of \$303.39 in costs. See: *Palmer v. Simmons*, U.S.D.C. (SD Ga.), Case No. 6:04-cv-00075-BAE (April 9, 2007); 2007 WL 1052683. ■

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Ohio DNA Specimen Law Ruled Not Retroactive

The Ohio Supreme Court held that a state law requiring convicted felons and some misdemeanants to provide DNA specimens could not be applied retroactively to offenders placed on supervised release before the law's May 2005 effective date.

On August 6, 2002, Craig Consilio pleaded guilty to DUI, a fourth degree felony. He was sentenced to six months in jail and three years community supervision.

While Consilio was still on supervision the Ohio legislature enacted HB525, amending R.C. 2901.07(B)(3)(a) to require all felony and some misdemeanor offenders to submit a DNA specimen when on supervised release. HB525 became effective on May 18, 2005. It did not expressly address retroactivity.

The probation office informed Consilio that he would be required to provide a DNA sample under HB525. Consilio filed a motion in opposition, arguing that the amended statute could not be applied to him because it was not in effect when he was sentenced. The trial court denied the motion, finding the amended statute applied to all individuals on supervised release regardless of when they were sentenced. Consilio appealed.

While the appeal was pending, on January 10, 2006, Consilio's community supervision ended. The following month the Court of Appeals reversed the trial court's judgment, concluding that since the 2005 amendment was not expressly retroactive it could only be applied prospectively, and therefore did not apply to Consilio. This time the state appealed.

Ohio lawmakers amended the DNA specimen statute again in 2006 "to reaffirm" their intent that the prior HB525 version of the statute was to have been applied retroactively. That legislation became effective July 11, 2006.

On appeal, Ohio's Supreme Court rejected the state's argument that the 2006 amendment had established that "the General Assembly declared its intent that the HB525 version was retroactive as well." Rather, the Court concluded that the second amendment "cannot confer retroactivity upon a previous version of a statute."

Since it was "undisputed that the HB525 version of R.C. 2901.07(B)(3)(a) does not expressly mention retroactivity," the state Supreme Court found that "ver-

sion of the statute can be applied only prospectively."

Hence, the Court concluded that "because Consilio pleaded guilty and was sentenced to supervised release before May 18, 2005, he is not required to submit to the DNA specimen collection procedure pursuant to the HB525 version

of the statute. All individuals not covered by the previous list of enumerated felonies that were sentenced to supervised release before May 18, 2005, and that completed this supervision before July 11, 2006, are similarly exempted." See: *Ohio v. Consilio*, 114 Ohio St.3d 295, 871 N.E.2d 1167 (Ohio 2007). ■

Unemployment Compensation Denied to Guard Who Failed to Stop Prisoner Assault

The Commonwealth Court of Pennsylvania has held that a guard who was fired for willful misconduct for failing to report the planned assault of a prisoner was not entitled to unemployment compensation. The Court reached the same conclusion after a reversal and remand.

The Court's initial ruling reversed an order entered by the Unemployment Compensation Board of Review (Board), which held the former guard, D. Lee Martin, had good cause for the policy violation.

While employed at Pennsylvania's SCI-Camp Hill, Martin heard rumors that a fellow guard planned to have a prisoner assaulted. Fearing that other guards "would retaliate against him by shunning him, refusing to work with him, delaying responses to emergency situations, or causing personal injury" if he reported the planned assault, Martin did not report it.

While working in the control room "bubble" on July 13, 2005 with the guard who was rumored to have planned the assault and a third guard, Martin heard a prisoner screaming from a cell in a fellow guard's cellblock. That guard ignored Martin's request to stop what he suspected was the planned assault. Martin did not call for back up or take any other action. The prisoner sustained serious injuries as a result of the assault by four prisoners. Martin initially denied that he had any knowledge of the incident.

There was no dispute that Martin had failed to follow Pennsylvania Department of Corrections (PDOC) work rules, which constituted willful misconduct that prohibited unemployment compensation. The Board, however, found Martin's fear of retaliation and the threat to his personal safety constituted good cause to violate

the work rules. The Board's decision was then appealed.

The Commonwealth Court agreed with PDOC that the decision was erroneous. "In fact, it shocks the conscience of this court that the Board concluded that a corrections officer who refuses to report a threat of violence against an inmate and refuses to render aid to an inmate being beaten could use fear for his own personal safety as good justification for his refusal to render aid," the Court stated.

The Court went on to find that "Martin did nothing; he rendered no assistance; he failed to call for aid; he did not call for back-up or attempt to call for back up ... Martin is guilty of willful misconduct."

Most outrageous, the Commonwealth Court said, was that an official from PDOC's Office of Professional Responsibility (Office) testified he was aware that some guards abused both prisoners and other guards, and those guards refused to follow work rules. Because the conduct of the Office was not directly before the Court, it could only express its "outrage."

The Court concluded by saying that regardless of the Office's conduct, the fact that "Martin may suffer indignation at the hands of his co-workers does not allow him to compromise the safety of those in his charge. Here, [guard] Martin, a sworn officer of law, has offered fear for himself and his possessions, as his justification for refusing to stop a prisoner from being beaten and tortured with the complicity of other [guards] ... Martin's conduct was unconscionable."

The Board's order was therefore reversed. See: *Department of Corrections, SCI-Camp Hill v. Unemployment Comp. Board*, 919 A.2d 316 (Pa.Cmwlth. 2007).

Subsequently, however, the Commonwealth Court's ruling was reversed and remanded by the Pennsylvania Supreme

Court for reconsideration in light of *Navickas v. Unemployment Comp. Bd. of Review*, 567 Pa. 298, 787 A.2d 282 (2001) (the Unemployment Compensation Act sets forth a single governing standard of willful misconduct and does not have a higher standard based upon the type or nature of the employment) and *Grieb v. Unemployment Compensation Bd. of Review*, 573 Pa. 594, 827 A.2d 422 (2003) (the Unemployment Compensation Act sets forth a single standard regarding willful misconduct and does not have a heightened standard as a public safety exception). See: *Department of Corrections, SCI-Camp Hill v. Unemployment Comp. Board*, 594 Pa. 34, 934 A.2d 1149 (Pa. 2007).

Upon remand, on March 6, 2008, the Commonwealth Court again held that “fear of retaliation does not justify the failure to perform an essential duty of a corrections officer.” The Court specifically noted that “[Martin] refused to perform his job duties when he neither reported rumors of the assault nor intervened on the inmate’s behalf. Unquestionably, the mistreatment of an inmate is inimical to [PDOC’s] best interests. [Martin’s] actions also show an intentional disregard for the standards of behavior [that PDOC] can expect from its employees charged with protecting inmates.”

The Court found that Martin’s misconduct was willful, and thus the Board’s order was again reversed and Martin was denied unemployment benefits. See: *Department of Corrections, SCI-Camp Hill v. Unemployment Comp. Board*, 943 A.2d 1011 (Pa.Cmwlt. 2008). ■

PLRA Requires Grievance Exhaustion for ADA/RA Claims

The Ninth Circuit Court of Appeals has joined the Sixth Circuit in holding that the Prison Litigation Reform Act (PLRA) requires exhaustion of Americans with Disabilities Act (ADA) and Rehabilitation Act (RA) claims.

Nevada prisoner Roy O’Guinn had a history of mental illness, brain damage and organic personality disorder, requiring medical treatment. On November 9, 2004, he filed a complaint with the U.S. Department of Justice (DOJ), alleging prison officials had violated the ADA and RA by failing to adequately treat his mental disability.

On January 4, 2005, O’Guinn sued the Nevada Department of Corrections (NDOC) and several individual prison officials in federal court, alleging ADA and RA violations. He attached his DOJ complaint to the suit. He acknowledged that he had not exhausted NDOC grievance procedures because “Grievance [is] not applicable to ADA/Rehab Act and is not required under these acts.”

The district court characterized O’Guinn’s lawsuit as a civil rights action under 42 U.S.C. § 1983, and dismissed the action for failure to exhaust administrative remedies as required by the PLRA. Following an evidentiary hearing the court determined that O’Guinn had “failed to file NDOC grievances related to mental health treatment.”

The Ninth Circuit held that the dis-

trict court mischaracterized O’Guinn’s suit as a § 1983 action, finding that the complaint clearly pleaded ADA and RA statutory violations. Even so, the appellate court concluded that the plain language of 42 U.S.C. § 1997e(a) requires exhaustion of ADA and RA claims because the ADA and RA are federal laws, noting that the Sixth Circuit had reached the same conclusion in *Jones v. Smith*, 266 F.3d 399, 400 (6th Cir. 2001).

The Ninth Circuit agreed with the district court that O’Guinn’s failure to file grievances related to the claims raised in his lawsuit amounted to a failure to exhaust his ADA and RA claims. It also rejected O’Guinn’s contention that the DOJ complaint satisfied exhaustion requirements under § 1997e(a). As the Supreme Court has made clear, the PLRA requires exhaustion of the prison’s internal grievance process. The DOJ complaint was an external remedy.

The appellate court also rejected O’Guinn’s argument that “special circumstances” excused his non-exhaustion, finding that he waived that argument by failing to assert it in the district court. However, given O’Guinn’s subsequent exhaustion of the NDOC’s grievance process, the Court of Appeals noted “he need only file a new suit to have his case heard in a federal forum.” See: *O’Guinn v. Lovelock Correctional Center*, 502 F.3d 1056 (9th Cir. 2007). ■

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California Sex Offender's Probation Travel Restrictions Abated

by John E. Dannenberg

Kenneth Smith was convicted of committing a lewd act on his stepdaughter and sentenced to three years in prison, which was suspended in lieu of five years probation. Upon learning that Los Angeles County had a blanket policy disallowing registered sex offenders from leaving the county, even for job-related reasons, he asked the sentencing court for relief.

After the court denied his request because it would present "difficult monitoring problems," the appellate court ruled that the superior court had failed to consider his particularized needs and that such a "mass treatment approach does not serve either of the goals of probation, public safety or rehabilitation."

In 2006, Smith pled no contest to one count of violation of Penal Code §

288(a), a registerable sex offense. He lived in Lancaster but his job required him to drive outside the county. For example, he could drive 95 miles to Long Beach, but not 10 miles to Rosamond. Smith filed a motion for modification of conditions of probation to allow him to go where needed on his job, but return home to Lancaster every night. The motion was denied based solely upon Smith's sex offender status.

The Court of Appeal, citing Penal Code § 1203.1, held that conditions of probation must foster rehabilitation and protect public safety. Restrictions must be "reasonably related to the crime of which the defendant was convicted or to future criminality." Moreover, restrictions should be narrowly tailored to each probationer, and the sentencing court abuses

its discretion when it arbitrarily violates this standard.

The appellate court found that the superior court's blanket travel restriction failed any measure of particularized consideration for Smith because it was unrelated to his crime and because mere transit across county boundaries did not foretell any danger to the community or potential criminal behavior.

Holding that there was no reasonable relationship between Smith's crime and the probation restriction, the Court of Appeal ordered the trial court to either fashion a less restrictive condition or remove the travel restriction altogether. See: *People v. Smith*, 152 Cal.App.4th 1245, 62 Cal.Rptr.3d 316 (Cal.App. 2 Dist., 2007). ■

Sixth Circuit Outlines Exceptions to *Heck* Favorable-Termination Doctrine

The Sixth Circuit Court of Appeals has held the favorable-termination doctrine does not apply to 42 U.S.C. § 1983 actions brought by prisoners who were foreclosed from challenging their incarceration in a habeas action or who are only challenging the procedures that led to the incarceration and not the underlying conviction or duration of sentence.

The Court's ruling comes in an appeal brought by Ohio's Hamilton County Public Defenders (HCPD) office, which was sued by Michael Powers. An Ohio federal district court granted Powers' motion for summary judgment in his class action lawsuit that contended the HCPD had a custom or policy of failing to seek indigency hearings on behalf of criminal defendants facing jail time for unpaid fines.

Powers was ordered to pay a \$250 fine in lieu of a 30-day suspended jail sentence for a misdemeanor traffic offense. Two months later he was arrested for failing to pay the fine. After he pled guilty to the violation the jail sentence was imposed, causing him to spend at least one day in jail.

The HCPD argued that Powers' § 1983 complaint was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that a § 1983 damages action in

connection with an allegedly unlawful conviction or sentence cannot be maintained unless the conviction or sentence has been invalidated. The Sixth Circuit, however, noted that there are two exceptions to *Heck*.

In a concurring opinion in *Heck*, Justice Souter had expressed the view that the favorable-termination requirement did not preclude § 1983 lawsuits by persons who could not have their convictions or sentences overturned through habeas review. Because petitioners may obtain habeas relief only if they are "in custody," persons "who were merely fined, for example, or who have completed short terms of imprisonment, probation, parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences" are prohibited from bringing a habeas action to challenge their conviction and sentence.

This exception was further affirmed in the concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998). The Sixth Circuit acknowledged a conflict between the circuits in regard to this exception to *Heck*, but found the courts that rejected it "have mistaken the ordinary rule refinement that appellate courts necessarily engage in for an improper departure from binding Supreme Court precedent."

The Sixth Circuit found that *Edwards v. Balisok*, 520 U.S. 641 (1997) approved an analytical framework that would remove procedure-based challenges from *Heck*'s scope. Courts, however, must scrutinize "the nature of the challenge to the proceedings," because even challenges to procedures "could be such as necessarily to imply the invalidity of the judgment." Here, "if Powers succeeds in his § 1983 suit, that means only that the failure to grant Powers an indigency hearing was wrongful, not that the order committing him to jail was wrongful."

The Court found that HCPD's "alleged practice of not requesting indigency hearings has no bearing on Power's guilt or innocence in failing to pay his court-ordered fine." For the above reasons, the Sixth Circuit held that Powers need not comply with the favorable-termination requirement set forth in *Heck*.

Turning to the merits, the Court found Powers had asserted the deprivation of a federal right. States may not "impose a fine as a sentence and then automatically convert it to a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." Because the HCPD had failed to move for an indigency hearing, the appellate court found that HCPD "was both the cause in fact and the proximate cause of the

denial of Power's right to an indigency hearing prior to his incarceration for the unpaid fine."

The Court of Appeals, however, found there existed a genuine issue of

material fact as to whether there was a policy or custom of not seeking indigency hearings. For that reason, the grant of summary judgment was improper. Accordingly, the district court's

order was affirmed in part and reversed in part. See: *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592 (6th Cir. 2007), *petition for cert. filed*. ■

Washington Classification Reassessment Requires Notice and Hearing

The Washington State Court of Appeals held that reassessment of a prisoner's risk classification which made him ineligible for a 50 percent sentence reduction, without notice or an opportunity to be heard, violated due process.

In 2004, Charles Leon Wheeler pleaded guilty to possession of stolen property and was sentenced to 57 months in prison. He "believed he would be eligible for a 50 percent earned early release under ... RCW 9.94A.728(1)(b)." Prisoners in the Washington Department of Corrections (DOC) who are classified in one of the two lowest risk categories (RM-C and RM-D) qualify for the reduction, while those classified in the two highest categories (RM-A and RM-B) do not. The classification is based on the offender's criminal history and the DOC's risk assessment.

Initially, the DOC placed Wheeler in category RM-C, making him eligible for 50 percent earned early release. Subsequently, however, the DOC reassessed his risk level and placed him in category

RM-B – which rendered him ineligible.

Wheeler filed a personal restraint petition (PRP) in state court, objecting to the DOC's determination that he was ineligible for the 50 percent earned early release credit. Wheeler also argued the DOC had deprived him of due process of law by reassessing his risk category to RM-B without notice or an opportunity to object to the reassessment.

The DOC initially argued that Wheeler's 2001 conviction for attempted residential burglary rendered him ineligible for the early release credit. The court found, however, and the DOC conceded, that "under a plain reading of the statute, attempted residential burglary is not a disqualifying conviction." Regardless, the DOC persisted in classifying Wheeler as RM-B and denying him the 50 percent sentence reduction.

Citing *In re PRP of Adams*, 132 Wash. App. 640, 653, 134 P.3d 1176 (2006), the appellate court stated that "when DOC reassesses an offender's risk category, 'minimum due process requires written

notice of the reasons DOC is seeking to change ... classification and an opportunity to challenge the facts DOC relied on ... to reach that decision.'" Yet in this case there was "nothing in the limited record" suggesting that "Wheeler was given notice of the reasons behind DOC's decision ... or that he had an opportunity to challenge the facts relied upon by DOC to reach its decision."

The Court of Appeals concluded that under *Adams*, Wheeler was deprived of due process of law in violation of the Fourteenth Amendment to the U.S. Constitution. The case was then remanded "... with instructions for DOC to return Mr. Wheeler to RM-C status and determine his release date accordingly." See: *In re PRP of Wheeler*, 140 Wash.App. 670, 166 P.3d 871 (Wash.App. Div. 3, 2007). ■

Arbitrator Awards Hawaii Prisoner \$7,500 for Injuries Sustained While Working in Kitchen

On March 10, 2008, a Hawaii prisoner was awarded \$7,500 through arbitration after being burned by hot coffee.

On April 3, 2007, Will Kaaihue received second degree burns down the left side of his body while working in the kitchen at the Halawa Correctional Facility. Kaaihue had been attempting to move a five gallon container filled with hot coffee when the coffee spilled out and burned him. The spill was caused by a worn out latch on the container that failed.

Kaaihue sued the State of Hawaii and the kitchen supervisor, alleging that they were negligent in failing to provide safe working conditions. The arbitrator awarded Kaaihue \$10,000 in general damages and \$2,323.88 in costs. The \$10,000 award was reduced to \$7,500, though, due to Kaaihue's contributory

negligence – Kaaihue did not have permission to move the coffee container. Kaaihue was represented by John L. Rapp.

See: *Kaaihue v. State of Hawaii*, No. 070799 (1st Circuit Hawaii). ■

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Kentucky Jails' Seizure of Funds for Booking, Room and Board Fees Upheld

The Sixth Circuit Court of Appeals has held that the seizure of jail prisoners' canteen funds for booking and room and board fees does not violate due process.

When Campbell County and Kenton County (Kentucky) detain individuals in their jails, any money the detainee possesses is deposited into a canteen account. People in the community may also deposit money into a detainee's account. The funds can be used for commissary purchases.

Campbell County automatically removes a \$30 fee from jail canteen accounts to cover booking and arraignment costs. Kenton County does not charge the \$30 booking fee until the prisoner is released. Both counties charge room and board – \$20 per day in Campbell County and \$5 per day in Kenton County.

"Campbell County withholds up to one quarter of any monetary gifts to the inmate to cover these fees as well as up to a quarter of any funds remaining in an inmate's canteen account at the end of each day," the Court observed. "Kenton County recovers per diem fees by withholding up to one half of any funds given to an inmate as well as up to one half of any funds remaining in an inmate's canteen account at the end of the week."

Several detainees and freeworld people who sent them money that was taken by the counties filed suit in federal court, asserting that seizure of the funds without a pre-deprivation hearing violated the Due Process Clause. The district court consolidated the actions and granted summary judgment to the defendants.

The Sixth Circuit affirmed. Applying the balancing test of *Mathews v. Elridge*, 424 U.S. 319 (1976), the appellate court rejected the detainees' due process claims. While acknowledging a property interest in the canteen account funds, the Court of Appeals found that interest was insignificant, because the amount subject to seizure was small. "The withholding of funds involves elementary accounting that has little risk of error and is nondiscretionary."

Hence, the Sixth Circuit determined that the risk of erroneous deprivation was minor and the potential benefit of other safeguards – including a pre-deprivation hearing – were few. "It is not even clear

what the inmates hope to accomplish with a pre-deprivation hearing," the Court stated. Finally, the appeals court determined that "the government's interests – sharing the costs of incarceration and furthering offender accountability – are substantial, and indeed plaintiffs do not challenge them."

The Court also rejected the non-imprisoned plaintiffs' due process claims. "While these individuals undoubtedly once had an interest in this money, they voluntarily relinquished that interest when they gave it to their inmate relatives," the appellate court found. Having relinquished their property interest they could not state a valid due process claim.

Finally, the Court of Appeals rejected the claim that the jail canteen accounting policies violated the First Amendment by curbing free speech. "Yes, a family member's monetary gift would make the inmate's subsequent phone calls 'free speech' if that is how he chose to spend the money," the Court explained. "But that is not exactly what the framers had in mind ... the amendment does not protect any conduct that at some point might have a connection to speech...." The plaintiffs' First Amendment claim, "if accepted, would do more to trivialize, than to promote, our time-honored First Amendment traditions." See: *Sickles v. Campbell*, 501 F.3d 726 (6th Cir. 2007). ■

Pennsylvania Prisoner Appointed Counsel on Retaliation / MRSA Infection Claims

A Pennsylvania federal district court appointed counsel to a prisoner in a lawsuit claiming he contracted a serious infection and faced retaliation after filing grievances about his medical condition.

While housed at Pennsylvania's SCI-Chester, state prisoner Jose Crespo contracted Methicillin Resistant Staphylococcus Aureus (MRSA). His lawsuit against 14 health workers (nurses and doctors) and administrative prison staff contended that unsanitary conditions at the facility resulted in his contracting the infection, which manifested itself in pus-filled bumps covering various portions of his skin.

Crespo filed grievances based upon the fact that 1) he was repeatedly reinfected with MRSA and 2) he was charged for each medical treatment despite believing it was a chronic condition for which he should have only been charged once. His pro se lawsuit claimed that in order to silence him about his MRSA infection and related issues, prison officials transferred him to SCI-Graterford, using a skirmish he had with another prisoner as a pretext for the transfer.

Before the district court was Crespo's motion to appoint counsel. The court found the motion had arguable merit and passed the criteria that the court had to

assess, which included: 1) the plaintiff's ability to present his or her case; 2) the difficulty of the particular legal issues; 3) the degree to which factual investigation will be necessary, and the ability of the plaintiff to pursue the investigation; 4) the plaintiff's capacity to retain counsel on his own behalf; 5) the extent to which the case is likely to turn on credibility determinations; and 6) whether the case will require testimony from expert witnesses.

The district court found that Crespo had only a 2.6 grade equivalency level. Additionally, the retaliation claim was complicated and would be difficult for him to argue. Finally, the prison conditions and MRSA infection claims would likely require expert testimony. For those reasons the court held Crespo was entitled to appointed counsel.

The district court further found that while prisoner Kenneth Davenport had assisted Crespo in this litigation, because Davenport was a non-lawyer he could not represent another person as requested in Crespo's motion. Arnold C. Joseph of Joseph & Associates was subsequently appointed, though the suit was later voluntarily dismissed. See: *Crespo v. Laws-Smith*, U.S.D.C. (E.D. Pa.), Case No. 2:06-cv-04651-ER; 2007 WL 1469050. ■

Retroactive Residency Restrictions for Missouri Sex Offenders Unconstitutional

by Matt Clarke

On May 24, 2007, Cole County, Missouri Circuit Court Judge Patricia S. Joyce ruled that a Missouri statute requiring certain registered sex offenders to move if they lived within 1,000 feet of a school (§ 566.147, R.S.Mo.) was unconstitutional as applied to offenders who had established residences that predated the statute.

R.L., a registered Missouri sex offender, filed suit in state court after his probation officer notified him that he had violated probation by failing to move from his residence which was located within 1,000 feet of an elementary school. In 2004, the Missouri Legislature enacted § 566.147.1, which made it a Class D felony for certain sex offenders to establish a residence within 1,000 feet of a school. Effective June 5, 2006, § 566.147.1 was amended to include sex offenders who resided within 1,000 feet of a school if the school existed at the time they established their residence.

R.L. was notified that his residency constituted a Class D felony; he was instructed to stop living at that location and develop a relocation plan with an agreed upon timeframe or face revocation of his probation. R.L.'s probation officer later notified him that he had violated probation by failing to move.

R.L. challenged the constitutionality of the statute. The circuit court held that the amended version of the statute interfered with R.L.'s quiet use and enjoyment of his property. The statute was punitive because it required affected persons who lived within 1,000 feet of a school before its amendment to vacate their residences or face probation or parole revocation and felony prosecution, and was retrospective in operation. Therefore, the law was in violation of Article I, § 13 of the Missouri Constitution, which prohibits retrospective laws that impair vested rights acquired under existing laws, create new obligations, impose new duties or attach new disabilities. It also violated Article I, § 10 of the U.S. Constitution in that it was a punitive, retrospective ex post facto law that disadvantaged and criminalized sex offenders living within 1,000 feet of a school at the time of the statute's amendment, when such residency prior to the 2006 amendment was not criminal. Even if the Missouri legislature had a nonpunitive intent in enacting

the statute, the felony criminal effect of the statute negated that intent.

The statute also violated the equal protection clauses of the Missouri Constitution (Article I, § 2) and the U.S. Constitution (14th Amendment), even under the lowest level of constitutional scrutiny, the "rational relationship" test. There was no rational basis for treating those living lawfully within 1,000 feet of an existing school at the time of the statute's amendment differently from those living within 1,000 feet of a school built after the statute's amendment.

The amended statute also violated the due process rights set forth in Article I, § 10 of the Missouri Constitution and the 14th Amendment to the U.S. Constitution by depriving affected persons of their property rights without notice or an opportunity to be heard.

The court specifically differentiated its ruling from that of the Eighth Circuit's opinion upholding the constitutionality of Arkansas' sex offender residency restrictions, which contained an exemption for sex offenders living within the designated distance from a school when the statute was enacted. [See: *PLN*, July 2007, p.40].

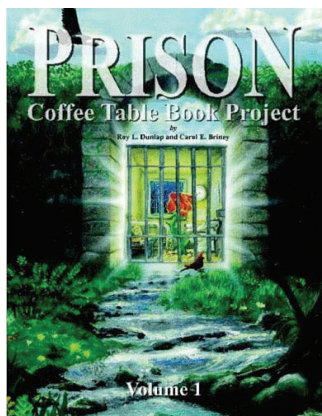
The court thus declared the amended

statute unconstitutional, and permanently enjoined the Missouri DOC from enforcing it against R.L. and similarly situated sex offenders. See: *R.L. v. Missouri DOC*, Circuit Court for Cole County, Missouri, Case No. 07AC-0000269.

On February 19, 2008, following an appeal by the state, the Missouri Supreme Court affirmed the lower court's ruling. The Court held that "The constitutional bar on retrospective civil laws has been a part of Missouri law since this State adopted its first constitution in 1820," citing *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006), a decision that overturned a statute requiring registration of sex offenders who committed offenses prior to the law's effective date. [See: *PLN*, July 2007, p.36].

"As with the registration requirements in *Phillips*, the residency restrictions at issue in this case impose a new obligation upon R.L. and those similarly situated by requiring them to change their place of residence based solely upon offenses committed prior to enactment of the statute," the Missouri Supreme Court found. See: *R.L. v. State of Missouri DOC*, 245 S.W.3d 236 (Mo. 2008). ■

Additional source: *Associated Press*



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Washington Prisoner Suit for “Prevailing Wages” from Private Employer Fails

by John E. Dannenberg

The Washington state Court of Appeals has affirmed a superior court's denial of a “prevailing wage” claim filed by state prisoners employed by Elliott Bay Metal, Inc. (Elliott), a private employer operating inside prison walls under a state Free Venture Industry program. The appellate court rested its determination upon an earlier ruling that the private prison industry program was facially unconstitutional in Washington.

Shawn Greenhalgh and other Washington state prisoners had sued the Department of Corrections (WDOC) to obtain payment of prevailing wages at their industry job with Elliott. The prisoners complained that Elliott had deceptively misclassified their work duties so as to avoid paying prevailing wages for the type of work they actually performed. The Snohomish Superior Court denied relief on the basis that the statute pro-

vided no private cause of action under which to sue.

Further, while the industry program was in fact authorized by state statute (RCW 72.09.100(1)), that statute had since been found unconstitutional in *Washington Water Jet Workers Association v. Yarbrough*, 151 Wash.2d 470, 90 P.3d 42 (Wash. 2004) (*Water Jet II*), because Washington's state Constitution, Article II, section 29 expressly prohibited the hiring out of prison labor to private companies.

A statute that has been found unconstitutional is a nullity, and the law reverts to where it stood before the flawed enactment. That is, there was no Free Venture Industry program and thus no prevailing wage to claim entitlement to. Greenhalgh nonetheless asked the court to apply *Water Jet II* only prospectively, that is, post-declaration of the enabling statute's demise due to its unconstitutionality.

The court refused, saying that “selective prospectivity, which is what Greenhalgh requests, has been abandoned.” Because *Water Jet II* was applied retroactively to the litigants in that case, “it applies retroactively and bars Greenhalgh's claim.”

Accordingly, the appellate court affirmed the superior court's judgment, but on the alternate grounds of unconstitutionality of the statute, observing that Greenhalgh therefore could not succeed upon any legal theory. See: *Greenhalgh v. Elliott Bay Metal*, 138 Wash.App. 1013 (Wash.App. Div. 1, 2007), *petition for review denied*.

In November 2007, Washington's Constitution, Article II, sec. 29, was amended by referendum to permit prisoners to work in private industry programs. Whether such newly-authorized work programs will adhere to applicable prevailing wage provisions remains to be seen. ■

News in Brief:

Arizona: On November 20, 2008, Earl Lappe, 32, a prisoner at the Lewis Morey Unit of the state prison in Buckeye was killed, apparently by another prisoner. In October, 2008, Duffy Kilrain, another prisoner at a separate prison, was also murdered.

California: On December 22, 2008, Angel Rodriguez, 22, a prisoner at the R.J. Donovan Correctional Facility died after a struggle with guards. A female relative was visiting him in his cell when guards allegedly saw her give him a small package through his cell bars which he then swallowed. He went into “medical distress” while restrained and guards removed drugs from his throat while giving him CPR. The relative was arrested on charges of delivering narcotics.

Croatia: In November, 2008, Ivan Damjanovic, the director of the nation's prison system, was fired after the Croatian newsweekly *Globus* did an expose on prisoners at the Lepoglava prison enjoying cell phones, drugs and prostitutes and having orgies in which guards joined in. Corruption is apparently rampant with prisoners paying bribes of up to 1,500 Euros to be sent to minimum security prisons despite laws banning such place-

ments until prisoners have served at least half of their sentences. Several prison officials, including wardens, have been charged with crimes ranging from bribery to abuse of power.

Florida: On December 21, 2008, Devin Perry, 26, a Gainesville probationer, was arrested and charged with arson, burglary, larceny and destruction of evidence for breaking into the Department of Corrections Probation and Parole office and stealing a refrigerator with urine samples after he provided a urine sample he believed would test positive for drug use. He shot out a window of the parole office and set shrubbery near the window that he entered on fire to apparently conceal blood from cuts he suffered entering the building. Police quickly zeroed in on him as a suspect.

Florida: On December 25, 2008, Lempira Norman, a prisoner at the Volusia county jail had a memorable if poor Christmas. On Christmas day fellow prisoners Justine Harris and Ryan Colina beat Norman and tattooed a penis on his back with a homemade tattoo kit. Norman promptly reported the penis tattooing to jail officials who confiscated the tattoo kit and charged Harris and Colina

with aggravated battery.

Guatemala: On November 22, 2008, a fight between prisoners at the Pavoncito prison left seven prisoners dead, including five who were decapitated. News photos showed a group of prisoners standing near four heads lined up on a rock pile in the prison yard with a fifth head on a wooden stake.

Illinois: On November 24, 2008, 20 prisoners in the Cook county jail in Chicago were charged with impersonating police officers and calling random long distance numbers to rack up fraudulent long distance calls.

Iraq: On December 26, 2008, six police officers of the American puppet regime and seven prisoners accused of being Al Qaeda members were shot and killed during an escape attempt from the Ramadi jail. At least 3 of the 11 prisoners, including Emad Ahmed Ferhan, the alleged leader of Al Qaeda in Mesopotamia, escaped successfully when they overpowered policemen returning a prisoner from a torture room to a holding cell, disarmed and killed him. Of 30 men in the holding cell, 11 escaped and were able to seize the jail armory.

Kansas: On December 27, 2008, Ross Archer, 42, a trusty at the Holt county

jail who was serving time on auto theft charges was arrested again after he stole a sheriff department cruiser. He then fled to Missouri where he was recaptured.

Minnesota: On November 19, 2008, Andrew Lemcke, 34, a guard at the Corrections Corporation of America run prison in Appleton, was charged with first and second degree murder for shooting his wife Nichole Riley-Lemcke in their home in Appleton in 2004. He was arrested in Arizona where he was working as a guard at the CCA prison in Florence. At the time of the shooting he claimed it was accidental after they had struggled when Nichole tried to shoot him.

Nebraska: On November 20, 2008, Craig Beckman, 44, a former guard at the state prison in Lincoln was sentenced to 20-22 years in prison after pleading guilty to charges he raped a 12 year old girl for more than a year.

North Carolina: Beginning in November, 2008, the state Department of Corrections began testing all prisoners arriving in the system for HIV, the virus which causes AIDS. At least ten prisoners were diagnosed with HIV who were not previously aware of their status.

Oregon: On March 27, 2008, former federal prison guard James Rolan was sentenced to a mere 2 years in prison after pleading guilty to receiving a bribe as a public servant and possessing heroin with intent to distribute. An FBI wiretap intercepted calls from Alfredo Bernal, a prisoner at FCI Sheridan where Rolan worked, to order heroin, marijuana and drug paraphernalia in exchange for \$2,000. Carranza was sentenced to an additional 30 months in prison for his role in the scheme.

Texas: On January 2, 2009, Jimmy Folsom, 44, a prisoner at the state prison in Huntsville, pleaded guilty in federal court to mailing threatening letters to New Hampshire attorney general Kelly Ayotte in a bid to be sent to a New Hampshire prison. Alas, by pleading guilty in federal court he will serve his time in a federal prison. None of which are located in the Granite state.

Texas: On November 21, 2008, Emmanuel Cassio, a jail guard at the Val Verde Correctional Facility in Del Rio was sentenced to 16 months in federal prison for walking into a cell and punching a prisoner without any provocation. He was prosecuted in federal court and pleaded guilty to violating the civil rights of a prisoner. He was also fined \$3,000. 📰

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South Carolina Jail Pays Prisoners \$80,000 for Failure to Prevent/Treat MRSA

South Carolina's Greenville County has agreed to pay \$80,000 to settle 25 prisoners' lawsuit that claims jail officials failed to take preventive measures to prevent the spread of an outbreak of Methicillin Resistant Staphylococcus Aureus (MRSA) at the Greenville County Jail (GCJ). The prisoners also claimed that the officials failed to treat their MRSA infection when they requested medical care.

Prisoners at GCJ began complaining to jail officials in July of 2005 that they had sores on their bodies and were experiencing significant pain and suffering that was associated with necrotic flesh

wounds, which were swollen and painful. No medical care was forthcoming despite numerous requests for treatment over a few months.

Although jail officials knew that MRSA was spreading throughout GCJ, they did not advise prisoners of this fact or take any precautions to stop its spread. Moreover, the County violated state law by failing to report the infectious outbreak.

It was only after a news media story broke that the prisoners were going to sue that jail officials took action. They then "made some cursory efforts to clean the

facility, installing soap dispensers that were not refilled, cleaning hallways and cell blocks, and making one superficial attempt to wipe down the cells with a bleach solution directly prior to the visit by the Plaintiffs' expert, Dr. Robert Greifinger.

In March 2008, the parties entered into a settlement of \$80,000 for all of the 25 prisoner plaintiffs. The county denied wrongdoing. The prisoners were represented by attorneys Milford Oliver Howard and Thomas W. Dunaway. See: *Boyd v. County of Greenville*, USDC, D. South Carolina, Case No. 06-CR-2339.



Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Gay & Lesbian Prisoner Project

Provide limited pen pal services and information for GLBT prisoners, and publishes Gay Community News several times a year, free to lesbian and gay prisoners. Volunteer-run with limited services. G&LPP, P.O. Box 1481, Boston, MA 02117

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrong-

ful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

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No Prison Guinea Pigs: President Obama Should Act Now To Ensure Prisoners Aren't Used For Medical Research

by Allen M. Hornblum and Jeffrey Ian Ross

We keep hearing that President Barack Obama is intent on correcting the excesses of the previous administration, whether it's waterboarding or dirty air or international relations.

But how about this: There exists the possibility that prisoners in American jails could be used for "voluntary" experiments - clinical trials for drugs, new surgical procedures and the like. It's a troubling piece of Bush-era business that the president could correct with the stroke of a pen.

For more than two years, we, as members of a liaison panel advising the Institute of Medicine, have been waiting for an answer from the secretary of health and human services concerning the troubling potential for convicts in American prisons to be used for experiments. In 2006, the formal IOM committee recommended that convicts be made available for human subject research - a possible return to the mindset that gave us horrors such as the Tuskegee Syphilis Study. Fortunately, the Bush administration did not act on the recommendation, but the lack of a decision has not given us any comfort. This country's leaders should firmly reject the proposal.

Our panel, focused on former prisoners and prisoner advocates, tried to convince the IOM committee that loosening restrictions on the already weakened protections for incarcerated Americans would take us back to a time when vulnerable populations were grist for the research mill and ethical abuses were tolerated. Prisoners were used as the guinea pigs of choice for researchers and pharmaceutical companies well into the mid 1970s, and prisons have been a convenient storehouse of cheap and available research subjects. Physicians with pet medical theories and budding careers, or drug companies in the financial straits of product development, aggressively sought access to walled institutions as perfect places for testing.

Incorporated in everything from testicular transplant and irradiation experiments to studies subjecting them to radioactive isotopes, dioxin and chemical warfare agents, prisoners were a key pillar of American medical and pharmaceutical research.

This, from the same country that led the prosecution of Nazi doctors for their

barbaric medical experiments on concentration camp prisoners. And this, from the country that served as a principal author of the Nuremberg Code, which ardently proclaimed that people "unable to exercise free power of choice" or subject to "constraint or coercion" should not be included as subjects in medical experimentation. Regrettably, the research community back at home continued to mine our mental institutions, orphanages and prisons for research subjects. Only during the great ethical enlightenment of the 1970s and the aftermath of the Tuskegee "studies" did American researchers condemn this practice.

The IOM's 2006 report, *Ethical Considerations for Research Involving Prisoners*, called prisoners "an especially vulnerable class ... who historically have been exploited by physicians and researchers." This turned out to be lip service, though: The group decided that the use of prisoners for experiments could be rationalized because this population is also vulnerable to diseases such as AIDS, hepatitis C and tuberculosis, and therefore could benefit from new treatments, even if they are experimental in nature. Develop an "ethical framework" for research, the

committee urged, and the potential for abuse would be eliminated.

We're skeptical, given the lack of choice that convicts have in their daily lives. Couple that with the notoriously poor health care available in American cell-blocks, and you have a potential disaster.

President Obama and his eventual nominee for secretary of health and human services, have an opportunity to clarify our nation's stance toward those whom we have declared unfit to live free among us. They can demonstrate, by rejecting the IOM's recommendation, that the prison abuses condoned or ignored by previous administrations will stop. While steps are being taken to close the notorious prison at Guantanamo, let's do what we can closer to home to ensure civil treatment for the incarcerated. ■

Allen M. Hornblum, author of "Acres of Skin" and "Sentenced to Science," frequently lectures on medical ethics. Jeffrey Ian Ross, a University of Baltimore professor and a fellow in UB's Center for International and Comparative Law, is author of "Special Problems in Corrections" and co-editor of "Convict Criminology."

Deceased New York Prisoner Wins Barber/Cosmetology Licensing For Ex-Cons

Three years after his death, ex-con Marc LaCloche won his long-fought case to permit ex-cons in New York state the right to gain barber and cosmetology licenses.

LaCloche, after an 11-year stint in New York prison, sought to make a living as a barber - a skill he had learned in prison. But New York prohibited felons from receiving business licenses, notwithstanding the state's Correction Law that prohibited discrimination based solely on a criminal record. The New York State Licensing Authority said that LaCloche's criminal history alone proved he did not have the "good moral character and trustworthiness" that would be requisite for a business license. In other words, his record per se doomed him from lawfully plying the trade the prison had trained him for.

LaCloche unsuccessfully took his case

to the courts. Later, he convinced a more sympathetic legislature to pass a bill that would permit felons to earn barber and cosmetology licenses, but then-Governor Eliot Spitzer vetoed it. When the bill was renewed in 2008, it was approved by new Governor David Paterson.

Paul Samuels, president of the New York criminal justice policy group Legal Action Center, said of the prior blanket ban, "It's telling people that even if you do your time, pay your debt to society, and you want to do the right thing, we're not going to let you...It's simply un-American." JoAnne Page, president of the Fortune Society, calls the new law "a crack in the door" that may lead the way to open more licensing opportunities for ex-cons. ■

Source: *New York Times*.

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Deconstructing Gus: A Former CCA Prisoner Takes On, and Takes Down, CCA's Top Lawyer

by Paul Wright, et al.

On June 13, 2007, former President Bush nominated Gustavus A. Puryear IV, 40, for a lifetime appointment to the U.S. District Court for the Middle District of Tennessee. While you've likely never heard of Gustavus Puryear, you may be familiar with the company he works for: Corrections Corporation of America (CCA), the nation's largest for-profit prison firm. CCA is conveniently located in the Middle District of Tennessee, and Puryear serves as the company's general counsel – its top attorney.

Puryear's judicial nomination did not go unnoticed; it drew the attention of a former CCA prisoner turned criminal jus-

tice advocate who opposes private prisons. By conducting extensive research, securing widespread media attention, contacting members of the Senate Judiciary Committee and recruiting organizational allies, he coordinated an opposition campaign that managed to stall – and ultimately stop – Puryear's nomination.

Further, the ex-CCA prisoner who took down CCA's general counsel, denying him a federal judgeship in a humiliating defeat, happens to be employed by *Prison Legal News*.

The Man Who Would Be Judge

So who exactly is Gustavus "Gus" Puryear? Born into a wealthy family in Atlanta, Georgia, Puryear graduated with a B.A. from Emory University in 1990 and received a J.D. degree with honors from the University of North Carolina School of Law in 1993. He excelled in debate, placing third in a national debate tournament while in college.

Puryear clerked for a year for Judge Rhesa H. Barksdale on the U.S. Court of Appeals for the Fifth Circuit before settling down in Nashville, Tennessee. There he landed a position with the law firm of Farris, Warfield & Kanaday (now Stites & Harbison), where his family had longstanding connections.

Following three years as a corporate lawyer, Puryear turned to politics. He served as counsel for the U.S. Senate Committee on Government Affairs under former Senator Fred Thompson, then from 1998 to 2000 was the legislative director for former Senator Bill Frist.

In what must have been a highlight

of his political career, Puryear helped prepare former Vice President Dick Cheney for the election debates in 2000, and again in 2004.

Upon his return to Nashville he was introduced to John Ferguson, CCA's CEO. Puryear joined CCA as the firm's general counsel in January 2001, where he oversees all of the private prison company's litigation.

Puryear serves on the board of Nashville Bank & Trust, and is a Commissioner on the National Prison Rape Elimination Commission. He's a member of the prestigious Belle Meade Country Club and a deacon in the Presbyterian Church.

With a reputation for being extremely intelligent, charismatic and genteel, Puryear appeared to be a perfect candidate for a federal judgeship under the Bush administration. Indeed, he said the nomination was "like a dream come true."

And in the Other Corner ...

Approximately one year before Puryear joined CCA as the company's top lawyer, Alex Friedmann was released from the Tennessee Dept. of Corrections (TDOC). He had served ten years in state prisons and county jails on convictions for armed robbery, assault with attempt to commit murder and attempted aggravated robbery.

Six of those years, from 1992 to 1998, were spent at the CCA-operated South Central Correctional Facility in Clifton, Tennessee. While at South Central, Friedmann was subjected to retaliatory cell searches, disciplinary charges and transfers due to his efforts to "degrade CCA with negative articles" and "create and disseminate information concerning negative incidents

Inside

From the Editor	14
Geo Flees Pennsylvania	16
Torture in Angola	18
Corrupt Halfway Houses	20
Supreme Court: Prosecutors Immune	26
PLN Reader Survey	27
CMS Problems Continue	32
Phoenix Jail Abuses Unabated	34
Prisoner Education Guidebook	38
California Prison Population Capped	40
PLN Writer Paroled, Finally	44
Michigan Prison Population Increase	46
News in Brief	50

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Deconstructing Gus (cont.)

experienced by CCA,” according to records produced by South Central staff.

At one point CCA transferred him to a prison in the extreme northwest corner of the state, a decision that was overturned by the TDOC on appeal. CCA also refused to let him receive an article in *The Nation* that was critical of prison privatization, in which he was quoted. That blatant censorship was likewise overruled by TDOC officials. [See: *PLN*, June 1998, p.16]. During this period he became a contributing writer for *PLN*.

While most ex-prisoners prefer to put their prison experiences behind them, Friedmann felt the problems he witnessed in the criminal justice system – particularly in regard to private prisons – could not be forgotten.

Following his release on November 1, 1999, Friedmann worked for several law offices, using the legal skills he had learned while incarcerated. He served one year with Reconciliation, a non-profit agency that advocates on behalf of prisoners’ families and children, and became involved in criminal justice issues ranging from felon disenfranchisement to restorative justice. He has been a volunteer mediator, and has also returned to prison as a visitor as part of an Inside/Out program.

Continuing his anti-private prison activism, Friedmann joined the Private Corrections Institute (www.privateci.org), a Florida-based watchdog group that opposes the privatization of correctional services, where he serves in an unpaid voluntary capacity as vice president.

Friedmann was hired by *Prison Legal News* in 2005 as *PLN*’s full-time associate editor; his responsibilities include news research, editing, website support and a variety of other tasks. He contributed a chapter to *PLN*’s third anthology, *Prison Profiteers: Who Makes Money from Mass Imprisonment*, and has spoken on justice-related topics at Yale University, an annual meeting of the National Lawyers Guild, and Critical Resistance; at legislative committee hearings in two states; and before the U.S. House Subcommittee on Crime, Terrorism and Homeland Security.

Identifying the Issues

In June 2007, an article about Puryear’s judicial nomination crossed Friedmann’s desk. After discussing the nomination with other criminal justice

advocates, the general consensus was little could be done. Candidates for U.S. District Court positions are perceived as less important than those for the appellate courts or Supreme Court, and tend to sail through Senate Judiciary Committee hearings with little opposition.

Still, Friedmann did not want the nomination to go unchallenged as he believed Puryear was an unsuitable candidate for an appointment to the federal bench, beyond the moral issue that as a CCA executive Puryear profited from people’s incarceration.

Further, U.S. District Court judges decide the vast majority of cases in the federal court system, as the appellate courts issue relatively few rulings and the Supreme Court hears only a fractional number of cases. Thus, they are arguably the most important rung on the federal judicial ladder, as they guard the entrance to the courthouse door.

“District court judges make life-and-death decisions on a regular basis, e.g. in capital punishment cases, and the appellate courts often give deference to fact finding by the district courts,” Friedmann noted. “A federal judgeship is no place for an inexperienced lawyer to ‘learn the ropes’ while ruling on important issues of Constitutional law.”

Delving into Puryear’s background through LEXIS and Westlaw searches, reviewing court dockets and related research, Friedmann developed a list of issues that could be raised in an opposition campaign.

Those issues included: 1) Puryear’s conflicts of interest in cases involving CCA, 2) his lack of litigation and trial experience, 3) the politically partisan nature of his nomination, 4) his questionable objectivity in prisoner lawsuits, 5) his concealment of information from the public, and 6) his membership in a discriminatory country club.

After some deliberation, Friedmann added one final issue – Puryear’s involvement in an investigation and litigation related to the death of Estelle Richardson, a female prisoner who died at a CCA jail. As it turned out, the Estelle Richardson case would prove to be one of the most important elements of the opposition campaign.

Conflict of Interest? **What Conflict of Interest?**

Puryear was nominated to serve as a federal judge in the U.S. District Court for the Middle District of Tennessee – the

Deconstructing Gus (cont.)

same jurisdiction where CCA is headquartered, where hundreds of lawsuits against the company are filed.

Puryear's annual compensation for fiscal year 2007 was around \$610,000, including bonuses, and since August 2007 he has sold shares of CCA stock valued at \$10 million. In short, CCA has made Puryear a multi-millionaire.

Pursuant to 28 U.S.C. § 455, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Given Puryear's lucrative history with CCA, he would, in theory, have to recuse himself from cases naming CCA or the company's subsidiaries or employees as parties.

This was a significant factor because a federal docket search indicated that CCA and its employees had been named in over 400 cases in the Middle District of Tennessee, with at least 260 of those cases being filed since 2000.

During his February 12, 2008 nomination hearing before the Senate Judiciary Committee, Puryear took issue with the number of cases in which he would have a conflict of interest. He also commented that there were only six active cases pending in the Middle District court that would constitute a conflict.

But that was incorrect; as of the date of Puryear's hearing there were 12 pending cases involving CCA or CCA employees – double the number he cited.

Puryear stated that if confirmed he would divest the remainder of his CCA stock and recuse himself from all cases involving CCA "for an extended period of time." When questioned by Committee members about the length of that

"extended period," he did not provide a precise answer but said he was "hesitant" to commit to recusing himself beyond five years.

Yet Puryear would not be able to divest himself of his network of friends and political and business contacts, his social connections with CCA executives, or his inside knowledge regarding CCA's litigation strategy and legal staff. As CCA presumably would still be around after five years, and still face a significant number of lawsuits in the Middle District, a temporary recusal period would not resolve those problems.

"Less Courtroom Experience Than Most Inmates"

According to the U.S. District Court in Middle Tennessee, Puryear had been named as counsel of record in 130 cases, which certainly sounds impressive. However, when Friedmann checked the dockets for each of those cases the results were telling.

Of the 130 cases, 85 had been dismissed by the court prior to service on the defendants while 39 were handled by another law firm or attorney. Puryear answered one lawsuit with a letter stating the defendant no longer worked for CCA. He was directly involved in just five other federal cases over his entire legal career, most recently a decade ago.

Additionally, Puryear had taken only two cases to jury trials – and lost one. A call to the U.S. Sixth Circuit Court of Appeals, which is over the Middle District of Tennessee, revealed that Puryear was not admitted to practice before that court. A check of his academic credentials through Westlaw found he had authored just one law journal article, in 1992.

"I could open an attorney directory, point randomly at a page and pick a candidate for federal court more qualified than Mr. Puryear," Friedmann stated.

While incarcerated, Friedmann was personally involved in six federal lawsuits, including three he litigated pro se. In one of those cases, filed against CCA and prison employees, he obtained a preliminary injunction and a \$6,000 jury award against a former CCA unit manager following a default judgment. In another suit he prevailed in a pro se appeal before the Sixth Circuit Court of Appeals.

Further, in *Richardson v. McKnight*, 521 U.S. 399 (1997) [*PLN*, Sept. 1997, p.1], Friedmann provided the plaintiff's

counsel with a legal argument and supporting documentation that was used in their Supreme Court brief (*McKnight* held that private prison companies cannot raise a defense of qualified immunity).

From this perspective, Friedmann had more experience – and success – in the federal courts as a prisoner with no legal training than Puryear had as a practicing attorney. Indeed, Puryear's apparent lack of familiarity with the federal courts led a reporter for *Mother Jones* magazine to observe he had "less courtroom experience than most inmates."

As Puryear's supporters couldn't dispute the fact that he had little trial or litigation experience, they instead pointed to his rating from the American Bar Association (ABA), which evaluates judicial nominees. Although the ABA ratings are not binding on the Senate Judiciary Committee, they reflect a nominee's professional abilities. The ratings consist of: not qualified, qualified and well qualified. Puryear was rated "qualified."

However, Puryear's supporters, including Senator Lamar Alexander and former Senator Bill Frist, ignored the fact that of the 102 federal judicial nominees rated by the ABA during the 110th Congress, 79 – or almost 80 percent – received ratings of well qualified. Thus, Puryear ranked in the bottom 20 percent of his judicial nominee peers.

Referring to Puryear's ABA rating, Vanderbilt University associate professor Stefanie Lindquist stated, "A 'qualified' rating is relatively weak. That's going to hurt him."

Or, as Friedmann put it, "Would you rather have surgery performed by a qualified surgeon or a well qualified surgeon? Would you want your child to be taught by a qualified teacher or a well qualified teacher? The same reasoning applies to the judiciary."

So why would an obviously inexperienced and less-than-qualified attorney like Puryear, with such a sparse track record in the federal courts, be nominated for a lifetime position as a federal judge? An examination of his political connections supplied a likely answer.

It's Who You Know

To say Puryear is a staunch Republican would be an understatement; he's practically a poster child for the GOP. He worked under former Senator Fred Thompson (R-TN) during an

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investigation into Democratic campaign fundraising, and served as the legislative director for former Senator Bill Frist (R-TN).

Plus, of course, Puryear was an advisor to former Vice President Dick Cheney during the 2000 and 2004 debates. He's also friends with Cheney's son-in-law, Philip Perry, who served as general counsel for the U.S. Dept. of Homeland Security.

Since 2001, Puryear has donated at least \$18,000 to Republican candidates and political committees. The *Nashville Post* referred to him as a "Republican heavyweight."

Puryear's employer, CCA, has been generous to the GOP, too – including to Tennessee's current Republican senators, Lamar Alexander and Bob Corker, who expressed strong support for Puryear's judicial nomination.

CCA's political action committee and the company's executives and their spouses gave more than \$36,000 to Alexander and \$27,000 to Corker from 2003 to 2008. CCA was Senator Alexander's fifth largest contributor over that time period.

Notably, neither Alexander nor Corker bothered to mention in any of

their statements in support of Puryear's nomination that they had received significant campaign contributions from Puryear and CCA.

Senator Alexander's personal and political connections with CCA go way back. CCA co-founder Tom Beasley once rented an apartment in Alexander's house, and later helped manage one of his gubernatorial campaigns. Beasley, a former chairman of the Tennessee Republican Party, also reportedly gave Alexander's campaign \$100,000 in 1997-1998. Several staffers in Alexander's administration from when he served as Tennessee's governor later worked for CCA, including Charles L. Overby, who currently sits on CCA's board of directors.

"To say that CCA has long been in bed with the Republican Party diminishes the depth of their relationship," observed an article in the *Nashville Scene*, an independent weekly publication in CCA's home town.

Given the political connections and bona fides of Puryear and CCA, and Puryear's lightweight experience in the federal courts as an attorney, his judicial nomination smacked of partisan payback.

"This is, of course, political," said

Friedmann. "I dislike politics. I believe the right person who is most qualified should be appointed to a position of public service – not someone who happens to be a member of one party or another and is being repaid for their political patronage."

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Deconstructing Gus (cont.)

That being said, Mr. Puryear would be unqualified whether he was a Democrat or a Republican, whether he was nominated by Clinton or Bush. He's not qualified and not the right man for the job. Which transcends politics, or at least it should."

Yet political connections that lead to government appointments are nothing unusual, as most nominations for federal judges and Assistant U.S. Attorneys are partisan in nature (though not always as blatantly as in this case). Thus, the political aspect of Puryear's nomination was not raised to any great extent during the opposition campaign.

Bad-Mouthing Prisoner Lawsuits

Upon researching the sparse number of news articles that mentioned or quoted Puryear, Friedmann found two that raised disturbing questions.

In a July 2004 article in *Corporate Legal Times*, Puryear offhandedly remarked that "Litigation is an outlet for inmates. It's something they can do in their spare time." Another article in the October 2005 issue of *GC South* discussed Puryear's "no settlement" policy and stated, "Of course [CCA] settles some suits, but Puryear's overarching 'no settlements' goal stems from his belief that many inmates use litigation to fill their free time and that letting them win only encourages more jailhouse lawyering."

Of course most judges, and legislators, don't like litigious prisoners; e.g., witness the Prison Litigation Reform Act. But the notion that a federal judicial candidate did not take prisoners' legal concerns seriously was troubling.

In his capacity as *PLN*'s associate editor, Friedmann had reported on many meritorious lawsuits filed by or on behalf of prisoners, including cases involving wrongful deaths, rapes and sexual abuse, grossly inadequate medical and mental health care, brutality by guards, abysmal conditions of confinement, and First Amendment and due process violations. The facts in those cases were often egregious; many resulted in settlements, jury awards or injunctive relief.

"All persons, including prisoners, deserve impartial consideration from our nation's judges," said Friedmann. "All people are entitled to equal justice under the law."

Further, Puryear knew better than

to disparage prisoners' lawsuits as an "outlet" for their "free time," because CCA had settled or been found liable in a variety of prison and jail-related cases, many of which were reported in *Prison Legal News*.

For example, a \$3 million South Carolina jury award for the abuse of juvenile offenders at a CCA facility [*PLN*, May 2001, p.17]; a \$1.6 million settlement in a lawsuit involving abuse at CCA's Youngstown, Ohio prison [*PLN*, Aug. 1999, p.14]; a \$5 million settlement to a female prisoner who was raped by guards employed by TransCor, a CCA subsidiary [*PLN*, Sept. 2006, p.1]; a \$235,000 federal jury award for medical neglect involving a Tennessee prisoner [*PLN*, July 2001, p.12]; and a \$41,885 settlement in a CCA prisoner's failure to protect case in New Mexico [*PLN*, Feb. 2002, p.11].

Those are just some of the highlights. From January 1, 2001 through December 31, 2003, during the first two years of Puryear's tenure as general counsel at CCA, the company settled over 190 lawsuits or claims involving both prisoner and employee litigation for a combined total of \$7.39 million.

Predictably, upon questioning by the Senate Judiciary Committee, Puryear expressed his view that lawsuits brought by prisoners "deserve a fair hearing," and that if confirmed he would "strive to be fair and impartial ... in all cases, including those brought by inmates." He claimed that his earlier comments only referred to frivolous prisoner lawsuits, prompting Senator Arlen Specter to ask him what he meant by "frivolous."

To demonstrate he was not biased against prisoners, Puryear cited his position on the National Prison Rape Elimination Commission. The Commission, formed as part of the Prison Rape Elimination Act (45 U.S.C. § 15601), is developing standards to reduce incidents of rape and sexual assault in correctional facilities. [Note: *PLN* has submitted formal comments on the Commission's draft standards].

However, when Friedmann checked the records of the National Prison Rape Elimination Commission he found that Puryear had missed fully half – four of eight – of the Commission's public hearings. Puryear acknowledged his poor attendance record only after being questioned by the Judiciary Committee.

Puryear also tried to counter accusa-

tions of bias against jailhouse lawyers by describing a 1992 case in which he had represented Christopher Johnson, a Tennessee state prisoner. Puryear took the case to trial in federal court (his only federal jury trial), where he lost. Then, he said, "Mr. Johnson, who had since been released, wished to represent himself on appeal. I sought and was granted leave to cease representing Mr. Johnson."

That characterization was not entirely candid. After pulling the case file from the court's archives, Friedmann discovered that Johnson had asked to have Puryear removed from the case twice – before trial because Puryear failed to raise issues in Johnson's supplemental complaint alleging retaliation, placement in segregation and being called a racial epithet by prison staff, and again after trial because Puryear had purportedly "failed to prepare for the trial and present all relevant evidence and proof."

The district court granted Johnson's second motion to dismiss counsel and denied Puryear's motion to withdraw as being moot. Thus, Puryear's account of his representation of Johnson, and withdrawal as counsel, was at best misleading.

Friedmann cited Puryear's disparaging comments about prisoner litigation, his poor attendance record at Commission hearings, and his position as CCA's general counsel in which he defends against prisoner lawsuits as evidence that Puryear would not be objective or fair when hearing prisoners' cases if confirmed as a federal judge.

The Public's Right to Know ... Be Damned

As a private company, CCA is not subject to the federal Freedom of Information Act or state public records laws in most cases. Therefore, government agencies that contract with CCA, and members of the public, must rely on documents that CCA produces either voluntarily or pursuant to its contractual obligations.

This includes documents concerning security-related incidents at CCA prisons such as sexual assaults, riots, escapes and unnatural deaths, which CCA calls "zero tolerance events." The company tracks such data internally through its quality assurance division, which was placed under CCA's legal department – and Puryear's oversight – in 2005.

The opposition campaign raised this issue with the Senate Judiciary Commit-

tee, noting that Puryear and CCA had withheld information from government agencies and members of the public, who had a right to know about problems in the company's prisons and jails.

As one example, following a hostage-taking at CCA's Bay County, Florida jail in 2004, which resulted in a prisoner and hostage being shot by a SWAT team member, CCA refused to release an after-action report. Puryear arranged to have a private law firm prepare the report, and a CCA attorney said it would never become a public record.

When the Private Corrections Institute (PCI) requested a copy of the report, CCA claimed it had been "prepared by outside counsel in anticipation of litigation," and thus was exempt from disclosure. Yet when Puryear responded to questions from the Judiciary Committee regarding the Bay County after-action report, he denied there was a written report and said it had been delivered verbally.

In another case, staff at the CCA-run Hardeman Co. Correctional Facility in Tennessee failed to report a May 2007 incident in which the warden physically assaulted a prisoner. State prison officials learned of the abuse two months later after they were contacted by the prisoner's attorney. CCA staff had tried to cover-up the incident; the warden subsequently resigned, was prosecuted and pleaded guilty. [See: *PLN*, June 2008, p.10].

Due to CCA's secretive nature, it was difficult to obtain details about other cases

where information about security-related incidents had been concealed or withheld. But then came an unexpected development from an unlikely source.

In July 2007, PCI was contacted by Ronald T. Jones, a former senior manager in CCA's quality assurance division who had recently resigned. PCI had filed an ethics complaint against Jones in 2000 after he was hired by CCA within two years of leaving his state job with Florida's Correctional Privatization Commission, a violation of state law. Nevertheless, he had no hard feelings. He did, however, have a conscience, and wanted to blow the whistle on CCA.

According to Jones, a longtime Republican, CCA kept two sets of quality assurance audit reports. "I would prepare one report with all of the audit findings and auditor comments in it for 'internal purposes only' and a separate more generic report that contained only general information about audit results as a whole," he said in a written statement. The generic reports without the detailed audit results would be provided to government agencies.

Jones also stated, "When Mr. Puryear felt there was highly sensitive or potentially damaging information to CCA, I would then be directed to remove that information from an audit report." The unredacted, detailed audit reports were designated "attorney-client privileged," and Jones was "told by senior quality assurance department staff that Mr. Puryear wanted [that] language inserted into the

detailed report to prevent that information from being accessible under Sunshine [public records] laws."

Jones further revealed that annual bonuses paid to CCA wardens and other company employees were based partly on the number of incidents reported at each facility. That supplied a financial incentive for CCA staff to underreport incidents – particularly zero-tolerance events – which in turn created a corporate culture of deception that undermined CCA's quality assurance data. According to an internal CCA newsletter, the practice of linking bonuses to a facility's audit score was discontinued in mid-2007.

PCI referred Jones to a reporter at *TIME* magazine, who broke the story in an online article on March 13, 2008. Citing information provided by Jones, the *TIME* article said CCA kept the unredacted quality assurance reports for in-house use only so as to "limit bad publicity, litigation or fines that could derail CCA's multimillion dollar contracts with federal, state or local agencies." Jones contended that Puryear's participation in this practice was unethical. The *Tennessean*, Nashville's daily newspaper, ran a front-page article about the accusations leveled against CCA

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Deconstructing Gus (cont.)

and Puryear on March 14, 2008.

CCA officials responded by quickly contacting their government contract partners and telling them Jones' allegations were completely false – although the company acknowledged that “appropriate information gathered in the audits is separately provided to our legal department,” and Puryear admitted “we did not make our customers aware of these documents,” referring to the detailed quality assurance reports that CCA kept for in-house use only.

CCA senior vice president J. Michael Quinlan, a former director of the federal Bureau of Prisons, referred to Jones as a “former disgruntled employee” and said he was “personally willing to stake my 37 years of correctional experience and reputation as a corrections professional on the integrity of our work.” You could almost see the wagons being circled.

Incidentally, while employed with the BOP, Quinlan was sued by a male co-worker who alleged that Quinlan had sexually harassed him in a hotel room – a suit that was later settled. [See: *PLN*, June 2000, p.20]. He was also accused of silencing a federal prisoner who claimed he had sold drugs to then-Vice President Dan Quayle. [See: *PLN*, Feb. 1992, p.4; Oct. 2000, p.14]. So Quinlan's reputation might not count for much.

Regardless, the damage to Puryear's reputation before the Senate Judiciary Committee had already been done, even though no official investigation resulted from the disclosure that CCA was concealing information from government agencies and the public.

Country Club Connection

Puryear listed the Belle Meade Country Club as one of his organizational memberships in a questionnaire provided to the Judiciary Committee. Most people aren't familiar with the Belle Meade Country Club unless they have seven-figure bank balances; it's so elite that not even its website is accessible to the public.

The Club, founded in 1901, is the most exclusive private golf and social club in Nashville. It is also almost exclusively white, not having admitted its first (and still only) black member until 1994 – and since that member lives in a different state, he doesn't attend often. Not that there aren't any blacks at the Club; it's just that

they mainly cut the grass, serve the food and clean the facilities.

With its stately columned facade and well-tended grounds, the Belle Meade Country Club is reminiscent of a quaint Southern mansion where Nashville's rich can role-play what it must have been like during the nostalgic era of slave plantations.

The Judiciary Committee's questionnaire asked Puryear to indicate whether any of the organizations to which he belongs “currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies.”

His response? While acknowledging a lack of racial diversity prior to 1994, Puryear stated, “To my knowledge, during my membership at the club, it has not discriminated on the basis of race, sex, or religion.”

Which is an interesting answer, not only considering the Club's almost completely lily-white membership, but also because female members (and the Club's single black member) do not have voting privileges.

Only members who have Resident Member status are able to vote on Club business or hold office. As it so happens, the Club's approximately 600 Resident Members are all male; none are black. Women join the Club as “Lady Members” without voting privileges, and Non-resident Members, which include those who live in other states, likewise cannot vote.

While there is no official policy that prohibits women or blacks from being Resident Members, none are – and new members must be proposed and recommended by the existing all-male, non-black Resident Members. Not surprisingly, the Club's Constitution, By-laws and member handbook do not include a non-discrimination statement.

That the Club's Resident Members have never successfully proposed a black or female member for Resident Member status over the Club's 108-year history is indicative of intentional discrimination – or at the very least *de facto* discrimination. But Puryear, who is by all accounts a highly intelligent attorney, maintained he was unaware of any discrimination at the Club.

Puryear defended his membership by noting that three federal judges, including Sixth Circuit Court of Appeals Judge Gilbert S. Merritt, were members of the

Club [though Judge Merritt is no longer an active member]. Puryear also noted that as an Associate Member he does not have voting privileges himself – although that failed to address the inability of *any* women members to vote, or why *all* of the Club's Resident Members were male and none were black.

Others are not so short sighted. Puryear's ex-boss, former Senator Bill Frist, resigned his Club membership in 1993 shortly before he entered national politics. Rather than moot the controversy by canceling his membership, Puryear remains a member of the Belle Meade Country Club to this day.

Puryear's membership in an elitist country club with discriminatory practices did not go unchallenged. Friedmann contacted three women's rights groups, the National Organization for Women, the National Council of Women's Organizations and the Women's Equal Rights Legal Defense and Education Fund, which sent letters to the Judiciary Committee sharply criticizing Puryear's affiliation with the Belle Meade Country Club.

“If Mr. Puryear is appointed to the federal bench, it is difficult for us to conceive how women defendants and plaintiffs, or indeed women attorneys, could appear before him and expect to receive impartial and equal consideration given Mr. Puryear's past membership in the Belle Meade Country Club and his defense of that membership,” stated Susan Scanlan, Chair of the National Council of Women's Organizations.

Estelle Richardson's Death Revisited

PLN has reported extensively on the death of Estelle Richardson, 34, a prisoner at the CCA Metro-Davidson County Detention Facility in Nashville, Tennessee who was found unresponsive in her segregation cell on July 5, 2004, one day after a cell extraction.

An autopsy revealed she had a fractured skull, four broken ribs and a lacerated liver. Chief Medical Examiner Dr. Bruce Levy, who ruled Estelle's death a homicide caused by blunt force trauma to the head, determined her injuries could not have been self-inflicted. “If she had fallen from a high window or if she had been hit by a car, I would expect to see these types of injuries,” he said at the time.

Four CCA guards were indicted in connection with Estelle's death in September 2005; however, the charges were later dropped because the timing of the

fatal head injury could not be accurately determined. In February 2006, CCA quietly settled a federal lawsuit filed on behalf of Estelle's two minor children. Her homicide remains unsolved. [See: *PLN*, April 2005, p.14; Feb. 2006, p.1; May 2006, p.19].

Initially, the opposition campaign raised the Estelle Richardson case as an example of Puryear's priorities in representing and defending CCA. While there were no allegations that Puryear had done anything wrong in connection with the investigation into Estelle's death or the subsequent civil litigation, his primary concern was protecting CCA's interests, which, of course, is what he is paid millions to do.

"What about the public's interest in knowing who beat Estelle Richardson to death?," asked Friedmann. "What about bringing her killers to justice, whether they were CCA guards or other prisoners? That, apparently, was not one of Mr. Puryear's concerns – and a person who has no interest in ensuring that justice is served has no business being a judge."

Puryear faced tough questions about Estelle's case at his February 12, 2008 Judiciary Committee hearing, and pro-

vided some rather disturbing answers. He stated the four CCA guards arrested in connection with her homicide had been "exonerated"; the cause of Estelle's death could not be determined and she may have died accidentally; and her four broken ribs might have been caused by CPR, which he said was a "common" occurrence.

Puryear further informed the Judiciary Committee that Estelle's death was "profoundly distressing to me personally and professionally," and had been "seared" into his memory.

However, he forgot to mention the involvement of a fifth CCA guard relative to Estelle Richardson's death. Other prisoners had reported seeing that guard, Shirley M. Foster, injure Estelle in an unmonitored shower area three days before she died. Friedmann tracked down two of those witnesses, now incarcerated at the Tennessee Prison for Women, and they confirmed that Foster had yanked Estelle out of the shower, causing her to fall and hit her head. Foster was never charged.

Puryear also forgot to tell the Judiciary Committee that CCA officials had claimed there was no videotape of Estelle's cell extraction the day before her death, allegedly because the video camera wasn't

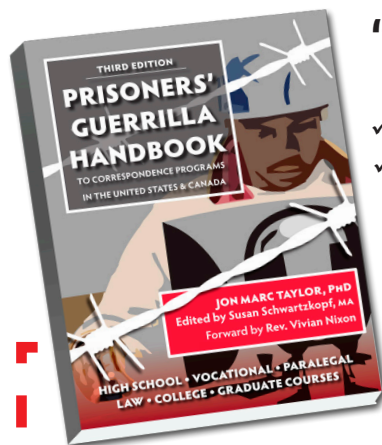
working. Instead, he made an oblique reference to "additional in-service training concerning video camera procedures" as one of the remedial actions taken by CCA following Estelle's homicide.

Police investigators who inspected the camera reported that it appeared to be in working condition, and the Assistant District Attorney said the missing video was a contributing factor in the decision to indict the four CCA guards, as it signified a possible cover-up.

After Puryear's testimony at the Committee hearing, Friedmann did some fact checking. He spoke with the DA's office and learned about the alleged non-existent videotape of Estelle's cell extraction, and obtained a report from the Sheriff's office on Estelle's death that was critical of CCA and conflicted with statements made by Puryear.

He also obtained a copy of Estelle's autopsy report, with its finding of homicide, and supplied copies to the Committee members. He spoke with Dr. Levy, the Chief Medical Examiner who had conducted Estelle's autopsy, and asked him to comment on Puryear's characterization of her injuries and cause of death.

Dr. Levy apparently took exception to



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Deconstructing Gus (cont.)

Puryear's remarks. On February 21, 2008 he sent a heated letter to the Senate Judiciary Committee that said he "was frankly stunned" by Puryear's testimony. The Chief Medical Examiner rejected Puryear's statement that CPR could have caused Estelle's rib fractures and liver damage, saying that was "misleading at best."

"The Committee should be very concerned about a nominee for federal judge who is less than truthful when answering questions from the Senate Judiciary Committee," Dr. Levy warned, adding, "I hope Mr. Puryear's statements before the Committee earlier this week were an isolated misjudgment and not the alarming statements they appear to be."

Puryear responded to questions about the Estelle Richardson case by noting that both medical experts in the lawsuit filed by Estelle's family had disagreed with Dr. Levy about the cause of death. Further, the timing of the fatal head injury was disputed and likely occurred at least three days earlier.

Puryear also explained that CCA's paid medical expert had opined Estelle's broken ribs were "almost certainly" caused by CPR. Of course that same expert, Dr. William McCormick, had testified in an earlier, unrelated murder case that the death of a woman who had a skull fracture and internal injuries, and whose body was "covered with bruises from head to toe," was an accident due to a fall down a few steps. The jury in that case rejected his expert opinion. See: *State v. Gray*, 960 S.W.2d 598 (Tenn.Crim.App. 1997).

In regard to his remark that the four CCA guards had been "exonerated," Puryear said he had used that term in its "common, colloquial meaning," and acknowledged that "a prosecutor's decision not to prosecute a previously indicted defendant is different from a jury's verdict of 'not guilty.'"

Additionally, in a February 26, 2008 letter to the Judiciary Committee, CCA attorney James F. Sanders jumped to Puryear's defense. Presumably with a straight face, Sanders wrote, "there is no credible evidence to support Dr. Levy's homicide conclusion, other than the head injury and the death itself." As one journalist who wrote about Estelle's case observed, "Ah, yes, just those bothersome little details. The head injury and the death itself."

Meanwhile, Joseph F. Welborn III,

one of the lawyers who defended CCA in Estelle Richardson's wrongful death suit, and attorney David Randolph Smith, who represented Estelle's children, filed a joint motion to unseal the settlement hearing transcript in the case. The unsealed transcript was then provided to the Senate Judiciary Committee in support of Puryear's answers to questions concerning Estelle's death.

Although Smith and Welborn had advised the court that "The transcript does not contain terms of the minor settlement and will not violate the order of the Court that the settlement remain confidential," the unsealed transcript in fact contained sufficient details to determine that CCA paid approximately \$2 million to settle the lawsuit filed on behalf of Estelle's children. [See: *PLN*, May 2008, p.28]. The document is posted on *PLN*'s website.

After being contacted by Friedmann, Estelle Richardson's sister-by-adoption sent a letter to the Senate Judiciary Committee describing the circumstances of Estelle's death. She told the Committee that CCA had "never apologized" to Estelle's family or children. Apparently Puryear, who personally negotiated the settlement, felt \$2 million was sufficient and no apology was necessary.

Silja J.A. Talvi, a *PLN* board member and senior editor at *In These Times*, a monthly news magazine, had been following the Estelle Richardson case for years. On May 5, 2008 she wrote a scathing two-part article on Puryear's judicial nomination in the context of Estelle's death, which was published as an exclusive on AlterNet.

Contrasting Puryear's rich and privileged life with that of Estelle Richardson, a "low-income, African American mother of two," Talvi noted that it would have been "unlikely that the two would have ever met under even the most random of circumstances."

And yet their fates were strangely intertwined – Estelle, who died at a CCA jail alone in a segregation cell, and Gus Puryear, who years later had to answer uncomfortable and difficult questions about her death. Talvi was later interviewed by Amy Goodman on the news program *Democracy Now!*, where she discussed her reporting on the Puryear nomination.

Following the publication of Talvi's article on AlterNet, an anonymous donor offered a \$35,000 cash reward for information in the Estelle Richardson case. The reward consisted of \$10,000 for the recovery

or proof of existence of the elusive videotape of Estelle's cell extraction the day before she died, and \$25,000 for information leading to the prosecution and conviction of those responsible for her death.

"The substantial reward offered in Estelle Richardson's unsolved homicide demonstrates that the lives of prisoners are not worthless," said Friedmann. "While for the past four years CCA officials have been unable to explain who was responsible for Ms. Richardson's murder, this reward will hopefully shed some light on her tragic death."

The Puryear opposition campaign devoted a separate website to Estelle's case and the \$35,000 reward (www.whokilledestelle.org), and a Nashville civil rights group, Power to the People, took on Estelle's death as a social justice issue and held a protest rally in Sept. 2008.

Ultimately, Estelle Richardson did what the other, more mundane issues raised by the opposition campaign could not. Her unsolved homicide put a human face on the prisoners held in CCA's for-profit facilities; it also revealed Puryear to be little more than a corporate hack whose primary goal was protecting CCA's interests, regardless of who died in the company's lockups or under what circumstances.

Fighting the Good Fight

Friedmann formed an independent group to coordinate the Puryear opposition campaign called Tennesseans Against Puryear. While that organization conducted most of the opposition efforts, Friedmann also participated in his capacities as *PLN*'s associate editor and vice president of the Private Corrections Institute, at his own expense.

Tennesseans Against Puryear worked with several organizational allies, including the Alliance for Justice, a national association of left-leaning advocacy groups. The Alliance for Justice was one of the first organizations to sound an alarm over Puryear's nomination, saying he lacked "the fundamental commitment to transparency, integrity, honesty, and legal ethics required of those seeking a lifetime appointment to the federal courts."

Other organizations that signed on to the opposition campaign included the National Lawyers Guild; the American Federation of State, County and Municipal Employees (AFSCME); Grassroots Leadership, a North Carolina-based civil rights organization; the California Correctional Peace Officers Association

(CCPOA); and Architects/Designers/Planners for Social Responsibility, which opposes prison expansion as being against public policy.

AFSCME and the CCPOA joined mainly because they oppose privatization, which is a threat to union jobs, and didn't want to see a pro-private prison judge like Puryear on the federal bench.

Also, as noted previously, three national women's rights groups submitted letters of opposition to the Senate Judiciary Committee as a result of Puryear's membership in the Belle Meade Country Club.

Prior to Puryear's Feb. 12, 2008 hearing before the Judiciary Committee, Friedmann sent statements and proposed questions to the Committee members that addressed Puryear's conflicts of interest, lack of experience, bias against prisoner litigation, concealment of information from the public, and role in the Estelle Richardson case.

Not even Puryear's position as a deacon in the Presbyterian church was left unscathed, as Friedmann mentioned that the General Assembly of the Presbyterian Church had passed a resolution in 2003 condemning for-profit private prisons

such as those operated by CCA.

To their credit, the Committee members took note and grilled Puryear at his nomination hearing, using the documents and questions provided by Friedmann as a guide. One reporter described the proceedings as "testy." According to a spokesperson for Committee Chairman Patrick Leahy, "During that hearing, a lot of red flags were raised."

Afterwards, the opposition campaign submitted a formal response to the Committee that identified inaccuracies and inconsistencies in Puryear's testimony. Senators Leahy, Dianne Feinstein, Russ Feingold and Edward Kennedy sent written follow-up questions to Puryear. At least one senator sent a second round of questions.

On the home front, Friedmann wrote two editorials opposing Puryear's nomination that were published by the *Tennessean*. He worked closely with media contacts, issued press releases on new developments in the opposition campaign, and ran public notices in the *Tennessean* and *Nashville Scene*. During two trips to Washington D.C., Friedmann met with representatives of seven members of the Senate Judiciary Committee, including

Chairman Leahy's staff.

Senator Leahy, as Chair of the Judiciary Committee, was a key part of the strategy to keep Puryear's nomination from going to the full Senate. In a small state like Vermont, citizens have extraordinary access to their congressional delegation. During the opposition campaign, *PLN* editor Paul Wright, who lives in Vermont, spoke a number of times with Senator Leahy's chief of staff and was able to mobilize several dozen voters – including members of the local bar and the Vermont chapter of the National Lawyers Guild – to express their concerns about Puryear's nomination. Those concerns were far from academic; more than 500 Vermont prisoners are housed at a CCA prison in Kentucky, where they have been abused and mistreated.

The year-long effort to derail Puryear's nomination generated extensive coverage in the news media, both locally and nationally. The *Associated Press* ran two national wire stories about the opposition campaign, while both the *Tennessean* and *Nashville Scene* published front-page articles and numerous other commentaries regarding Puryear. His contentious nomination was also reported in the *Nashville Post* and

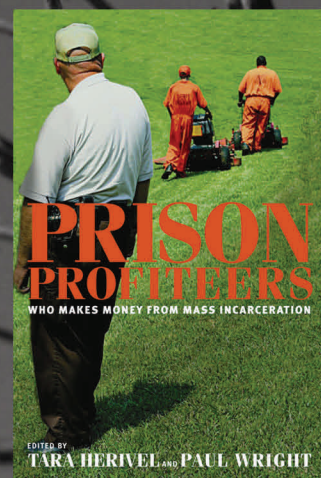
Prison Profiteers: Who Makes Money from Mass Incarceration
Edited by Paul Wright & Tara Herivel
Paperback, 324 pages, The New Press, 2008, \$19.95

This is the third and latest book in a series of Prison Legal News anthologies that examines the reality of mass imprisonment in America. [The other two titles are *The Ceiling of America: An Inside Look at the US Prison Industry* and *Prison Nation: The Warehousing of America's Poor*, both available from PLN].

Prison Profiteers is unique from other books on the market because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. Why is sentencing reform dead on arrival in every state legislature and congress? What is the biggest transfer of public wealth into private hands in recent history? Read *Prison Profiteers* and you will know! Hint: It has to do with prisons.

Contributors include: Judy Greene on private prison giants Geo (formerly Wackenhut) and CCA; Anne-Marie Cusac on who sells electronic weapons to prison guards; Wil S. Hylton on the largest prison health care provider; Ian Urbina on how prison labor supports the military; Kirsten Livingston on the privatization of public defense; Jennifer Gonnerman on the costs to neighborhoods from which prisoners are removed; Kevin Pranis on the banks and brokerage houses that finance prison building; and Silja Talvi on the American Correctional Association as a tax-funded lobbyist for professional prison bureaucracies; Tara Herivel on juvenile prisons; Gary Hunter and Peter Wagner on the census and counting prisoners; David Reutter on Florida's prison industries; Alex Friedmann on the private prisoner transportation industry; Paul Von Zielbauer on the sordid history of Prison Health Services in New York; Steven Jackson on the prison telephone industry; Samantha Shapiro on religious groups being paid to run prisons and Clayton Mosher, Gregory Hooks and Peter Wood on the myth and reality of building rural prisons.

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Deconstructing Gus (cont.)

Nashville City Paper, and on the national level in *TIME* magazine, *Harper's Magazine*, *Mother Jones* and the *National Law Journal*. Additional coverage appeared on AlterNet and Democracy Now!, and in a Think-MTV video exposé.

Some aspects of the Puryear opposition campaign were ineffective, such as unsuccessful bar complaints filed against the attorneys who had unsealed the confidential settlement transcript in Estelle Richardson's wrongful death suit. Also, research into a methadone clinic that rented its property from a realty company owned by Puryear proved to be unproductive (except to disclose that the clinic was improperly disposing of patient records, which resulted in an investigation by state officials).

The touchstone and focal point of the opposition campaign was Friedmann's website, www.againstpuryear.org, which laid out the various arguments against Puryear's nomination and included links to supporting documents and nomination-related news coverage.

The site, which went live in January 2008, received almost 4,000 unique visitors over a 10-month period. According to analytics software, CCA kept a close watch on the Tennesseans Against Puryear website, visiting it 295 times – almost once a day. In order to thwart a counter site, Friedmann had also reserved the domain name for www.forpuryear.org.

CCA Strikes Back

It took Puryear and CCA some time to take the opposition campaign seriously, but once they did they mounted an earnest defense.

CCA found a media ally in the *Nashville City Paper*, a free daily publication with a conservative viewpoint. The *City Paper* ran several articles generally favorable of Puryear's nomination, reporting CCA's "renewed public relations push" and support for Puryear from other attorneys and notable figures.

Puryear obtained letters of endorsement from a number of well-heeled law firms, including Bass Berry & Sims, Baker Donelson, Neal & Harwell, and Walker Tipps & Malone. Further, he received a letter of recommendation from Thurgood Marshall, Jr., the son of late Supreme Court Justice (and former FBI informant) Thurgood Marshall.

Even the attorney who represented

Estelle Richardson's children in their lawsuit against CCA, David Randolph Smith, sent a letter to the Judiciary Committee in favor of Puryear's nomination. Puryear would make "an excellent judge," Smith wrote.

However, Friedmann perceived a common thread. Almost all of the attorneys who sent letters in support of Puryear worked at firms that shared "financial, political and/or professional relationships" with CCA, he observed.

For example, Bass Berry & Sims had represented CCA in connection with securities offerings. The firm hired former CCA senior director Leslie Hafter to head its lobbying efforts; also, Bass Berry & Sims partner Lee Barfield II was the brother-in-law of former Senator Bill Frist, who had employed Puryear as his legislative director.

Likewise, Walker Tipps & Malone had represented CCA as a client, including in the Estelle Richardson lawsuit. It was a partner at that firm, J. Mark Tipps, who recruited Puryear to work for former Senator Fred Thompson. Tipps later recommended Puryear to then-Senator Bill Frist, and subsequently introduced him to CCA CEO John Ferguson. And so on.

In regard to the letter of recommendation from Thurgood Marshall, Jr., Friedmann noted that Marshall sat on CCA's board of directors and owned 7,000 shares of the company's stock. "He thus has a substantial financial stake in CCA's continued success and, of course, has a duty as a board member to be supportive of the company and its officers, including Mr. Puryear," said Friedmann.

As for plaintiff's attorney David Randolph Smith, a Democrat, his support of Puryear stemmed at least in part from a desire not to see an even worse Republican candidate should Puryear's nomination fail. In a conversation with Friedmann, and later on the record with the *Nashville Scene*, Smith said he did not want a "right-wing religious nutjob" appointed to the federal bench in lieu of Puryear, whom he viewed as a moderate. That Smith thought Puryear was the least objectionable nominee was not exactly a ringing endorsement.

On April 13, 2008, Puryear's ex-boss, former Senator Bill Frist, weighed in with a *Tennessean* editorial in support of Puryear. Frist condemned "political posturing fed by outside groups" and the "political circus" that accompanies judicial nomi-

nations, and urged the Senate to "not play politics with the federal courts."

Oddly, Frist failed to mention that during his tenure in Congress he proposed the "nuclear option" to change Senate rules in order to prevent Democrats from using filibusters to block votes on judicial nominees, in a partisan attempt to ensure the confirmation of more Republican judges. Perhaps it slipped his mind.

At CCA's annual shareholder meeting on May 16, 2008, which Friedmann attended, CEO John Ferguson acknowledged the company had spent funds on Puryear's nomination for the purpose of countering "unfounded" accusations and "mischaracterizations" about CCA as a result of negative media coverage.

As part of those corporate expenditures, CCA hired MMA Creative, an advertising and marketing firm, and placed paid ads in the *City Paper* and *Nashville Post*.

CCA created a blog site on August 1, 2008 to "provide factual information" about the company and "separate the facts from the reported myths about private prisons." While not specifically in response to the Puryear opposition campaign, the site (www.thecca360.com) includes links to two pro-Puryear blogs, one of which has since been taken down.

The CCA 360 site also contains a section devoted to Friedmann. Titled "Who is Alex Friedmann?," CCA answers that question by saying he is a convicted felon (without mentioning his felony convictions are almost two decades old) who "lacks academic training" and is "not a reliable media source."

In response, Friedmann said the website "is exactly what I'd expect from CCA, and I'm flattered that they consider my efforts so effective that they have to resort to such infantile tactics."

The End Game

CCA's public relations campaign proved to be too little too late. The *Tennessean*, the *Nashville Scene* and the *Associated Press* all ran articles casting doubt on Puryear's judicial nomination. The *Nashville Post* reported that Puryear should "keep his day job." Even the right-leaning *Nashville City Paper* referred to his nomination as "stalled."

Senators Edward Kennedy and Dianne Feinstein, both members of the Judiciary Committee, reportedly put a hold on Puryear's nomination, deeming him a controversial candidate rather than

a consensus nominee. "I understand they have put Puryear in the 'controversial' category," said Vanderbilt University law professor Brian Fitzpatrick. "It's very rare for a district court nominee to become controversial."

Finally, on September 23, 2008, after no movement on Puryear's nomination in the Judiciary Committee for seven months, Senator Lamar Alexander, Puryear's chief standard bearer, raised the white flag and acknowledged it was "not going to happen."

Ironically, it was one of Puryear's ardent supporters, Alabama attorney Ed Haden, who may have driven the final nail into Puryear's judicial nomination coffin. In an August 14, 2008 *Associated Press* article, Haden was quoted as saying Puryear could still be confirmed based on *quid pro quo* deal-making. "At the end of the session, it's, 'Who wants a bridge in Vermont?'" he said, in a not-so-subtle reference to Vermont senator and Judiciary Committee Chairman Patrick Leahy.

While that may in fact be how things are done in Washington – and Haden would know, as he previously served as nominations counsel for Senator Orrin Hatch and chief counsel for Senator Jeff Sessions – it isn't prudent to say it publicly. Upon being informed of Haden's cavalier comment, Senator Leahy's chief counsel noted dryly that Haden "seems to have no idea how Senator Leahy approaches nominations."

In the end, the Puryear nomination concluded with a whimper, not a bang. After the Senate adjourned on January 2, 2009, his nomination was returned to the White House, closing the door on Puryear's hopes for a federal judgeship. The vacancy on the U.S. District Court for the Middle District of Tennessee will now be filled by President Obama; in a written statement, Puryear blamed the demise of his nomination on "election-year politics."

The Puryear opposition campaign declared victory in a January 22, 2009 press release. "While some may consider it ironic that a former CCA prisoner managed to derail the judicial nomination of CCA's general counsel, the fact remains that Mr. Puryear was a questionable, partisan candidate who had conflicts and problematic issues, both past and present, that ensured his nomination would not survive scrutiny," Friedmann stated. "The opposition campaign simply provided the necessary level of scrutiny."

Although Puryear and Friedmann have never met, they both attended CCA's annual shareholder meeting last May. "I don't have anything personal against Mr. Puryear," said Friedmann. "And I'm sure he's enough of a professional to understand that the opposition campaign that killed his nomination was nothing more than business. Just as his employment

Online Postings Lead To Stiffer Sentences

by Brandon Sample

Prosecutors are increasingly using photos posted on Facebook and MySpace, popular social networking sites, to obtain harsher sentences.

It was bad taste, to say the least, when Joshua Lipton, a 20-year-old college junior charged with seriously injuring a woman during a drunken driving accident, showed up to a Halloween party dressed as a prisoner. Photos of Lipton in his faux prison garb, a black-and-white striped shirt and orange jumpsuit, were posted on Facebook and later fell into the hands of John Sullivan, the prosecutor handling Lipton's drunken driving case.

Sullivan used the photos at Lipton's sentencing to paint Lipton as unremorseful. The judge agreed, called the photos "depraved" and gave Lipton two years in prison.

"Social networking sites are just another way that people say things or do things that come back and haunt them," said Phil Malone, director of the cyberlaw clinic at Harvard Law School's Berkman Center for Internet and Society. "The things that people say online or leave online are pretty permanent."

Pictures like those of Lipton are embarrassing and make it more difficult to obtain leniency. Fortunately for defendants, it does not appear that prosecutors are scouring the web in preparation for every sentencing.

"It's not possible to do it in every case," said Darryl Perlin, a senior prosecutor in Santa Barbara County, California. "But certain cases, it does become relevant."

Perlin was willing to go along with Lara Buys's request for probation for a drunken driving accident that killed her passenger – at least until he saw her MySpace page.

Buys's page featured photos of her – taken after the accident but before sentencing – holding a glass of wine and

with CCA, in which he profits from people's incarceration, is nothing more than business." ■

Sources: www.againstpuryear.org, *Tennessean*, *Nashville Scene*, *Nashville City Paper*, *Nashville Post*, *Mother Jones*, *TIME*, *Harper's Magazine*, *AlterNet*, *Democracy Now!*, *UPI*, *Associated Press*, *politico.com*, www.usdoj.gov, *Jackson Sun News*, www.finance.yahoo.com

making jokes about drinking. Perlin used the pictures to argue for a jail sentence instead of probation. Buys was sentenced to two years in prison.

"Pending sentencing, you should be going to [Alcoholics Anonymous], you should be in therapy, you should be in a program to learn to deal with drinking and driving," Perlin said. "She was doing nothing other than having a good old time."

"When you take pictures like that," Santa Barbara defense attorney Steve Balask said, "it's a hell of an impact." ■

Source: *cnn.com*

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From the Editor

by Paul Wright

Readers will have received the January and February, 2009 issues of *PLN* later than usual because we had a problem with our mailing list database. The problem has been resolved and we are now moving back towards our regular publishing schedule. We apologize for any inconvenience this may have caused.

On January 28, 2009, John Dannenberg was finally released from prison. John has been a longtime *PLN* subscriber and began writing for *PLN* around ten years ago. He has been an excellent writer and a friend. His long parole ordeal, like that of thousands of prisoners in California and elsewhere, was a roller coaster of despair. The good news is that after several years of litigation and three writs of habeas corpus being granted, he was finally released. Of course, a writ of habeas corpus isn't what it used to be and we can note it takes one court order to put someone in prison and three to get them out. The article on John's court ordeal is in this issue of *PLN*. John wrote the article over a year ago, and it sat in my "to run" file until the day came that he was finally released.

I am also very pleased to announce the publication of the *Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, 3rd Edition*. This is the first book to be published by Prison Legal News and we hope there are many more

to come. We plan to focus on self-help and non-fiction reference books useful to prisoners that commercial publishers may be unwilling to publish because they are unprofitable or have a limited market. Getting into book publishing has been a learning experience but one that has been useful. We are publishing thoroughly professional, reliable and useful books. If you or someone you know is a qualified author, drop us a line or an e-mail. We will soon announce instructions for the criteria for book proposals.

Jon Marc Taylor, Susan Schwartzkopf and Jules Siegel have done a fantastic job of writing, editing and laying out this edition of the *Prisoners' Guerrilla Handbook*. If you are in prison and want to get an education, this is the book you need. With the demise of higher education behind bars, we hope that updating and publishing a book like this will allow prisoners to learn how to obtain college degrees in prison to better improve their lives both while they are in and after they get out. Prisoners should encourage their prison libraries and education departments to purchase reference copies of this highly informative book.

While we are on the good news roll, which is a change, this month's cover story reports on the successful effort to prevent CCA general counsel Gustavus Puryear IV from obtaining a federal judgeship after he was nominated by former President Bush. When Puryear was first nominated I thought his judgeship was a forgone conclusion: he was a rich, politically connected, Republican corporate lawyer. He was personal friends with Vice President Dick Cheney and Tennessee's two U.S.

senators. Alex Friedmann, *PLN's* associate editor, was insistent that Puryear's nomination be opposed. One thing about fighting losing battles is that occasionally we win one. This was such a battle. Alex did a brilliant job on his own time and at his own cost independent of *PLN*, while juggling his many and time-consuming duties as *PLN's* associate editor, to dig up the facts and then rally political support to ensure that Puryear's nomination did not go to the Senate floor. Even more impressive, Alex was able to do this on a shoe string budget.

In some respects, Puryear was saved from a large pay cut. He is still making millions as CCA's corporate counsel, rather than the \$180,000 he would make as a federal judge. And he is still a member of the racist and sexist Belle Meade Country Club. The important lesson to be drawn from this struggle is that sometimes the underdog wins, and sometimes huge government corporations can be run into the ground or defeated on tactical issues and sometimes strategic ones as well. Kudos to Alex for a job well done and to the many groups and people who supported this effort.

Remember that *PLN's* subscription rates increased in February 2009, and the new rates are \$24 a year for prisoners, \$30 for non prisoners, and \$80 for professionals and institutions. Prisoners can pay with stamps or embossed envelopes as long as they are new and in excellent condition. *PLN* still represents the best bargain around for timely, informative and useful prison-related news and legal information.

We always want to maintain our relevance and usefulness to our readers. This issue of *PLN* has a reader's survey, which we conduct every few years. Please take a few minutes to fill out the survey and return it. These surveys are extremely important because they allow us to know what readers want more of, what they would just as soon see us stop or drop, and how we can better serve your needs. It also helps give us a better idea of who reads *PLN* and what you want from the magazine. Even if you love *PLN* and think everything is great, fill out the survey and let us know. If you think we can improve, send along your suggestions. And if you are unhappy with *PLN*, let us know that too so we can improve.

Thank you for your continued support of *PLN*. ■

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GEO Cancels Contract at Pennsylvania Jail, Looks Elsewhere for Business

by David M. Reutter

GEО Group, Inc. (formerly known as Wackenhut Corrections), the second-largest private prison company in the nation, has operated the jail in Delaware County, Pennsylvania since 1995. GEO reportedly saved the county \$30 million when it built the 1,883-bed George W. Hill Correctional Facility (GHCF); in December 2007, GEO and the county agreed on an \$80 million two-year contract renewal.

From all appearances it seemed the privatization of GHCF, which is the only privately-operated county jail in Pennsylvania, would result in a permanent relationship between GEO and Delaware County. However, citing “underperformance and frequent litigation,” GEO gave notice that it planned to terminate the contract on December 31, 2008. Today the jail is under another company’s management.

While GEO’s premature pullout was unexpected, it was hardly surprising. *PLN*’s December 2007 cover story detailed numerous problems at GHCF, which have resulted in several six-figure settlements brought by families of prisoners who died at the facility. Many of those cases involved deficient medical care, mental health care or supervision by jail staff.

GEO’s cancellation of its contract to operate the Delaware County facility came only four months after another death. That incident involved a high-profile prisoner, and an autopsy indicated he died from complications related to cystic fibrosis, which his family claimed GHCF had failed to treat.

Those who regularly listen to Howard Stern’s radio show are familiar with Kenneth Keith Kallenbach, who was a member of the “Wack Pack.” Kallenbach, 39, had been housed at GHCF since March 27, 2008 on a probation violation. The violation stemmed from an arrest for allegedly trying to lure a teenage girl into his car; he had previously been placed on probation after pleading guilty to a DUI-related offense.

Cystic fibrosis is a chronic condition in which abnormally thick mucous builds up in the lungs and digestive system. Prior to entering GHCF, Kallenbach managed his condition by taking enzymes to help

digest his meals and by using a salt-water breathing machine at home.

When the police officer who arrested Kallenbach saw him at an April 15, 2008 preliminary hearing, he was shocked by Kallenbach’s gaunt appearance. “He looked bad,” said Officer Mark Smalarz. “I said, ‘Kenny, man, you’re really losing weight.’” Actually, he was dying.

On April 24, Kallenbach succumbed to pneumonia; a subsequent autopsy found his death resulted from “complications of cystic fibrosis, with bronchiectasis, acute and organizing pneumonitis and sepsis.” After the medical examiner’s July 19, 2008 report was released, Kallenbach’s family indicated they might sue. “They definitely killed my son,” stated Fay Kallenbach, Kenneth’s mother. A little more than a month later, GEO announced its contract termination and pullout.

According to GHCF’s Acting Superintendent, John A. Reilly, Jr., GEO cited “higher than average workers’ compensation” claims as one reason for abandoning its contract. Beyond inadequate medical care, retaining quality employees has been another ongoing problem for GEO. In 2008, Delaware County imposed \$700,000 in fines against the company for understaffing at GHCF. Further, some of GEO’s employees have had a hard time staying out of jail themselves.

In July 2008, former GHCF guard Michael Waters, 37, pled guilty to a charge of institutional sexual assault for having sex with a female work release prisoner – which, although consensual, was illegal. He was sentenced to three to 23 months in jail. Earlier that same month, guard Nytara Hall, 30, pleaded guilty to forgery. She reportedly forged a letter to the parole board so her boyfriend, who had a murder conviction, could live with her.

Other GEO guards at GHCF have pleaded guilty to sexual assault and conspiracy to commit bank robbery, while two former jail guards were convicted of assaulting a restrained prisoner with a basketball. In August 2007, GHCF guard Samuel Willis was arrested for attempting to lure two underage girls into his car while he was off-duty.

It is the financial bottom line, however, that is the driving force behind GEO’s

abrupt pullout from Delaware County. The company has long had a history of providing substandard services and medical treatment while settling any lawsuits that survive the preliminary stages. As most prisoner suits are filed pro se, few advance past that point. The lawsuits at GHCF, however, have involved such egregious facts that the settlements were not for nominal amounts as attorneys were willing to take the cases.

GEO paid settlements of \$300,000 and \$125,000 in 2000 and 2005, respectively, to the families of jail prisoners who committed suicide. In 2006, the company paid \$100,000 to the family of Rosalyn Atkinson, who died following a fatal dose of blood pressure medication. A lawsuit filed by the family of Brian Sullivan, a prisoner who died in April 2005 of a heroin overdose – his second overdose at the jail in five months – was settled confidentially in 2006. Most recently, on October 22, 2008, GEO agreed to pay an undisclosed amount to settle a wrongful death suit involving Cassandra Morgan, who died at GHCF due to an untreated thyroid condition. [See: *PLN*, Dec. 2007, p.1].

Angus Love, Director of the Pennsylvania Institutional Law Project, has handled several lawsuits against GHCF, including one case in which a prisoner with HIV received “virtually no treatment” and another where prison staff removed a cast from a prisoner who had a broken bone. Even Reilly, the Acting Superintendent at the facility, admitted that the medical department at GHCF had “underperformed.”

While GEO can withstand large settlements, which are often paid by its insurance carrier, the number of expensive lawsuits involving GHCF proved too much for its profit margin. Reilly estimated that claims at the Delaware County jail constituted about 70 percent of GEO’s litigation expenses company-wide. “I just think they’re losing money here,” he said.

With eight prisoner deaths at GHCF since 2005, GEO faces several potentially large settlements or verdicts in pending lawsuits, including an anticipated suit resulting from Kallenbach’s death. With a few rare exceptions, the company has been

unable to expand its business operations above the Mason-Dixon Line; consequently, GEO appears to be retreating to areas where it can flourish, particularly in the South.

The company has also been greasing the political wheels of politicians who have already hopped on the privatization bandwagon. It is very generous with such political contributions.

New Mexico Gov. Bill Richardson has been one of the largest recipients of GEO graft. The company and its corporate officers and employees have given Richardson over \$67,750 for his re-election campaign and presidential campaign. When Richardson was chairman of the Democratic Governor's Association, GEO gave that organization \$30,000. In 2006, the firm contributed \$66,450 to New Mexico state candidates.

GEO, however, is not the only private prison contractor that plays this game. Corrections Corporation of America (CCA) donated \$18,700 to New Mexico politicians in 2006. Prison food vendor Aramark contributed \$60,000 to Richardson and his running mate in their re-election campaign. And Wexford Health Services gave Richardson \$20,000 in 2005 and 2006 combined.

GEO has its sights set on Florida, too, where the company is headquartered. GEO gave Florida politicians a total of \$395,925 in 2006.

Why all of this money going to lawmakers in New Mexico and Florida? Both states have proven willing to contract with private prisons companies, and thus are good candidates for future expansion. GEO currently operates 4 facilities in Florida and 3 in New Mexico. But while the location may change, GEO's business model of providing cut-rate prison services and inadequate medical care is

unlikely to be any different.

On January 1, 2009, another private prison company, Community Education Centers (CEC), took over GEO's contract to operate GHCF in Delaware County. While the new contractor might provide better services and adequate health care, that appears unlikely. Notably, CEC is presently facing a class-action suit over

deficient medical treatment at the company's Coleman Hall re-entry facility in Philadelphia. ■

Sources: *Delco Times*, *Philadelphia Daily News*, *Associated Press*, *The New Mexican*, *Philadelphia Inquirer*, www.philly.com, www.kyw1060.com, www.tradingmarkets.com

\$295,000 Award to Wisconsin Prisoner in Moldy Mattress Case Reduced by Court

On September 17, 2008, a Wisconsin federal jury awarded a prisoner \$295,000 for violation of his constitutional rights. Specifically, the jury found that state prisoner Reggie Townsend was "denied the minimal civilized measure of life's necessities."

After a riot at the New Lisbon Correctional Center in late 2004, Townsend was placed in a 12' x 6' segregation cell for 60 days. He was forced to sleep on a thin mattress in a cell adjacent to the shower. His mattress quickly became "wet, moldy, and foul smelling," but guards ignored his complaints.

Townsend sued prison guard Jerry Allen for failing to replace the unsanitary bedding. At trial, the jury determined that Allen was aware of the mattress' condition and made a conscious decision to disregard it. While the jurors found Townsend had not suffered physical injury, they held Allen liable for demonstrating a willful or reckless disregard for Townsend's constitutional rights.

The jury awarded Townsend \$295,000 in punitive damages against Allen, though the State of Wisconsin is responsible for paying the award. Fortunately for state officials, they may not be

paying the entire amount.

On February 10, 2009, the U.S. District Court denied Allen's post-trial motion to set aside the verdict, but granted his Fed.R.Civ.P. Rule 59 motion for remittitur of the damage award. The Court found that the award was "excessive in light of the evidence," and ordered Townsend to either accept a reduced award of \$29,500 or retry the damages part of his lawsuit. Townsend chose the latter option and accepted the reduced damage award. See: *Townsend v. Allen*, U.S.D.C. (W.D. Wisc.), Case No. 05-cv-00204-BBC. ■

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Torture at Angola Prison:

President Obama promises to close Guantanamo, but a court proceeding in Louisiana exposes brutality closer to home

by Jordan Flaherty

The torture of prisoners in US custody is not only found in military prisons in Iraq, Afghanistan and Guantanamo. If President Obama is serious about ending US support for torture, he can start in Louisiana.

The Louisiana State Penitentiary at Angola is already notorious for a range of offenses, including keeping former Black Panthers Herman Wallace and Albert Woodfox in solitary for over 36 years. Now a death penalty trial in St. Francisville, Louisiana has exposed widespread and systemic abuse at the prison. Even in the context of eight years of the Bush administration, the behavior documented at the Louisiana State Penitentiary at Angola stands out both for its brutality and for the significant evidence that it was condoned and encouraged from the very top of the chain of command.

In a remarkable hearing that explored torture practices at Angola, twenty-five prisoners testified last summer to facing overwhelming violence in the aftermath of an escape attempt at the prison nearly a decade ago. These twenty-five prisoners - who were not involved in the escape attempt - testified to being kicked, punched, beaten with batons and fists, stepped on, left naked in a freezing cell, and threatened that they would be killed. They were threatened by guards that they would be sexually assaulted with batons. They were forced to urinate and defecate on themselves. They were bloodied, had teeth knocked out, were beaten until they lost control of bodily functions, and beaten until they signed statements or confessions presented to them by prison officials. One prisoner had a broken jaw, and another was placed in solitary confinement for eight years.

While prison officials deny the policy of abuse, the range of prisoners who gave statements, in addition to medical records and other evidence introduced at the trial, present a powerful argument that abuse is a standard policy at the prison. Several of the prisoners received \$7,000 when the state agreed to settle, without admitting liability, two civil rights lawsuits filed by 13 prisoners. The prisoners will have to spend that money behind bars - more than 90%

of Angola's prisoners are expected to die behind its walls.

Systemic Violence

During the attempted escape at Angola, in which one guard was killed and two were taken hostage, a team of guards - including Angola warden Burl Cain - rushed in and began shooting, killing one prisoner, Joel Durham, and wounding another, David Mathis.

The prison has no official guidelines for what should happen during escape attempts or other crises, a policy that seems designed to encourage the violent treatment documented in this case. Richard Stalder, at that time the secretary of the Louisiana Department of Public Safety and Corrections, was also at the prison at the time. Yet despite - or because of - the presence of the prison warden and head of corrections for the state, guards were given free hand to engage in violent retribution. Cain later told a reporter after the shooting that Angola's policy was not to negotiate, saying, "That's a message all the inmates know. They just forgot it. And now they know it again."

Five prisoners - including Mathis - were charged with murder, and currently are on trial, facing the death penalty - partially based on testimony from other prisoners that was obtained through beatings and torture. Mathis is represented by civil rights attorneys Jim Boren (who also represented one of the Jena Six youths) and Rachel Connor, with assistance from Nola Investigates, an investigative firm in New Orleans that specializes in defense for capital cases.

The St. Francisville hearing was requested by Mathis' defense counsel to demonstrate that, in the climate of violence and abuse, prisoners were forced to sign statements through torture, and therefore those statements should be inadmissible. 20th Judicial District Judge George H. Ware Jr. ruled that the documented torture and abuse was not relevant. However, the behavior documented in the hearing not only raises strong doubts about the cases against the Angola Five, but it also shows that violence against prisoners has become standard procedure at the prison.

The hearing shows a pattern of systemic abuse so open and regular, it defies the traditional excuse of bad apples. Prisoner Doyle Billiot testified to being threatened with death by the guards. "What's not to be afraid of? Got all these security guards coming around you everyday looking at you sideways, crazy and stuff. Don't know what's on their mind, especially when they threaten to kill you." Another prisoner, Robert Carley, testified that a false confession was beaten out of him. "I was afraid," he said. "I felt that if I didn't go in there and tell them something, I would die."

Prisoner Kenneth "Geronimo" Edwards testified that the guards "beat us half to death." He also testified that guards threatened to sexually assault him with a baton, saying, "that's a big black... say you want it." Later, Edwards says, the guards "put me in my cell. They took all my clothes. Took my jumpsuit. Took all the sheets, everything out the cell, and put me in the cell buck-naked... It was cold in the cell. They opened the windows and turned the blowers on." At least a dozen other prisoners also testified to receiving the same beatings, assault, threats of sexual violence, and "freezing treatment."

Some guards at the prison treated the abuse as a game. Prisoner Brian Johns testified at the hearing that "one of the guards was hitting us all in the head. Said he liked the sound of the drums - the drumming sound that - from hitting us in the head with the stick."

Solitary Confinement

Two of Angola's most famous residents, political prisoners Herman Wallace and Albert Woodfox, have become the primary example of another form of abuse common at Angola - the use of solitary confinement as punishment for political views. The two have now each spent more than 36 years in solitary, despite the fact that a judge recently overturned Woodfox's conviction (prison authorities continue to hold Woodfox and have announced plans to retry him). Woodfox and Wallace - who together with former prisoner Robert King Wilkerson are known as the Angola Three - have filed

a civil suit against Angola, arguing that their confinement has violated both their 8th Amendment rights against cruel and unusual punishment and 4th Amendment right to due process.

Recent statements by Angola warden Burl Cain make clear that Woodfox and Wallace are being punished for their political views. At a recent deposition, attorneys for Woodfox asked Cain, "Let's just for the sake of argument assume, if you can, that he is not guilty of the murder of Brent Miller." Cain responded, "Okay. I would still keep him in (solitary)...I still know that he is still trying to practice Black Pantherism, and I still would not want him walking around my prison because he would organize the young new inmates. I would have me all kind of problems, more than I could stand, and I would have the blacks chasing after them...He has to stay in a cell while he's at Angola."

In addition to Cain's comments, Louisiana Attorney General James "Buddy" Caldwell has said the case against the Angola Three is personal to him. Statements like this indicate that this vigilante attitude not only pervades New Orleans' criminal justice system, but that the problem comes from the very top.

The problem is not limited to the Louisiana State Penitentiary at Angola – similar stories can be found in prisons across the US. But from the abandonment of prisoners in Orleans Parish Prison during Hurricane Katrina to the case of the Jena Six, Louisiana's criminal justice system, which has the highest incarceration rate in the world, often seems to be functioning under plantation-style justice. Most recently, journalist A.C. Thompson, in an investigation of post-Katrina killings, found evidence that the New Orleans police department supported vigilante attacks against Black residents of New Orleans after Katrina.

Torture and abuse is illegal under both US law – including the constitutional prohibition against cruel and unusual punishment – and international treaties that the US is signatory to, from the 1948 Universal Declaration of Human Rights to the International Covenant on Civil and Political Rights (ratified in 1992). Despite the laws and treaties, US prison guards have rarely been held accountable to these standards.

Once we say that abuse or torture is ok against prisoners, the next step is for it to be used in the wider population. A recent petition for administrative rem-

edies filed by Herman Wallace states, "If Guantanamo Bay has been a national embarrassment and symbol of the U.S. government's relation to charges, trials and torture, then what is being done to the Angola 3... is what we are to expect if we fail to act quickly... The government tries out its torture techniques on prisoners in the U.S. – just far enough to see how society will react. It doesn't take long before they unleash their techniques on society as a whole." If we don't stand up against this abuse now, it will only spread.

Despite the hearings, civil suits, and other documentation, the guards who performed the acts documented in the hearing on torture at Angola remain unpunished, and the system that designed it remains in place. In fact, many of the guards have been promoted, and remain

in a supervisory capacity over the same prisoners they were documented to have beaten mercilessly. Warden Burl Cain still oversees Angola. Meanwhile, the trial of the Angola Five is moving forward, and those with the power to change the pattern of abuse at Angola remain silent. ■

Jordan Flaherty is a journalist based in New Orleans, and an editor of Left Turn Magazine. He was the first writer to bring the story of the Jena Six to a national audience and his reporting on post-Katrina New Orleans has been published and broadcast in outlets including Die Zeit (in Germany), Clarin (in Argentina), Al-Jazeera, TeleSur, and Democracy Now. He can be reached at neworleans@leftturn.org.

Research assistance for this article was provided by Emily Ratner.

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Widespread Corruption in Private Halfway Houses

by Derek S. Limburg

Privately-operated halfway houses across the nation have become embroiled in scandals and mismanagement. The wrongdoing stretches from the top to the bottom, from former politicians and corrections commissioners to staff and prisoners.

Reports surfaced in June 2008 about operational problems at The Villa, a halfway house in Greeley, Colorado run by Avalon Correctional Services. A Colorado Public Safety Report on The Villa, also known as The Restitution Center, detailed numerous violations – including insufficient security, unqualified staff, falsified drug tests, and sexual relations between staff and prisoners. The sex reportedly took place in an area called the “Boom-Boom Room,” and weapons and drugs were found in a tunnel at the facility.

Following the report, the state canceled its contract with Avalon. The residents of The Villa were moved to a community corrections program at the Weld County Jail, and management of the program was assumed by another company, Intervention, Inc.

Reports concerning two other Colorado halfway houses operated by Avalon, the Phoenix Center and the Loft House, also found problems – including poor training, inadequate record-keeping and high employee turnover.

“It makes you question whether [the company] should still be in business in Colorado,” said state Rep. Liane McFadyen, who is a member of the Community Corrections Advisory Council.

In Atlanta, Georgia, former Dismas Charities employee Terrence Clay received a sentence of one year and one day in prison and a \$1,000 fine for soliciting and taking bribes. Clay was employed by Dismas, a non-profit organization, at a halfway house for federal prisoners. At least twice in 2007, Clay solicited and received \$1,000 from a prisoner in exchange for certain favors.

“Today’s sentence should send the message that these serious crimes will continue to be prosecuted and punished,” said U.S. Attorney David E. Nahmais.

In Alaska, Bill Weimar became the 11th person nettled in an extensive joint investigation into political corruption conducted by the FBI and U.S. Department of Justice. Weimar pled guilty on August 11, 2008 to two federal felonies in U.S. District Court in Anchorage.

In 1985, Weimar and a group of partners founded Allvest, Inc. He then bought out his partners and turned Allvest into a multimillion dollar corporation with \$10 million in annual government contracts to provide halfway houses, drug treatment programs and other services.

Weimar admitted he paid a consultant \$20,000 during the August 2004 primary elections to cover a senatorial candidate’s consulting fees. Court documents cited phone calls in which the candidate told Weimar he was unable to pay the fees. Weimar agreed to cover the cost, noting it was illegal. “There’s no legal way to do that. At least not on that scale,” he said in a recorded conversation.

Weimar sent the consulting company a check for \$3,000 and also express mailed them \$8,500 in cash. The next day he cut the consultant an \$8,500 check. Weimar likely saw this as a worthwhile expense, as he reportedly held a \$5.5 million contingency interest if a local private prison project was completed, and he knew the candidate would support the project if elected.

Neither the consultant nor the senate candidate accused of conspiring with Weimar were named in court documents. However, contextual clues point towards former state Senator Jerry Ward as the unidentified candidate.

According to the federal indictment, by 2004 the candidate already had a long relationship with Weimar and held an elected office part of that time. Ward was elected in Anchorage in 1996 and in Kenai Peninsula in 2000. In 2002, Ward lost his re-election bid and attempted to regain his seat in 2004, losing in the primaries.

As a state senator, Ward had pushed hard for a private prison. In 1997, plans for a privately-run correctional facility in South Anchorage, involving Allvest and another company, Veco Corp., operating under a partnership called Corrections Group North, fell apart in the face of heavy public opposition.

In 2001 a House bill that pushed a private prison in Kenai was introduced, and Ward was one of three Senate sponsors. That effort, which involved Weimar, Veco Corp. and private prison firm Cornell Corrections, was unsuccessful. Weimar had sold five Alaska halfway houses to Cornell in 1998 for \$21 million, and later partnered with the company on the Kenai prison project.

The government’s case against former State Representative Tom Anderson also centered on the failed private prison initiative in Alaska. A key witness at Anderson’s trial was Frank Prewitt, a former Alaska Dept. of Corrections commissioner, private prison consultant and FBI informant.

Prewitt admitted he had accepted \$30,000 from Weimar in 1994 while he was still corrections commissioner. He testified that he considered the money a loan, which he repaid by working four months free of charge for Allvest after leaving his position with the state.

Bill Bobrick, a former executive director of the Alaska Democratic Party, also testified against Anderson. Bobrick, who was a lobbyist for Cornell, pleaded guilty on May 16, 2007 to conspiracy to bribe Anderson; he served five months in jail and five months on house arrest, plus two years on probation and community service work.

Anderson was convicted in July 2007 on seven felony charges related to accepting bribes to provide political influence for the unsuccessful private prison project. He was sentenced to five years on October 15, 2007.

No Cornell officials were indicted, and the company reportedly was unaware of any improprieties or the federal investigation involving Anderson and Bobrick.

Weimar, now 68 and living in Montana, pled guilty to conspiracy to commit mail and wire fraud and illegally manipulating currency transactions to avoid federal reporting requirements. He was sentenced in November 2008 to six months in prison and six months on home detention, plus a \$75,000 fine. His company, Allvest, had filed for bankruptcy in 2002 due to unpaid civil judgments.

These are but a few examples of the growing problems with the privatization of correctional services, including halfway houses. “Corruption by those who administer our prisons and other correctional institutions undermines the safety of everyone in those institutions, and further undermines the critical role they play in deterring and rehabilitating criminals,” stated U.S. Attorney Nahmais. ■

Sources: *Anchorage Daily News*, *www.bizjournals.com*, *www.9news.com*, *Greeley Tribune*, *Associated Press*, “Alaska’s Citizens Lock Out Private Prisons” by the National Institute on Money in State Politics (Nov. 6, 2008)

Dead Bodies at “Bodies” Exhibit May Be Executed Chinese Prisoners

by Gary Hunter

In 1977, German anatomist Gunther von Hagens developed a technique called plastination. The process involves slicing open human cadavers, exposing or extracting the internal organs, and infusing them with silicone or other polymers. Entire bodies can be preserved through plastination. In 1995, von Hagens began displaying his creations to the public in an exhibit called *Body Worlds*. The response was phenomenal.

An Atlanta-based company called Premier Exhibitions, Inc. opened its own version of a plastinated body exhibit in New York in 2005. The display, called *Bodies ... The Exhibition*, included 20 full-body cadavers and more than 200 organs, embryos and fetuses. Since opening, over 1.5 million people have attended the exhibition.

Last year, however, concerns were raised as to the origin of the bodies on display. Premier insisted that the cadavers were legally obtained from Dailan Medical University in China as “unclaimed” corpses. But an exposé by ABC’s *20/20* program reported the bodies actually came from a plastination lab not connected with the university.

Premier reportedly paid \$200 to \$300 apiece for the bodies, which were suspected to have come from Chinese prisons. Arnie Geller, former CEO for Premier, said he was assured by the lab that “these are all legitimate, unclaimed bodies”

Human rights activists like Sarah Redpath were unconvinced. “In the U.S. we have very specific laws as to what constitutes ‘unclaimed,’” she noted. “Premier’s use of ‘unclaimed’ is unknown,” since the standards in China are different.

U.S. Representative Todd Akin introduced a bill in April 2008 to prohibit plastinated bodies and organs from being imported into the United States (H.R. 5677). Akin said a primary concern is that the Chinese citizens did not give permission for their bodies to be put on display after their death.

“This is a human rights issue about affording human dignities to people around the world,” he stated.

The congressman’s concerns are well founded. In 2006 the Chinese government admitted that bodies of executed prisoners were being illegally harvested for organs; regulations to restrict that practice were

imposed in May 2007. [See: *PLN*, Sept. 2007, p.24; Jan. 2008, p.16].

Until now, U.S. Customs has not interfered with the importation of plastinated bodies, under the theory that the process alters human remains to such an extent they can be imported as plastic objects. Rep. Akin disagreed. “That is the same rhetoric that oppressive governments around the world have used to dehumanize people,” he said.

Although Akin’s proposed legislation failed to pass in Congress, state lawmakers in California and Pennsylvania have introduced similar bills requiring exhibitions to provide documentation of legal consent for the cadavers they put on display.

In New York, Attorney General Andrew Cuomo initiated his own investigation into what he termed “Premier’s practice of using bodies of undocumented origins in their exhibitions.” He subpoenaed records from the company related to how the bodies were obtained.

In a May 29, 2008 settlement agreement, Premier agreed to put \$50,000 in escrow to give refunds to past customers who claim they would not have attended the exhibit had they known the dubious

origins of the bodies. Premier also agreed to post a notice on its website and at its exhibits stating they are unable to confirm that the cadavers on display are not those of Chinese prisoners.

The notice, in very small text near the bottom of Premier’s website, is titled “Bodies NY disclosure.” It states, in part, “This exhibit displays human remains of Chinese citizens or residents which were originally received by the Chinese Bureau of Police. The Chinese Bureau of Police may receive bodies from Chinese prisons. Premier cannot independently verify that the human remains you are viewing are not those of persons who were incarcerated in Chinese prisons.”

Premier admitted no wrongdoing as part of the settlement. Note that the New York Attorney General’s action against Premier did not involve von Hagens’ *Body Worlds* exhibition, which, according to a June 2, 2008 press release, “is not affiliated with any other anatomical displays or copycat exhibits that use unclaimed and found bodies from China.”

Sources: *Atlanta Business Chronicle*, *abc-news.go.com*, *www.findingdulcinea.com*

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Florida's Juvenile Death Camps: A Painful Past Revisited

by David M. Reutter

Recent coverage of long-past abuses at Florida juvenile facilities has put a spotlight on the treatment of juvenile offenders. Reports by the *Miami Herald* and CNN have revealed that Florida youth facilities have been cruel and problematic institutions for over a century, which provides historical context for more recent incidents.

At least five Florida juveniles have died in custody since 2001. In June 2003, teenager Omar Paisley died at a Miami facility due to a nurse's neglect in treating his ruptured appendix. The nurse later pleaded guilty to a charge of culpable negligence and gave up her nursing license; Omar's family received a \$1.45 million settlement. [See: *PLN*, June 2005, p.8; Jan. 2009, p.31].

On January 6, 2006, Martin Lee Anderson, 14, died at a juvenile boot camp in a high profile incident that resulted in significant changes in the state's juvenile justice system. [See: *PLN*, July 2006, p.9; Dec. 2006, p.26]. Eight guards and a nurse were indicted in connection with Martin's brutal videotaped death, but all were acquitted at trial. [See: *PLN*, July 2007, pp. 9 and 11; June 2008, p.20].

A review of documents obtained by the *Miami Herald* has revealed that abusive conditions have long been endemic in Florida's juvenile corrections system. In a bid to improve transparency, the *Herald* was allowed to review century-old records and tour the campus of a facility formerly known as the Florida State Reform School (FSRS).

Established in 1897 by Florida lawmakers and opened on Jan. 1, 1900, FSRS was located in the Panhandle region in Jackson County. It comprised 1,200 acres of pristine land. The school had two dormitories located one-half mile apart; one was for white children and the other for "coloreds." There were peas, corn, sugar cane, velvet beans, cotton, hogs and mules at FSRS, which the boys cared for. A brick-making factory existed so the youths could learn a trade.

By 1903, the treatment of juveniles at FSRS had already gone astray. "We found them in irons, just like common criminals, which in the judgment of your committee is not the meaning of a state reform school," a Senate inspection committee wrote, calling FSRS "nothing more nor

less than a prison."

FSRS was renamed the Florida Industrial School for Boys and later the Arthur G. Dozier School for Boys ("Dozier"), after one of its superintendents.

Tragedy struck in November 1914 when a fire erupted in a "broken and dilapidated" stove in the white boys' dormitory. When the fire broke out, many of the guards had been visiting a house of ill repute, according to a grand jury report. Six youths and two employees died.

The Dozier school served as a symbol of force and intimidation for Florida children for decades. "When kids were growing up, their parents would say to them, 'If you don't behave, we'll send you to Dozier,'" said the school's current superintendent, Mary Zahasky.

Harsh beatings had become the norm at youth facilities throughout the United States, especially in the middle of the 20th century, but at Dozier they "were beyond the pale," said Ronald Straley, who was held at Dozier in 1963. "It was a beautiful place. The cottages were all brick and the bushes were trimmed, there were big oak trees, and it was beautifully landscaped, and I thought, 'Wow, this is really something. I might make some friends here and have a good time.'"

Shortly after his arrival, however, Straley learned about the "White House," a small white building where guards paddled the boys with a three-inch-wide, 18-inch-long board. That was later traded for a leather and metal strap, like the kind used in barber shops, because "we were afraid the board would injure them," stated former Dozier superintendent Troy Tidwell.

Tidwell, whom the boys referred to as "the one-armed man," and deceased assistant superintendent Robert Hatton, used to "discipline" the boys at Dozier. Punishment would be meted out for minor offenses, and the beatings were especially savage.

"I couldn't believe I was being hit with that much force," said Straley. "When they were hitting you in the same spot and they had already broken the skin or bruised you, you were in some serious pain. I went out of there in shock."

The boys were forced to lie on their bellies and grip the metal railing at the head of a bunk bed. The mattress was covered with blood and body fluids, and

the pillow was flecked with tiny pieces of tongue and lip from when boys had bit themselves, according to Richard Colon, who told a *Herald* reporter about his stay at Dozier in 1957.

"Your hind end would be black as crow," said Bill Haynes, who was at Dozier from April 1958 to November 1959. "It had a crust over it. Your shorts will be embedded into your skin and would have to be pulled out [with tweezers]. And when they pulled them out, it hurts even worse."

A group of men who call themselves the "White House Boys" found each other on the Internet by posting accounts of their treatment at Dozier when they were juveniles. In addition to the beatings, they say they were sexually abused in a crawl space below the dining hall, which they called the "rape room."

"They were monsters. Oh my God, the things they did," said Straley, recalling the abuse. "When these men had me down, you weren't going to turn into Bruce Lee, you only had one option and that was you could scream all you wanted."

Florida Department of Juvenile Justice (DJJ) officials have not disputed the allegations raised by the men who comprise the White House Boys. In fact, DJJ dedicated a memorial to their suffering on October 21, 2008. After the ceremony, the men visited a cemetery that reportedly holds the graves of 31 boys who died at the school. The graves are marked by unadorned white crosses that do not bear any names.

Governor Charlie Christ has ordered the Florida Department of Law Enforcement to investigate allegations of past abuse at Dozier. The department was also asked to find out who is buried at the cemetery. "Whatever is below those crosses is crying out – and it's screaming for us to bring justice," said Don Stratton, who was physically and sexually abused at Dozier in the 1960s.

The Dozier school still operates as a juvenile facility, housing court-committed youths age 13 to 21, though the White House building has long since been closed.

On January 8, 2009, four men who served time at Dozier as juveniles filed a class action lawsuit against the State of Florida for the brutality they suffered at the hands of state employees at the school.

The suit, filed in Pinellas County Circuit Court, has since been joined by almost 90 other plaintiffs, including some who claim they were beaten and sodomized at another state reform school in Okeechobee. See: *Middleton v. Florida*, Circuit Court of the Sixth Judicial Circuit for Pinellas County, FL, Case No. 08-19597CI-19.

Sadly, while overt abuse has decreased in recent years, the ill treatment of juvenile

offenders in Florida continues to persist more than a century after FSRS opened, and the state's juvenile facilities are still producing graves – with the last one being dug in 2006 for 14-year-old Martin Lee Anderson. 📖

Sources: *Miami Herald*, *Associated Press*, *CNN*, www.caica.org, www.nwfdailynews.com

Prisoners Can Sue Virginia DOC's Contract Medical Provider for Breach of Contract

Virginia Department of Corrections (VDOC) prisoners who receive inadequate medical care may sue the VDOC's contract medical provider for breach of contract, the Supreme Court of Virginia decided on June 8, 2007.

Prison Health Services (PHS) is a contract medical provider for certain VDOC facilities. PHS's contract requires that it "provide cost effective, quality inmate health care services for up to approximately 6,000 inmates (initially) housed at four correctional facilities." The scope of health care services required by the contract includes all "medical, dental, and mental health services."

In 2005, Oludare Ogunde, a prisoner at the Greensville Correctional Center, filed suit against PHS and several of its employees. Ogunde's complaint alleged that he suffered from "severe acne cysts and acne keloidalis," and that this condition was aggravated by shaving.

According to Ogunde, PHS and its employees denied Ogunde treatment for his skin condition and failed to provide him with an exemption from the VDOC's grooming policy, VDOC grooming regulations prohibit male prisoners from wearing goatees or beards.

Ogunde argued that PHS's failure to treat him and provide an exemption to the grooming policy amounted to breach of PHS's contract with the VDOC. Accordingly, Ogunde sought compensatory damages, an injunction requiring PHS and its employees to provide him with medical treatment, and an exemption from the grooming policy.

The trial court, however, rejected Ogunde's breach of contract claim, finding that Ogunde was not in privity with PHS because he was only an "incidental beneficiary" of the contract. Ogunde ap-

pealed and the Supreme Court of Virginia reversed.

"Under certain circumstances," the court explained, "a party may sue to enforce the terms of a contract even though he is not a party to the contract." "The essence of a third-party beneficiary's claim," the court wrote, "is that others have agreed between themselves to bestow a benefit upon the third party but one of the parties to the agreement fails to uphold his portion of the bargain." Consistent with this principle, third parties have been allowed to sue on contracts where "the third party...shows that the parties to the contract clearly and definitely intended it to confer a benefit upon him."

In Ogunde's case, "PHS's performance under the contract renders a direct benefit to Ogunde," the court held. Consequently, "Ogunde was a third party beneficiary of the contract between PHS and VDOC." Accordingly, the judgment of the trial court dismissing Ogunde's breach of contract claim was reversed. See: *Ogunde v. Prison Health Services, Inc.*, 274 Va. 55, 645 S.E.2d 520 (2007). 📖

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District of Columbia Rehabilitation Program Contractor Liable in Juvenile's Death; \$1,000,000 Verdict Upheld

by Bob Williams

Re-Direct, Inc., a company that provides services for juveniles for the District of Columbia, appealed the denial of a post-trial motion for judgment as a matter of law or a new trial after being found negligent in a juvenile's death. Re-Direct unsuccessfully argued that the youth's actions had caused his death, and the denial of the company's motion was affirmed on appeal.

Kenneth Muldrow, Jr. was judicially committed to a psychiatric hospital in 1999 under the custody of the state's Youth Services Administration (YSA). Prior to his 19th birthday, the YSA placed him in a transitional program under Re-Direct's supervision. His hospital discharge instructions required medication as well as participation in mental health and substance abuse programs; however, the programs offered by Re-Direct were rarely attended and there was no record that Muldrow received his medication.

The Re-Direct program allegedly provided structure, a supervised environment and various rehabilitative services, with one phase providing individual living with minimal supervision. However, threats against Muldrow from another juvenile forced him to reside with his mother, Sonya, "until further notice."

Prior to that incident, four juveniles in the program were murdered and the state was found liable by "virtue of its deliberate indifference in selecting and monitoring" Re-Direct. The day after moving in with his mother Muldrow spent several days in intensive care and almost a month in the hospital after being beaten by several assailants. He was then returned to the Re-Direct program.

Sonya was assured that other than his attendance at school, she would have to sign her son out prior to his leaving the program. Despite that assurance, Muldrow was allowed to leave unsupervised two months later; he was subsequently severely beaten with bottles and metal objects, and died soon afterwards.

Sonya filed suit under 42 U.S.C. § 1983, raising constitutional and state tort claims. She alleged that Re-Direct, while acting under color of state law, was deliberately indifferent to her son's "right

to safe conditions and security from physical harm," as the company had "sole legal custody and responsibility" for him. A jury found that Re-Direct's constitutional violations and negligence had proximately caused Muldrow's death, and awarded his mother compensatory damages of \$200,000 and punitive damages of nearly \$800,000.

Re-Direct appealed the district court's denial of its motion for judgment as a matter of law or a new trial, arguing that the court had erred in 1) excluding testimony from a police witness, which was determined to be hearsay, claiming that Muldrow's theft of drugs and money was the motive for his murder; 2) admitting expert testimony concerning Re-Direct's "pattern of deliberate indifference" which was not disclosed in the pretrial report; and 3) improperly instructing the jury regarding the standard for Muldrow's contributory negligence, as Re-Direct claimed there was "no evidence of [his] mental health problems."

The U.S. Court of Appeals for the

District of Columbia found that the police witness had not presented motive-based evidence, but only allegations in an affidavit reflecting that one attacker claimed Muldrow had stolen money from him. This was offered in evidence to prove the truth of the matter asserted and thus was inadmissible hearsay. The appellate court held that the non-disclosed expert only testified to his observation as to prior "lack of staff training and lack of accountability" in Re-Direct's program, which was revealed to the defense during his deposition and was not prejudicial because ample evidence otherwise proved deliberate indifference. The Court further held that Muldrow's record was replete with mental health and psychiatric issues, and the jury found that his actions, even if negligent, did not proximately cause his death.

Therefore, the district court's denial of Re-Direct's motion for judgment as a matter of law or a new trial was affirmed. See: *Muldrow v. Re-Direct, Inc.*, 493 F.3d 160 (D.C. Cir. 2007). ■

California Jail Restraint and Taser Death Settles for \$3 Million

The surviving family of a deceased detainee at the Santa Cruz, California jail settled their wrongful death suit against Santa Cruz County and its sheriff's personnel for \$3 million in April 2008. The prisoner died in September 2005 of asphyxia, heart stoppage and brain death after being Tasered and then fatally restrained by deputies who had handcuffed him face down and sat on him until he stopped breathing.

David Cross, 44, had been arrested and booked into the jail. One day later, suffering from anxiety, he was placed in a restraint chair in a medical observation cell, where he lay down and banged his head on the cell door. After being medicated with Lorazepam, he was handcuffed and shackled while lying on his stomach, with two deputies sitting on his upper back. They also put a spit mask over his face and "drive-Tased" him twice. Several times he cried out, "I can't breathe," "I'm going to die," and

"Please get off me." After 3½ minutes, he stopped moving. Limp, and having emptied his bladder, he was put back into the restraint chair. None of the attending medical staff did anything for Cross until a nurse checked for his pulse 16 minutes later, but found none. A day after paramedics took him to the hospital, he was pronounced dead.

Cross's parents, brother and daughter sued in U.S. District Court charging wrongful death and violation of Cross's federal civil rights as well as those under California Government Code § 845.6. They alleged excessive use of force, lack of proper staff training and deliberate indifference to Cross's constitutional rights. Defendants claimed that their force was not excessive. However, they subsequently settled the suit for \$3 million. The plaintiffs were represented by Walnut Creek, California attorney Andrew C. Schwartz. See: *Cross v. Santa Cruz County*, U.S.D.C. (N.D. Cal.) Case No. C06-04891 RS. ■

Oregon Jailer Avoids Prosecution for Online Assault Boast; Jail Employees Lose Internet Access

by Mark Wilson

An Oregon jail guard who bragged in an online forum that he beat a prisoner and then had the prisoner charged criminally will not face charges himself, according to the Multnomah County District Attorney's Office.

In 2007, David B. Thompson, a guard at Portland's Multnomah County Detention Center (MCDC), made some disturbing comments in an Internet game site chat room. "I crushed a dude's eye socket from repeatedly punching him in it, then I charged him with menacing and harassment," Thompson wrote. "He took a plea to get away from me. He shoulda picked somebody else to try and fight."

Thompson admitted to investigators that his comment referred to a 2005 incident in which he repeatedly hit jail prisoner David M. Baker in the head and face, which was one of Thompson's 40 known use-of-force incidents since 2002.

Witnesses allegedly supported Thompson's claim that Baker had initiated the attack, according to the district attorney's "decline-to-prosecute" memo.

At the time of the incident, Baker, who had a history of assaults, said Thompson had attacked him without provocation. Regardless, he pled no contest to attempted assault on a public safety officer. During an investigation into Thompson's online comments, Baker again claimed that Thompson had initiated the assault; however, he refused to take a polygraph test. There was no indication that Thompson was asked to submit to a polygraph.

Senior Deputy District Attorney Don Rees characterized Thompson's online admission as nothing more than "puffing or boasting." The comment was one of over 1,700 posts that Thompson had made on the online gaming site, City of Heroes, which he accessed from his work computer. In another post he expressed the satisfaction he received from using a Taser. "Seeing someone get Tasered is second only to pulling the trigger," he stated. "That is money – puts a smile on your face."

On the advice of counsel, Thompson refused to discuss his computer use with investigators, according to the prosecutor's memo. "Here is a public servant, getting paid with public money, spending a significant amount of his shift playing video games," observed *Portland Tribune* reporter Nick Budnick.

Jail supervisor Ron Bishop said an internal affairs investigation would determine whether Thompson had violated MCDC computer use restrictions or general conduct standards. Meanwhile, Thompson was restricted from Internet access at the jail and moved to a position where he had no contact with prisoners.

Thompson's conduct raised serious questions about jail staff who

spend too much time online for non-job-related reasons while neglecting their official duties. Hoping to avoid similar incidents in the future, the sheriff's office has installed Internet filtering software to monitor and limit the websites employees can visit.

"It's a more proactive way of doing it," said Christine Kirk, the sheriff's chief of staff. She said the software has already been used to alert managers to excessive Internet use by several employees in the wake of the Thompson scandal.

After it was discovered in October 2008 that three deputies had used a work computer to view pornography, the sheriff's office instituted a policy prohibiting jail employees from going online without prior written permission. "I want people focusing on their job and not using the Internet," remarked Sheriff Bob Skipper. ■

Sources: *The Oregonian*, www.kptv.com, *Portland Tribune*

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Supreme Court Holds Prosecutors Immune from Using False Snitch Testimony to Gain Wrongful Conviction

by John E. Dannenberg

On March 28, 2007, the Ninth Circuit U.S. Court of Appeals ruled that a California man, wrongfully imprisoned for 24 years due to unreliable jailhouse informant testimony, could sue the prosecutor for civil damages for failing to set forth policies that would prevent such false convictions. Prosecutors are normally absolutely immune from suit within the scope of their professional duties.

Thomas Lee Goldstein was convicted of murder in 1980. Although he maintained his innocence, he was found guilty based largely on the testimony of appropriately-named repeat-snitch Edward Fink, who claimed Goldstein had confessed to him when they were held in the Long Beach, California jail. Goldstein's conviction was overturned by a federal court in 2004 due to Fink's lack of credibility as well as the exposure of an undisclosed side deal by the prosecutor to be lenient in Fink's own prosecution.

Following his release, Goldstein worked as a paralegal; he sued for violation of his civil rights using the novel theory that the prosecutor had no procedures or policies in place regarding the use of jailhouse informants. The prosecutor predictably claimed that he was absolutely immune for any errors he may have committed during Goldstein's prosecution.

The Los Angeles Grand Jury had found in 1990 that widespread false jailhouse snitch testimony was used by Los Angeles prosecutors during the 1970s and 1980s. Fink himself was a three-time felon at the time of Goldstein's trial – and his testimony was even doubted by the Long Beach police.

One defendant named in Goldstein's suit, former Los Angeles District Attorney John Van de Kamp, who today ironically chairs the California Commission on the Fair Administration of Justice, urged the state legislature to limit the use of jailhouse snitches. State Senator Gloria Romero obliged by introducing a bill barring convictions based upon such testimony unless corroborated by independent evidence. That bill, SB 609, was passed by the state legislature but vetoed by Gov. Schwarzenegger in October 2007.

Current Los Angeles District Attorney Steve Cooley expressed concern

over the Ninth Circuit's ruling, saying it "strips away a long-established protection for prosecutors." But this was an over-reaction. In the appellate decision, Judge Thelton E. Henderson (sitting by designation) noted that prosecutors do not enjoy immunity for misadvising police during an investigation or for making public statements about criminal proceedings. The key test for prosecutorial immunity is whether the prosecutor's challenged act is "intimately associated with the judicial phase of the criminal process."

The appellate court found that the failure to create a policy regarding the proper use of jailhouse snitches, which was an administrative act, did not rise to that level. See: *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007).

The U.S. Supreme Court granted review and unanimously reversed the Ninth Circuit on January 26, 2009. The Court found that the defendants in Goldstein's suit were entitled to absolute

prosecutorial immunity, holding that such immunity extended to claims involving failure to train prosecutors, failure to supervise prosecutors, and failure to "establish an information system containing potential impeachment material about informants."

The Court quoted former Chief Judge Learned Hand, who had opined in reference to granting absolute immunity to prosecutors, "[I]t has been thought in the end better ... to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

Which may all be well and good in theory. But in practice, Goldstein spent 24 years in prison due to the improper actions of the prosecutor in his case, and he now has no remedy at law – which simply adds insult to injury. See: *Van De Kamp v. Goldstein*, 2009 U.S. LEXIS 1003 (2009). ■

Additional source: *New York Times*

Hawaii Prisoner Awarded \$15,000.50 for Slip and Fall

A Hawaiian prisoner has been awarded \$15,000.50 for a slip and fall that occurred in a prison kitchen. A related claim for damages for a slip and fall that occurred near a shower was rejected, however.

Anthony Jones slipped and fell a couple of times while at the Halawa Correctional Facility. The first incident occurred in July 2005 when Jones slipped and fell while walking past a shower stall on a wet, slippery concrete floor. The floor had no mats and a very low slip resistance. The second incident occurred on December 5, 2005, while Jones was working in the kitchen. Jones slipped and fell while carrying a tray of spoons.

Jones sued the State of Hawaii, alleging that the wet shower floor and loose kitchen tile presented an unreasonable risk of harm to him and that the state was aware of the risk but did nothing about it. Jones sought damages for injuries that he allegedly suffered to his back.

A court arbitrator awarded Jones \$19,000 in special damages, \$65,000 in

general damages, and costs. The state appealed.

The court reversed. While the state had notice that the wet shower floor presented an unreasonable risk of harm, Jones failed to prove that he sustained any injury or aggravation of a preexisting injury due to the fall, the court held. Consequently, the state's "negligence was not a legal cause of the plaintiff's back injury or any aggravation of any preexisting back injury or condition." Accordingly, no damages were awarded.

Turning to the kitchen incident, the court agreed that the state was negligent. However, the court found Jones was also negligent. Jones "failed to exercise due care for his safety; he knew areas of disrepair existed," the court wrote. Accordingly, the court awarded Jones \$1.00 in nominal damages and \$30,000 for pain and suffering. However, after apportioning liability at 50%, the award was reduced to \$15,000.50. See: *Jones v. State of Hawaii*, Civil No. 060194 (1st Cir. Hawaii). ■

Prison Legal News Subscriber Survey 2009

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**Please return this survey to: PLN / Survey, 2400 NW 80th St. #148, Seattle, WA 98117
by May 15, 2009**

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Sub ID: _____

1. Your age (circle one)
Under 20 20-29 30-39 40-49 50-59 60+
2. Your gender (circle one) **Male Female**
3. Your educational level (circle one) **Grade 6-12 HS/GED Bachelors Masters Ph.D.**
4. Have you ever been imprisoned? (circle one)
Yes No
5. Are you currently imprisoned? (circle one)
Yes No
- If yes, which system are you in? (circle one)
State BOP Local/Jail Juvenile ICC
6. If you are NOT currently imprisoned, what is your yearly income? (circle one) **Under \$20k \$20k-\$40k \$40k-\$60k \$60k-\$100k \$100k+**
7. If you are NOT currently imprisoned, what is your occupational group? (circle closest choice)
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Attorney (civil)
Civil rights (group / activist)
Court system (judge, clerk, bailiff, etc.)
BOP / DOC / Parole / Probation
Other: _____
8. Do you pay for your PLN subscription from *your own funds*? (circle one) **Yes No**
9. Do you think PLN provides good value for its cost? (circle one) **Yes No**
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11. How long have you had a PLN subscription, in years? (circle one) **0-1 1-2 3-4 Over 4 yrs.**
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13. How do you rank PLN in the following areas?

	Excellent	Good	Fair	Poor	Bad
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Quality of writing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Usefulness of information	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. How do you read PLN? (circle one)
Cover to cover
Skim, then return to specific articles
News in Brief first
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Other: _____
15. How did you first hear about PLN? (circle one)
Promotional mailing
Word of mouth
Internet
Books to Prisoner project
Other: _____
16. How many people (other than you) read your copy of PLN within 60 days after you receive it? (circle one) **0 1 2 3 4 5 6 Over 8**
17. How often do you refer to back issues of PLN? (circle one) **Once weekly Once monthly Once quarterly Once yearly Don't keep**
18. Do you want the length of PLN's cover stories to be (circle one): **Longer Shorter Unchanged**
19. Do you want the News in Brief section to be (circle one): **Longer Shorter Unchanged**
20. Do you want more in-depth, feature articles? (circle one) **Yes No**
21. Do you want more book reviews? (circle one) **Yes No**
22. Do you want graphics in the magazine, such as pictures or charts with the cover stories and articles? (circle one) **Yes No**

23. Do you want artwork or editorial cartoons related to prisons, prisoners, etc. to liven up the magazine? (circle one) **Yes No**

24. Do you want PLN to be redesigned and laid out more like a commercial magazine? (circle one) **Yes No**

25. Do you want more coverage in PLN of parent/child issues (custody, visitation, etc.) (circle one) **Yes No**

26. Do you want more coverage of issues related to prisoners in the community (parole/supervised release, half-way house, work release programs, etc.)? (circle one) **Yes No**

27. Do you want more coverage of prisoner medical and mental health issues? (circle one) **Yes No**

If yes, what type of issues? (circle all applicable)

Dental Hepatitis HIV Diabetes
Mental Disabilities (blindness, hearing, etc.)
Other _____

28. Do you want more coverage of enacted legislation that positively impacts prisoners (reduced sentences, increased good-time, etc.)? (circle one) **Yes No**

29. Do you want PLN to devote more coverage to immigration issues? (circle one) **Yes No**

30. Do you want PLN to devote more or less coverage to international prison issues? (circle one) **more less keep the same**

31. Do you think PLN devotes enough coverage to local and county jail issues? (circle one) **Yes No**

32. Do you think PLN has enough coverage on juvenile justice-related issues? (circle one) **Yes No**

33. Do you want PLN to write news stories from a neutral perspective, or with a tendency to be sympathetic to the prisoners point of view? (circle one) **Neutral Prisoner's perspective**

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a. If yes, how often do you visit PLN's website? (circle one) **Once a week or more A few times a month Every few months Rarely**

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Entire Texas Prison System Locked Down to Search for Phones; Prison Cell Phone Problem is Pandemic

by Matt Clarke

On October 20, 2008, Texas Governor Rick Perry placed all 112 prisons and 155,000 prisoners in the Texas Department of Criminal Justice (TDCJ) on lockdown to search for cell phones after a state senator received calls from a death row prisoner.

Richard Lee Tabler, 29, who is awaiting execution, used a cell phone to call state Senator John Whitmire, chair of the Senate Criminal Justice Committee, on October 7, 2008 to ask for his help in obtaining a pro bono attorney and special visits for his mother and grandmother.

Tabler's mother, Lorraine, was arrested at an airport when she arrived from Georgia after Sen. Whitmire told her he had arranged a visit with her son. Detectives are in possession of a videotape from a Wal-Mart in Waycross, Georgia that shows her purchasing minutes for the cell phone that Richard used. Over forty calls made from death row were to her home number.

Tabler's mother and sister, Kristina Martinez, who surrendered to authorities in Temple, Texas on October 22, 2008, were named in felony warrants for providing a prohibited item to a prisoner. They face up to two years in state jail.

Tabler had also called *Austin American-Statesman* reporter Mike Ward, complaining about conditions on death row. Displaying a questionable understanding of journalistic ethics in regard to protecting his sources, Ward cooperated with authorities and arranged a specific time for Tabler to call him. Tabler's cell was raided during the call. Tabler's last words on the phone, as guards entered his cell, were threats to find out what kind of car Ward was driving.

Previous searches of Tabler's cell had failed to turn up a phone. He told Sen. Whitmire that he avoided discovery of the phone and charger by handing them off to a guard during shakedowns.

Whitmire initially refused to believe that the person contacting him was really a death row prisoner, thinking the calls were a hoax by an anti-death penalty group with an office in Livingston, Texas. His attitude changed when Tabler casually mentioned the names and addresses of Whitmire's two daughters, as a not-so-subtle form of intimidation.

Tabler also had a scheme in which he allowed nine other prisoners to use the cell phone in exchange for having money sent to his relatives. They placed over 2,800 calls in one month. Tabler told Whitmire he had paid a guard \$2,100 to smuggle the cell phone into death row. That disclosure resulted in prison authorities searching death row at the Polunsky Unit before the TDCJ's system-wide lockdown. Two more phones and chargers were discovered.

However, TDCJ officials said they have been unable to verify whether prison staff gave the cell phone to Tabler. "In the cases we are investigating on death row there has been no evidence to indicate that an employee is involved," stated TDCJ Inspector General John Moriarty. Of course, that begs the question of how phones made it to death row absent staff involvement.

The TDCJ blamed prisoners and their outside supporters, who allegedly operate contraband smuggling rings that use code words, fake names, money transfers and drop sites. "It's a convoluted, complicated network that's very difficult to trace. And it's going to be very difficult to shut off, because as soon as we bust someone, another person will step in and start it all over again," Moriarty said.

Prior to the lockdown, almost 700 cell phones and related components (usually chargers or SIM cards) had been seized throughout the TDCJ in 2008, including 22 on death row, up from around 580 confiscated in Texas prisons in 2007. When the system-wide TDCJ lockdown was lifted in mid-November 2008, approximately 140 additional cell phones, 100 chargers and 200 weapons had been found by prison staff, including more than a dozen phones on death row.

The Stiles Unit in Beaumont is the

TDCJ prison with the worst cell phone problem. In 2008, 180 phones were discovered at the facility prior to the lockdown. This included 60 cell phones found in a compressor delivered to the prison. On the second full day of the lockdown, two guards were caught leaving Stiles with cell phone chargers. That led to TDCJ implementing a system-wide policy of pat and metal detector searches of all prison employees as they left work for the duration of the lockdown.

Texas has the only prison system in the nation that does not allow prisoners regular access to telephones so they can call their families. Although the state has signed a contract to have phones installed at all TDCJ facilities, the installation is not expected to be complete until April 2009. [See: *PLN*, Feb. 2009, p. 27].

Texas prison officials hope that regular access to telephones will reduce the demand for illicit cell phone smuggling. However, in the California DOC, where prisoners have access to pay phones, 1,331 cell phones were confiscated in the first six months of 2008 alone.

Meanwhile, Texas Board of Criminal Justice Chairman Oliver Bell released a memo detailing new measures to be taken by the TDCJ to reduce cell phone smuggling. The measures include pat searches of employees, vendors and visitors upon reasonable suspicion, and a zero-tolerance policy for contraband in which all cases of possession of alcohol, tobacco, drugs or cell phones will be referred for criminal prosecution.

Previously, employees caught with such contraband were transferred to another prison or allowed to resign, which allowed them to be re-hired by TDCJ after six months. Also, staff members who had been permitted to bring large containers of food

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Prison Cell Phones (cont.)

to work were now restricted in the amount of food and the size of the containers.

Senator Whitmire has sworn to address what he calls TDCJ's culture of tolerating contraband. He is pushing for policy changes, such as routine pat-down searches of guards and visitors entering the prisons, and possibly jamming cell phones. He admitted that the problem of corruption among TDCJ guards was exacerbated by the fact that they are underpaid and overworked.

During an emergency meeting of the Senate Criminal Justice Committee on Oct. 21, 2008, Whitmire sharply criticized top prison administrators. "We've got a serious problem. I'm angry nothing has been done up to this point to stop the contraband you all knew was there," he fumed. "If your job depended on keeping cell phones off death row, and I think that's an accurate statement, why can't you stop it?" he asked TDCJ Executive Director Brad Livingston.

Predictably, prison officials requested more money to address the cell phone problem – almost \$66 million for increased surveillance cameras and security measures, which was more than double the TDCJ's initial request in August 2008 before the death row cell phone scandal made headlines. "The games are over. We've just given everyone 66 million reasons about why we're very serious about this," said Chairman Bell.

In fact, cell phones present a dilemma in prisons and jails across the nation. "It is a major problem throughout the country," acknowledged George Camp, co-director of the Association of State Correctional Administrators. "Unquestionably we are seeing more of it."

Maryland prisons have seen a rise in smuggled cell phones, with 849 being confiscated in 2008 – a 76% increase over the previous year. Statewide, over 600 cell phones were found in Tennessee prisons in 2008, including at the state's Riverbend Maximum Security Institution.

As a result, lawmakers are cracking down. Oklahoma made possession of a cell phone in prison a misdemeanor last year, while under a law enacted in October 2008, possessing a phone in the Florida DOC is a felony offense.

Phone smuggling techniques that do not involve corrupt prison employees have become more innovative. In one case, cell

phones and other contraband were shot over a prison's perimeter fence using a makeshift launcher. Once inside, the phones are hard to detect as they contain little metal and are small enough to hide in obscure areas – including body cavities.

"As long as you have human beings in prisons as inmates and employees, and as long as there are human beings on the outside of those prisons, you're going to have contraband in prison," observed South Carolina DOC Director Jon Ozmint.

Oklahoma and South Carolina – and most recently Texas – are among the states that have sought FCC approval to jam cell phone signals in prisons. Under the Federal Communications Act, a law conceived in 1934, the FCC is only authorized to allow federal agencies to jam the public airwaves. The cell phone industry, represented by CITA, an industry association, has strongly and vocally opposed permitting anyone to jam cell signals, including prison officials.

Undeterred, South Carolina conducted a test of jamming technology provided by Florida-based CellAntenna Corp. in November 2008. "It far exceeded our expectations," said George Camp. "They showed the ability to pinpoint what was jammed and not affect anything outside the prison." The FCC was invited to attend the jamming demonstration, which violated federal law and could subject the state to fines of up to \$16,000 per day.

At an October 21, 2008 emergency meeting of the Texas Board of Criminal Justice, Senator Whitmire expressed his desire for TDCJ to follow South Carolina's lead. When Chairman Bell pointed out that jamming cell phone signals in Texas prisons would be a violation of federal law, Whitmire replied, "Why don't you just do it and see what the consequences are?" Ironically, Tabler probably had the same thought before he used a cell phone to call Whitmire.

On January 15, 2009, federal legislation was introduced by U.S. Senator Kay Bailey Hutchison and Rep. Kevin Brady, both of Texas, that would let a state's governor petition the FCC to use cell phone jammers in prisons. The Safe Prisons Communications Act (S. 251 and H.R. 560) is presently pending in Congress. "Recent cases of prisoners smuggling cell phones behind bars highlight the need to use current technology to prevent this ability," Sen. Hutchison stated.

The bill has received support from CellAntenna Corp., which would see its sales – and profits – increase significantly

if prison officials are allowed to use cell phone jamming equipment. CellAntenna has also filed a petition for rulemaking with the FCC to permit state and local officials to use jamming technology.

Yet concerns over cell phone jamming are real. Brazil responded to prison riots that were coordinated via cell phone by jamming cell signals at one prison. The jamming knocked out cell phone service for 200,000 nearby residents. However, New Zealand recently completed a successful 12-month test of jamming equipment, and that country's Department of Corrections is preparing to deploy cell phone jamming system-wide.

Technologies for detecting cell phones have also improved. One Pennsylvania prison and several federal Bureau of Prisons facilities are testing a detector made by Maryland-based EVI Technology. That system, and a similar one made by competitor AirPatrol, uses a signal detector hooked up to a computer to display the location of cell phones on a map of the prison. The system costs \$25,000 for a small jail and up to \$80,000 for a 3,000-bed facility.

A less expensive technology involves dogs. Maryland recently completed the training of three cell-phone-sniffing dogs using methods similar to those used to train canines to find drugs. The dogs reportedly have an 80% success rate and are not distracted by other electronic devices. The trainers don't know exactly which components in the phones the dogs detect by smell, so they have to use several different brands of cell phones during the training process. The Washington, D.C. prison system is sending dogs to Maryland for training, and Virginia recently hired All States K-9 Detection, a California-based dog-training company, to train its canines to detect phones.

Cell phones remain a serious problem in prisons not only in the U.S., but worldwide. Even though many prisoners use illegal cell phones to call their loved ones (thereby avoiding extortionate prison phone rates), others use them for less benign purposes. A New Zealand prisoner used a cell phone to organize a methamphetamine deal worth over \$500,000. Hundreds of incarcerated gang members in Brazil used them to organize attacks on police officers and riots in 73 prisons.

Cell phones also played a role in a Taliban attack on a military prison and the escape of 870 prisoners in Afghanistan. In Kenya, where over 600 cell phones and 400 unused SIM cards were recently

discovered, prisoners used cell phones to run fake lottery scams.

In the U.K., prison officials have purchased special chairs called Body Orifice Security Scanners (BOSS) to detect cell phones hidden on prisoners or in their body cavities. In recent months the chairs have found 21 phones at just one U.K. facility.

Further, cell phones have been used to plan a murder in Maryland, a riot in Oklahoma, and escapes in Kansas and Tennessee – in the latter case resulting in the death of a prison guard. And, of course, a Texas death row prisoner used one to harass and threaten a state senator.

Just hours after the TDCJ's system-wide lockdown ended last November, yet another phone was found in the cell of a Texas death row prisoner. From December 2008 through January 2009, 220 additional cell phones have been removed from Texas prisons. And in early February 2009, TDCJ Stiles Unit guard Eric J. Talmore, 24, was arrested after he tried to smuggle three cell phones and marijuana into the facility in a container of rice. Another guard arriving at work who witnessed Talmore getting caught turned around and left the prison, and has not returned.

Ironically, harsh punishment for the staff who smuggle cell phones into prisons is largely nonexistent. All of which indicates that efforts to keep cell phones out of prison cells will most likely be an expensive exercise in futility. 📞

Sources: *Austin American-Statesman*, *Houston Chronicle*, www.gritsforbreakfast.blogspot.com, *Associated Press*, *National Public Radio*, *KTRH-AM News Radio*, www.networkworld.com, *Morris News Service*, *Pittsburgh Post-Gazette*, en.wikinews.org, *Washington Post*, *Dallas Morning News*, www.newsok.com, *KETK News*, *News KBMT*, *USA Today*, *Kansas City Star*, www.telegraph.co.uk

Ohio Court Releases Prisoners from Private Jail to Protect Them

One thing about privately-operated jails and prisons is fairly consistent: They rarely function properly. A series of incidents at Ohio's Columbiana County Jail, which is operated by CiviGenics, Inc. (a subsidiary of Community Education Centers), is the latest example of that common deficiency.

Problems first became apparent when three guards were charged with smuggling drugs. One of those guards, Jason L. Jackson, is scheduled to go to trial on March 31, 2009 on a felony count of bringing marijuana into the facility. The other guards, Nathaniel Barnes and Gary J. Ludt, pleaded guilty to contraband smuggling. Ludt received an 18-month sentence while Barnes will be sentenced later this year.

In June 2008, a prisoner escaped after kicking out an unsecured window in the minimum-security wing of the jail. Then on August 17, 2008, four prisoners broke into a locked closet and opened a panel that exposed duct work leading to the roof. They escaped after leaving dummies in their bunks covered with sheets; all four were captured the following day. According to a post-incident report, several CiviGenics employees had failed to follow proper procedures. Three were fired.

The jail is so poorly run that a county judge had to release three prisoners early to ensure their safety. Those prisoners, Jeffrey B. Woodburn, Michael Lentini and Jonathan McGarry, were serving misdemeanor sentences ranging from 100 to 180 days. They also

had work release privileges.

As a result, they were allowed to work during the day and return to the jail at night. Because their misdemeanor offenses were violence-related, they were placed in the maximum-security wing of the facility. There, felons awaiting trial told them to smuggle drugs and cigarettes into the jail "or something bad would happen."

When Woodburn refused he was attacked by three other prisoners, resulting in a punctured lung and numerous cuts and bruises. He was assaulted after advising jail officials of the threats, who placed him in an isolation cell. An unknown prisoner was able to gain access to the emergency button on the control panel that opened all the cell doors in the unit.

A county judge granted a motion to release Woodburn, Lentini and McGarry on probation and electronically-monitored house arrest, to protect them from assaults and threats from other prisoners.

While the Columbiana County Jail may not operate properly under CiviGenic's management, at least the courts are doing the responsible thing in ensuring prisoners are not being subjected to harm – even if that means having to set them free. 📞

Sources: *Morning Journal News*, www.reviewonline.com, *Youngstown Vindicator*

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CMS Contract Woes Persist in New Jersey, Arizona and Delaware

by David M. Reutter

Deficiencies in medical care and failure to comply with contractual obligations have resulted in the termination of two contracts for Correctional Medical Services (CMS). The contracts were worth a total of \$95 million annually.

Regular *PLN* readers will not be surprised at the reasons behind the contract terminations. What is unusual is that the contracts were canceled, as prison officials normally tolerate CMS's substandard performance in order to save money; also, using a private contractor allows them to deflect blame for inept medical care.

In March 2008, New Jersey Governor Jon Corzine terminated CMS's contract to provide medical, dental and pharmaceutical services to the state's prisoners. The contract had an annual value of \$85 million. CMS has provided health care to New Jersey prisoners since 1996.

The New Jersey State Inspector issued a report in October 2007 that was highly critical of CMS, finding the company had overcharged the state and failed to comply with its contractual obligations. The state auditor issued a report with similar findings.

CMS officials seemed shocked that the contract was going to be terminated, especially in the midst of a four-year contract term. "The state has been extremely satisfied with our work and has never given us an indication that they would prefer to make a change in contractors," remarked CMS spokesman Ken Fields. Then again, perhaps the state felt its actions would speak louder than words.

Terminating CMS's contract was the end of a "failed experiment," said Patricia Perlmutter, an attorney who reached a settlement on behalf of mentally ill New Jersey prisoners in 1999. "For years, they delivered very poor service to the prisoners in the state. There certainly was improvement over time. The number of complaints we would receive did diminish the last year of [the] contract term. But overall, they didn't deliver what they promised."

CMS was advised it would have to provide medical services until October 2008, while the University of Medicine and Dentistry of New Jersey (UMDNJ) gradually takes over health care for the 27,600 state prisoners held in DOC fa-

cilities and 14,000 in county jails. It is expected that state payrolls will increase as UMDNJ hires some of CMS's employees, adds more workers, and pays them fringe benefits.

CMS was critical of the fact that UMDNJ was awarded the contract in a no-bid process. State officials said competitive bidding was not necessary because the contract was arranged through an interagency compact. Critics also charged that UMDNJ, which recently instituted reforms after a federal investigation found it had lost more than \$400 million in fraudulent and wasteful spending, cannot provide the savings obtainable from a private contractor. Yet such savings often come at the cost of adequate care.

Just a few months after CMS was told it would lose its New Jersey contract, Arizona's Pima County jail gave the company the boot, too. County officials said CMS had consistently failed to fulfill basic contractual obligations – including staffing levels and providing care in a timely manner – since it took over prisoner medical services in 2002.

"Our feeling is they have not met our requirements for quality care at the jail," said Dr. Fred Miller, Pima County's chief medical officer.

Because CMS failed to meet staffing requirements, the company did not collect \$1.3 million of its latest two-year contract, which was valued at \$18.5 million. In the last 26 months, CMS had five administrators and four corporate liaisons for Pima County. This lack of stable leadership has been a recurring theme for the company.

CMS's psychiatric care at the Pima County jail was singled out for criticism by court officials; in one case, a nurse practitioner was allowed to conduct a psychological evaluation of a murder suspect. The quality of such evaluations was addressed by Pima County Superior Court Judge Nanette Warner at a bench conference. "I have huge issues with the quality of staff, the quality of care. It has been a frustration for the court," she said. "Their whole goal is how not to do any work."

CMS, of course, disagreed with Judge Warner's assessment. The company "has well-established policies and procedures that are based on years of experience working in hundreds of facilities," stated

CMS spokesman Ken Fields. "That experience is brought to every community we serve, including Pima County."

PLN readers will recall that CMS's policies, procedures and experience resulted in the company's health care services in Delaware being placed under supervision by the U.S. Department of Justice. [See: *PLN*, Nov. 2008, p.10]. None of the qualities expressed by Fields about CMS's medical care helped Delaware prisoner Duane Williams. In fact, he was killed by the company's incompetence.

In 2006, a CMS nurse administered insulin shots to Williams and fourteen other prisoners using the same contaminated syringe. [See: *PLN*, Nov. 2008, p.28]. Four days before his death on March 12, 2008, Williams spoke to a reporter from the *News Journal*. He said he had felt pain in his abdomen for over four months, but wasn't taken seriously until a prison guard noticed Williams' eyes were turning yellow. The guard demanded that he be seen by a nurse or doctor, or be taken to a hospital.

By then it was too late. Williams' death, at age 32, left his wife a widow and his 10-year-old daughter without a father. Sadly, his preventable death was just one of several among Delaware prisoners who have suffered and died in the name of increased profits for CMS. [See: *PLN*, Dec. 2005, p.1].

"Without a doubt the prison system killed him," stated Harry Williams. "My brother wasn't a drinker or a drug addict. They killed him. They waited too long." The suspected cause of Williams' death was acute hepatitis.

With a track record of inept care resulting in deaths and injuries, one wonders how private companies such as CMS procure and retain contracts. The recent award of a contract to Correctional Health Services (CHS) reveals the kick-back economics that make such contracts possible.

On April 16, 2008, New Jersey's Bergen County Freeholder Board awarded the contract for health care at the county jail to CHS without public bidding. The year-long contract is worth \$690,200, and the political connections are revealing.

CHS is run by Geoff Perselay, a former Administrator for Hudson County, New Jersey. In 2007, CHS donated \$1,300

to the campaign of Bergen County Sheriff Leo McGuire. Since 2003 the company also has given at least \$8,000 to the Bergen County Democratic Organization. The members of the Freeholder Board are all Democrats.

Political connections may get CHS contracts, but that doesn't always mean the company can keep them. In January 2008, a state Superior Court judge found a contract with CHS to provide services at New Jersey's Essex County Jail was "arbitrarily and capriciously" awarded in lieu of a vendor that bid \$4.2 million less for the same job. The court terminated the contract.

Following the cancellation of CMS's contract with New Jersey, the company filed a protest letter in April 2008 that challenged the termination and claimed UMDNJ would cost the state an additional \$50 million to provide health care for state prisoners. The company was represented by John Paul Doyle, a former majority leader in the state's Assembly, but to no avail. The contract termination was upheld.

While such political and contractual high jinks continue, the fact remains that prisoners such as Duane Williams are literally dying due to a lack of adequate, routine care for the sake of enriching for-profit contractors. And even in cases where prison and jail health care contracts are canceled, all too often another for-profit medical service provider simply takes the place of the outgoing contractor. For example, after losing its contract with Pima County, CMS was replaced with another private company, ConMed Healthcare Management.

Problems continue with CMS's prisoner health care contract in Delaware, where Governor Jack Markell has expressed dissatisfaction with CMS and DOC director Carl Danberg has stated he has been looking for other medical care providers. However, due to budget problems, Danberg reluctantly signed a one-year contract extension with CMS on January 16, 2009. "I am not pleased with this," he said. "It is a position that I do not want to be in."

A third semi-annual report on CMS's medical services, required by a settlement between the U.S. Dept. of Justice and the Delaware DOC, was released in July 2008. It found "continuing problems with care, including poor supervision of medical personnel, inadequate staffing, long waits for inmates seeking care and inappropriate care,"

according to an article in the *News Journal*.

In January 2009 a fourth report was issued by the monitor overseeing the state's settlement with the Dept. of Justice. This most recent report found some improvements, but also cited on-going problems with CMS that included a "lack of stable and effective leadership."

"I have addressed my displeasure at the pace of progress directly to the CEO of CMS ... in very clear and uncertain terms," stated Danberg. When the company's \$39 million annual contract with the State of Delaware ends in 2010

and goes up for renewal, CMS may find it has lost yet another contract. ■

Sources: *Star-Ledger*, *Gannett State Bureau*, *The News Journal*, *Arizona Daily Star*, www.northjersey.com, www.nj.com

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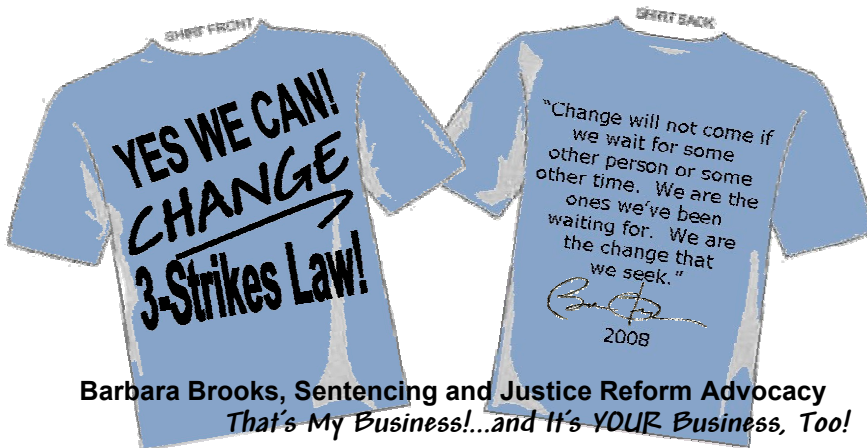


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\$2,925,000 in Recent Settlements Involving Maricopa County and Sheriff Joe Arpaio

by Matt Clarke

The most recent developments in a thirty-year history of abuse and medical neglect of prisoners by Arizona's Maricopa County Sheriff's Office (MCSO) include three lawsuits in which the county paid almost \$3 million in settlements. Those cases follow repeated reports and investigations that have found gross deficiencies at MCSO jails.

The tragic events that resulted in the lawsuits prompted Phoenix civil rights attorney Michael C. Manning – who has already won over \$17 million in judgments against MCSO and self-styled “toughest sheriff in America” Joe Arpaio – to ask the U.S. Department of Justice (DOJ) to investigate abuses within the MCSO.

Manning represented the family of Brian Crenshaw, who was 40 years old, mentally disabled and legally blind when he was arrested for shoplifting in 2003. Maricopa County jail physicians prescribed Crenshaw anti-depressants and prohibited his being housed in the jail's infamous Tent City. However, guards denied him his medications and assigned him to Tent City anyway, where he was reportedly beaten by a guard and placed in solitary confinement.

He died of internal complications several weeks later after being found unconscious in his segregation cell with a broken neck, fractured toes and other injuries. In January 2008, the county agreed to a \$2 million settlement in a lawsuit filed by Crenshaw's family. Jail officials continue to deny any fault in his death, and claim his injuries resulted from a fall off his 4-foot, 2-inch tall bunk. See: *Evans v. Maricopa County*, Superior Court of Maricopa County, AZ, Case No. CV2004-004221.

On April 23, 2008, Maricopa County agreed to pay \$125,000 to Nick Tarr, a proponent of allowing slot machines at dog race tracks – a political issue that Sheriff Arpaio opposed. Tarr was wearing a khaki shirt with Arizona Department of Public Safety patches over an “I (heart) Arizona” T-shirt, plus pink boxer shorts (similar to those that Arpaio requires jail prisoners to wear). While in his “Joe Arizona” attire, Tarr was arrested by MCSO deputies on Oct. 31, 2002 for impersonating a police officer. The charges were eventually dropped and Tarr filed

suit, alleging the incident had impaired his ability to earn a living. See: *Tarr v. Maricopa County*, U.S.D.C. (D. Ariz.), Case No. 2:04-cv-00411-MEA.

On April 1, 2008, Manning filed another lawsuit against the county and Sheriff Arpaio in Maricopa County Superior Court for denying a prisoner medical care, resulting in his death. The suit, which alleged state tort claims and civil rights violations under 42 U.S.C. § 1983, related to Rico Rossi, a local businessman and veteran who had pleaded guilty to a DUI charge. Sentenced to 24 hours in jail, he was in a holding tank awaiting release when he collapsed. Other prisoners attempted to get the guards' attention.

After a long delay, Sgt. DeLaRosa came to the tank door, observed Rossi on the floor, and told the prisoners he was merely having a seizure and to roll him on his side. Rossi was having trouble breathing and showed darkened skin color. Eventually he stopped breathing, which the prisoners reported to jail staff.

Medical personnel eventually arrived at the tank. They did not bring emergency equipment with them and had to go back and forth to the infirmary several times. When they finally showed up with a breathing mask they didn't know how to use it, failed to hyperextend Rossi's neck so air could flow into his lungs instead of merely inflating his cheeks, and ignored the other prisoners' helpful suggestions on how to use the equipment.

Dr. Gonzales, on duty in a nearby jail infirmary, refused to come to the tank and instead told guards to call 911. They did but gave the 911 operator the wrong address, which resulted in a 20-minute delay before an ambulance arrived. Rossi was pronounced dead after being taken to a hospital. The county Board of Supervisors agreed to pay \$800,000 to settle the wrongful death suit filed by Rossi's family. See: *Rossi v. Maricopa County*, Superior Court of Maricopa County, AZ, Case No. CV2008-007376.

The chronic abuse and neglect of prisoners at MCSO jails prompted Michael Manning to contact the U.S. Attorney General's office and request an investigation. In an April 23, 2008 letter, Manning explained how he was a commercial litiga-

tion attorney who was first drawn into a lawsuit against Arpaio in 1998 due to his friendship with the mother of a prisoner who died in a jail restraint chair.

Manning's letter described both a pattern of prisoner abuse and Arpaio's history of tampering with evidence when sued. It also outlined the many reports – some commissioned by the MCSO itself – that repeatedly warned of abusive and dangerous conditions in the jails, but were ignored by the county and sheriff.

For example, in 1996 the DOJ hired Eugene Miller, an expert with a national reputation, to study MCSO facilities. Miller concluded that a culture of cruelty and understaffing existed in the jails, which led to the frequent use of excessive force and a failure to honestly investigate complaints of abuse. He concluded that failure to correct such conditions would result in lawsuits that would cost the county much more than implementing reforms.

Several months after Miller's report was released, the DOJ warned the MCSO that unconstitutional, unjustified excessive force was being used against jail prisoners, reports of excessive use of force were not being investigated, the jail was severely understaffed, in-service training was inadequate, and prisoners were not being given their prescribed medications and were denied humane levels of health care.

In a confidential 1996 letter to the county Board of Supervisors, Sheriff Arpaio admitted that unjustified excessive force was being used, prisoners' complaints of excessive force were not being investigated, many essential elements for running the jails were failing, and further violence was inevitable.

The MCSO entered into a settlement with the DOJ in 1997, in which it agreed to correct the use of force, medical, in-service training and understaffing issues. However, the county failed to remedy those problems. The DOJ, as it invariably does, failed to enforce the settlement and simply dismissed the suit. The U.S. Attorney who mishandled the case was Janet Napolitano, whom Arpaio endorsed when she ran for, and was elected, governor of Arizona. Napolitano is now Secretary of the Department of Homeland Security.

Maricopa County hired George Sul-

livan, another jail expert with a national reputation, to review its facilities in 1997. He reported that excessive force was still being used, staffing was below safe levels, a "code of silence" allowed abuse of prisoners by guards and medical staff to flourish and go unpunished, in-service training was still inadequate, conditions in the Tent City were inhumane, and Arpaio's "tough talk" against prisoners encouraged a culture of cruelty. Sullivan recommended that the jails stop using restraint chairs, and predicted that settlements and verdicts against the county would be expensive.

The MCSO then hired Dennis Liebert, yet another nationally-known jail expert. He reported the Sheriff's office had an operational policy of understaffing, with prisoner-to-staff ratios as high as 266 to 1. Staff safety training had been cancelled, assaults were increasing in the jails, and guards admitted that the facilities were dangerously unsafe. Liebert recommended that the Tent City be closed, and predicted increased liability from lawsuits.

A group of doctors working at MCSO facilities sent a confidential letter to county leaders in 1999, warning of the jail staff's indifference to prisoners' medical needs and the concealment of

evidence of prisoner abuse by the medical management team. The doctors said the system was deteriorating and serious risks lay ahead.

Also in 1999, the MCSO and DOJ entered into another settlement agreement in which the county agreed to provide constitutionally adequate medical care to prisoners. The MCSO did not honor that agreement and the DOJ once again did nothing.

The following year the county hired Dr. Jacqueline Moore, a health care expert, to review its jails. Dr. Moore found there were serious systemic deficiencies in the provision of medical care to prisoners, the restraint chair was being used as punishment, prisoners were being denied mental health treatment, prisoners' medical records from previous jail terms were not being consulted, medical screening was inadequate, prisoners were denied prescribed medication, and prisoners with mental health issues were being abused by guards.

In 2002, Maricopa County hired retired MCSO captain Jerry Swatzell to study safety issues at the jails. He concluded the facilities were so understaffed as to make them critically unsafe.

The county re-hired Dennis Liebert

in 2003. He reported that jail conditions were below minimum U.S. standards and violated a 1995 federal court order entered against MCSO. He warned of dangerous understaffing, poor staff training and inadequate health care standards, including interference with access to prescribed medications.

More recently, Dr. Todd Wilcox, a former director of health care for the MCSO, resigned in February 2008. He cited unconstitutional conditions as a reason for his decision to step down. "I have come to the realization that CHS [Correctional Health Services, which provides medical care at MCSO jails] is failing to deliver healthcare that meets constitutional minimums and that the current CHS administration is unqualified and has insufficient resources to rectify the situation moving into the future," Dr. Wilcox wrote.

In late September 2008, the National Commission on Correctional Health Care revoked its accreditation of MCSO jails, finding they did not meet federal standards for prisoner health care, and stated that county officials had provided the Commission with incorrect information. The Commission had previously found in December 2005 that 14 "essential" or



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Maricopa County Sheriff (cont.)

“important” standards were not being met at MCSO facilities.

On October 21, 2008, U.S. District Court Judge Neil V. Wake, following extensive hearings, held that MCSO jails continued to violate prisoners’ civil rights. The Court modified a 1995 judgment in a class action suit that set forth minimum constitutional standards for pretrial detainees. Continuing violations included overcrowding and inadequate nutrition. See: *Graves v. Arpaio*, U.S.D.C. (D. Ariz.), Case No. 2:77-cv-00479-NVW.

“Sheriff Arpaio’s horrendous treatment of detainees, especially those with severe medical and mental health problems, has caused terrible suffering for years,” stated Margaret Winter, Associate Director of the ACLU’s National Prison Project, who represents the prisoners in the *Graves* litigation.

Despite this litany of constant criticism and documented deficiencies, MCSO Deputy Chief Jack MacIntyre noted that other agencies and investigators had reviewed and approved the county’s treatment of prisoners.

Attorney Michael Manning has not been alone in his condemnation of the MCSO and Sheriff Joe Arpaio. Phoenix Mayor Phil Gordon and the Anti-Defamation League have both contacted the DOJ, expressing concerns related to Arpaio’s use of immigration sweeps and racial profiling. Further, Arizona’s Legislative Latino Caucus sent a formal letter to U.S. Rep. Nancy Pelosi in April 2008, calling for hearings into civil rights violations by the Sheriff’s office.

These numerous letters, reports, warnings, settlements and court judgments reveal a juggernaut of prisoner abuse fueled by unresolved systemic problems in MCSO jails that have persisted for well over a decade. The monetary cost to Maricopa County is rapidly mounting; the cost in basic decency and humanity, and in the deaths of prisoners due to abuse and medical neglect, is immeasurable.

Another needless death at an MCSO facility occurred on December 5, 2007 after Juan Mendoza Farias, while handcuffed in an isolation cell, was shot with pepper balls and a Taser, doused with pepper spray, then shocked with a stun shield and more Tasers. He died two hours later following several other altercations involving over a dozen guards. Video footage of

some of the events leading up to Farias’ death was either withheld or did not exist, and the *Phoenix New Times* had to file suit to get the MCSO to release records related to the incident.

Farias had been arrested for a DUI offense; he suffered from seizures, but was placed in the jail’s general population.

Ultimately he received a death sentence at the hands of MCSO guards. In other words, business as usual under Sheriff Arpaio’s leadership. ■

Sources: *Arizona Republic*, *Phoenix New Times*, *Letters from Michael C. Manning* dated 4-23-08 and 9-26-07

Audit Faults New York Prison Oversight

by Mark Wilson

The New York State Commission of Correction (SCOC) is failing to fulfill its prison and jail oversight duties, according to an audit released on August 25, 2008 by the State Comptroller.

SCOC is responsible for overseeing New York’s 69 adult prisons, 4 secure juvenile prisons, 77 county jails and 317 local police lock-ups. “For the fiscal year ended March 31, 2007, SCOC received a State appropriation of \$2.6 million.” The SCOC is comprised of three commissioners and 25 employees, down from 66 employees in 1990.

To carry out its mission, SCOC adopted rules governing facility construction and operation and the treatment of prisoners. SCOC is mandated by law to ensure compliance with its regulations by conducting site inspections, to evaluate “safety, security, health of inmates, sanitary conditions, rehabilitative programs, disturbance and fire prevention and control preparedness, and adherence to laws and regulations governing the rights of inmates.”

SCOC is also responsible for: investigating grievances and complaints about the treatment of inmates, approving the construction of new facilities and the expansion or renovation of existing facilities; and the training of jail and prison employees.

DOCS Facilities

As of December 31, 2006, the New York Department of Correctional Services (DOCS) operated 69 adult prisons, confining approximately 63,000 prisoners. Although SCOC is charged by law with regularly inspecting DOCS facilities, when SCOC’s staff was cut in the 1990s, it stopped inspecting DOCS facilities to focus its scarce resources exclusively on local facilities.

“SCOC officials stated that, under current arrangements, inspectors visit DOCS facilities only in certain special circumstances: (1) when a DOCS facility requests that its inmate population be allowed to exceed its rated capacity or (2)

when there is an incident (such as inmate violence or inmate death) that needs to be investigated independently,” wrote auditors. SCOC has not conducted any inspections to determine whether DOCS facilities are complying with SCOC regulations since 1988.

Auditors found that “if SCOC is to accomplish its regulatory mission, it must provide an inspection capacity.” Accordingly, auditors recommended “that SCOC establish an ongoing formal risk assessment process for targeting scarce resources selectively, inspecting those facilities that have the greatest need for review.”

OCFS Facilities

The Office of Children and Family Services (OCFS) operated four secure juvenile facilities. In 1996, state law made SCOC responsible for overseeing those facilities. SCOC was also charged with adopting rules “for the care, custody, and treatment of center residents,” and inspecting the facilities to ensure compliance with its regulations.

SCOC has not adopted rules and it did not inspect OCFS facilities until 2007. “SCOC officials told us that they were working on the regulations but had been unable to complete them due to a lack of legal resource,” auditors wrote. “The officials said they hope to complete the standards during the fiscal year 2007-2008.”

Auditors acknowledged the difficulties caused by staff reductions, but found that “SCOC has had more than ten years to complete the process. As a result of SCOC’s lack of progress in this area, OCFS secure centers have received minimal oversight from SCOC.” This provided less assurance that the youth were housed in a safe, stable, and humane environment. Accordingly, auditors recommended that “SCOC complete the regulations as expeditiously as possible” and in the interim “perform basic inspections at the centers to ensure that there

is a minimally-acceptable level of care, custody, and treatment.”

County and Local Facilities

As of December 31, 2006, SCOC regulations governed 77 county correctional facilities. SCOC is responsible for overseeing these facilities to ensure compliance with the regulations, and has established various inspection goals for these agencies. SCOC is also responsible for inspecting the state's 317 local police lock-ups every two years.

With respect to the county jails, the audit found that while SCOC is regularly inspecting these facilities, it “is not meeting its inspection goals fully, as some inspections are not complete.” Moreover, auditors found that “SCOC does not always follow up” as it is required to when significant violations are found during inspections. Auditors recommended that “SCOC develop a mechanism for tracking the inspection process and use it to ensure that its inspection goals are met and all required follow-up action is taken.”

Auditors also “found that many of the lock-ups were not inspected every two years” and “recommendations for corrective action were not always followed up.” There is “no requirement for local police lock-ups to report their operation” and “there is no centralized listing of all of the local police lock-ups throughout New York.” As a result, auditors noted “SCOC officials told us that their staff occasionally discovers new or recommissioned local police lock-ups by accident (e.g. driving by them).” Auditors made several recommendations including requiring “local

police lock-ups to report their existence to SCOC” and developing “a comprehensive tracking system for monitoring the stats of inspections at local police lock-ups.”

Grievances and Complaints

SCOC is responsible for establishing procedures for the investigation of grievances and complaints about the treatment of prisoners. SCOC receives thousands of grievances and complaints each year.

While auditors found that grievances were generally handled in accordance with SCOC policies and procedures, it also “found certain improvements are needed.” Specifically, “SCOC generally does not follow up with facility officials to ensure that appropriate corrective action is, in fact, taken.” Additionally, “the complaint resolution process may not be subject to adequate supervisory review, and grievances are not always resolved within the 25-business-day time frame adopted by SCOC.” Accordingly, auditors recommended “that a formal quality assurance process be developed for the resolution of grievances and complaints.”

Jack Beck of the Corrections Association of New York is not surprised by the audit's findings. His independent non-profit group has legislative authority to inspect state prisons and report findings to lawmakers and the public.

Beck believes SCOC staffing reductions have diminished its effectiveness, in terms of how rigorous its inspection process is. The commission doesn't appear to be doing a lot of monitoring when it comes to prison construction and renovation, which is needed to ensure there are adequate services for prisoners and

security, suggested Beck. “I believe that they need more staffing to be monitoring what they're looking at,” said Beck. “They need to be more aggressive.”

See: *Oversight of Correctional Facilities and Handling of Grievances and Complaints*. Office of the New York State Comptroller, Report 2006-S-93 (August 25, 2008). ■

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***Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, 3rd Edition*, by Jon Marc Taylor and Susan Schwartzkopf**

Published by Prison Legal News, ISBN 978-0-9819385-0-9; 224 Pages; \$49.95

Reviewed by Paul Wright

In 1994 the Democratic Congress and President Clinton eliminated Pell grants for prisoners. Within the next few years, most states followed suit and either totally eliminated or gutted their prison education programs. Prison and jail education programs beyond GED and Adult Basic Education (ABE) became, and remain, a rarity. Of course, prisoner illiteracy rates remain sky high; all that changed is that prisoners seeking a higher education can no longer seek one within the prison system. The other alternative is correspondence courses. While there are books on the market discussing correspondence courses, they are all aimed at non prisoners, virtually all of which require some degree of internet access or residency.

Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, 3rd Edition (PGHCP) is written by Missouri prisoner Jon Marc Taylor who has successfully completed a B.S. degree, an M.A. degree and a Doctorate by mail while imprisoned. This book was initially published in the late 1990s. The second edition was published by Biddle Publishing in 2002. The publisher retired in 2007 and Prison Legal News took over the publishing of the book as the first title in its new book line.

With the expert assistance of Editor Susan Schwartzkopf, the third edition of *PGHCP* has been totally revamped and updated. Many colleges no longer offer correspondence courses, having gone totally to online distance learning courses. This book offers a complete description of more than 160 programs that are ideal for prisoners seeking to earn high school diplomas, associate, baccalaureate and graduate degrees and vocational and paralegal certificates. In addition to giving contact information for each school, Taylor includes tuition rates, text book costs, courses offered, transfer credits, time limits for completing course, whether the school is accredited, and if so by whom, and much, much more. What makes the book unique is Taylor's first hand personal experience as an imprisoned distance learning student who has a basis for comparison and knows how to judge

a college correspondence course from the perspective of an imprisoned student who doesn't have e mail access and who cannot readily call his instructor.

Book editor Susan Schwartzkopf brings a masters degree in education and 12 years of experience teaching immigrants English language skills to the project. The book's introduction by Vivian Nixon, the executive director of the College and Community Fellowship which advocates for the inclusion of released prisoners in higher education, further bolsters the masterful expertise and experience brought together in this book.

Taylor also explains factors to be considered in selecting an educational program and how to make meaningful

comparisons between the courses offered for the tuition charged. No money to pay for school? Taylor covers that too. Diploma mills? The book addresses how to recognize and avoid them. Any prisoner seeking to begin or continue their education behind bars will find this to be an invaluable road map. This is not just the only book on the market to address the needs of prisoners seeking a higher education while locked up; it does a fantastic job accomplishing its goal. It saves the prospective student countless dollars and time researching the best course for their needs. Cost is \$49.95, free shipping. Contact: Prison Legal News, 2400 NW 80th St. # 148, Seattle, WA 98117. 206-246-1022. www.prisonlegalnews.org. ■

In the Shadow of San Quentin: An Interview with Prison Law Office Director Donald Specter

by Todd Matthews

If any one of the dozen attorneys working at the Prison Law Office ever needs to be reminded of the importance of their work, they only need to step outside their office door. The non-profit law firm is located just outside the gates of California's San Quentin Prison, in the shadows of razor wire, guard towers, and the prison's 5,200 prisoners.

For 30 years, the Prison Law Office has provided free legal services to California state prisoners, with an emphasis on conditions of confinement and medical care. In 2000, the firm filed a class-action lawsuit on behalf of prisoners with chronic diseases who suffered medical neglect. The case was settled two years later, resulting in medical care improvements throughout California. The firm has also worked for prison reform aimed to benefit prisoners with disabilities and address overcrowding.

For the past 25 years, attorney Donald Specter has been at the forefront of this work as the firm's director. *PLN* recently caught up with Specter to ask him about his work on prison reform.

PRISON LEGAL NEWS: You have focused your law career on prisoners' rights for nearly 30 years. As I understand it, you joined the Prison Law Office in 1979 as a volunteer, and were appointed director in 1984. What was your original interest in or motivation for pursuing prisoners' rights issues as an attorney?

DONALD SPECTER: I originally thought about criminal defense as a career, but after a stint as a law student at a public defender's office realized I wasn't cut out for that line of work. However, to get to the public defender's office I had to travel past San Quentin every day. After law school, I saw a volunteer opportunity to provide legal assistance to San Quentin prisoners. I jumped at the chance.

PLN: What was the Prison Law Office like in terms of staffing and number of cases handled when you joined in the early-1980s versus today? How has the law office responded to the ever-growing number of inmates in California prisons over the past two decades?

SPECTER: When I started working at the Prison Law Office, it was staffed by one other attorney, who co-founded the

organization. When he left in 1984 there were four lawyers, and now there are 12, including myself, plus several legal assistants, a policy advocate and intermittent law students. Our office has also been affected by the overcrowding crisis in California's prisons. Even with a larger staff, we receive more requests for assistance than we can possibly handle. Some days we receive more than 100 handwritten letters from prisoners throughout the state.

PLN: When you look back at the law firm's work, which two or three cases, decisions, or areas of reform would you consider to be 'landmark' and heavily involved the work of the Prison Law Office?

SPECTER: Some of the more important cases have been *Madrid v. Gomez*, a highly publicized case challenging conditions in the supermax SHU and excessive force; *Pennsylvania v. Yesky*, a case in the Supreme Court holding that the American with Disabilities Act applies to prisons throughout the country; *Farrell v. Tilton*, which resulted in a consent decree over virtually all of the state's juvenile facilities and led to a dramatic depopulation; *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*, which respectively involved challenges to the medical and

mental health care systems in California's prisons, both of which are still in the remedial phase, with the Court appointing a Receiver in *Plata*; finally, we just ended a trial in *Plata* and *Coleman* in which we have argued that the Court should release 52,000 prisoners due to overcrowding. [Editor's Note: After this interview was conducted the court ruled in favor of the prisoners. That ruling is reported in this issue of PLN.]

PLN: When someone incarcerated in a California prison seeks out the Prison Law Office for assistance, how do they learn about the firm?

SPECTER: There are notices of our cases all over the prisons with our address so it's not hard for prisoners to know where to write for help.

PLN: What are the most common reasons for a prisoner to contact your office?

SPECTER: The most common reason prisoners write to us is for health care related issues. That's why we have spent so much of our resources in that area.

PLN: How many of those contacts turn into cases your firm will take on?

SPECTER: We try to use impact litigation as much as possible so we don't handle very many individual cases. We

provide direct assistance in only a very small percentage of cases.

PLN: Describe the areas of prison and jail reform that need the most work and are currently being pursued by the Prison Law Office?

SPECTER: At the moment, the most pressing issue is overcrowding. It is making it impossible for the state to provide the basic services to prisoners, and to comply with court orders in many different areas.

PLN: What keeps you motivated to continue in the field of prisoners' rights?

SPECTER: I've wondered about that myself. The opportunity to end human misery and suffering for people who have no power is a big part of it, as is the desire to stop the state from abusing its authority. The other aspect of this field is that it's always changing and there are always new and interesting issues that arise. ■

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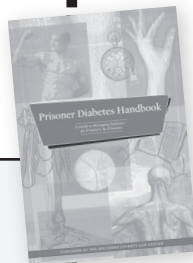
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Federal Three-Judge Panel Issues Tentative Ruling To Reduce California's Prison Population By Up To 57,000 In Three Years

by John E. Dannenberg

In a tentative ruling issued February 9, 2009, a three-judge federal panel ruled that uncontroverted evidence showed that unconstitutional health and safety conditions exist in California's prisons that are due solely to overcrowding, and that the only visible means to correct the constitutional violations was to order a reduction in the existing prisons' population. The court relied strongly on admissions of the underlying deficiencies made by Governor Arnold Schwarzenegger in *CCPOA v. Schwarzenegger*, 163 Cal. App.4th 802 (2008) [*CCPOA*].

The court's five-part ruling was both terse and unswerving. Reviewing the facts in Part 1, it observed that in *CCPOA*, Governor Schwarzenegger had in 2006 already proclaimed a "state of emergency" in California's prisons due to "severe overcrowding" that had caused "substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them." In *CCPOA*, the state appellate court had held that the evidence demonstrated the existence of conditions of "extreme peril to the safety of persons and property." The federal panel further noted that in its 20 year protracted history in the underlying prison healthcare litigation cases, it had consistently found that California had failed to provide constitutionally adequate mental or physical healthcare.

The disagreement in court focused on whether overcrowding *per se* was the "primary cause" of the violations. The court found the evidence "overwhelming." It observed that due to overcrowding, there were insufficient clinical facilities and resources to provide needed medical care. Specifically panned by the panel was the use of triple bunks in gymnasiums (and other areas not intended for housing) throughout the state prisons, because, per *CCPOA*, it had "substantially increased the risk of the transmission of infectious illnesses among inmates and prison staff." California prison wardens and medical experts from other states agreed.

The defendants countered that the existence of the panel's appointed Receiver for medical care had alleviated the problem. But the panel's Special Master wryly observed that "many of these

achievements ha[d] succumbed to the inexorably rising tides of population." The Receiver bluntly reported to the Governor that it would be impossible to achieve constitutional medical care with the current overpopulation.

In Part 2, the panel concluded that the only apparent remedy available was prisoner releases. While the court acknowledged the obvious -- that California could simply build its way out of the overcrowding -- it also observed that California was in dire financial straits (even before the recent recession) and could not afford this. Indeed, to resolve the budget crisis, California was considering cutting off the Receiver's court-ordered funding and terminate the ongoing receivership. This angered the panel, which noted that California had not been cooperative on its own in prison healthcare needs. To be sure, the federal courts in the past 20 years of healthcare litigation had had to issue over 77 substantive orders -- and still, constitutionally adequate prison healthcare was circumvented. In short, even the severe sanction of appointing a Receiver turned out not to be "adequate relief." Accordingly, only population reduction to match available healthcare would alleviate unconstitutional suffering of prisoners.

Third, the Panel interpreted what powers it had under the authorizing federal legislation, the Prison Litigation Reform Act (PLRA). Congress did not prohibit prisoner release orders, the panel held. Rather, Congress recognized that such a drastic remedy may be the only available remedy for "unconscionable and unconstitutional conditions in the nation's prisons." Tougher to decide was just how much reduction would return constitutional adequacy.

Again relying upon prior published admissions, the panel found that an earlier Blue Ribbon Commission chaired by former Governor Deukmejian had recommended limiting the population to 145% of capacity. A later Legislative committee, when considering bills authorizing new prison construction, proposed a statutory 130% limit. A mental health expert opined that his programs would not survive anything over 100% of ca-

capacity. Yet, the 2008 California prison population was steady at 200% of design capacity. From the evidence, the panel tentatively concluded that between 120% and 145% would be the limit it expected to finally arrive at.

In Part 4, the panel considered whether its proposed release would also be consistent with PLRA imperatives to strongly consider any "adverse impact on public safety or the operation of a criminal justice system." The panel relied upon the Expert Panel on recidivism reduction programming whose report indicated that approximately 40,000 existing prisoners could be safely released by increasing good conduct credits and slashing technical parole violations. The California Legislature is presently considering such changes, which the panel will take into consideration when issuing its final order. Given the current \$42 billion state budget deficit, the panel believed that any impact would not be "adverse," because about one-half billion dollars in annual savings would inure from such population reduction, net of proposed rehabilitative programs designed to reduce recidivism.

The fifth part of the order dealt with the PLRA directive that any order be "narrowly drawn ... no further than necessary to correct the violation of constitutional rights, and be the least intrusive means necessary to correct" them. The panel found that the state's own proposed 40,000 prisoner reduction plan would be not "intrusive" under the PLRA if imposed as a court ruling. In any event, such an order would not prohibit the state from building more prisons instead. The panel invited further input from the parties prior to its final ruling, and invited a settlement referee for that purpose.

As a practical matter, the panel's ruling is particularly timely. California's lawmakers consider it political suicide to release prisoners. Having a federal court "force" them to do the dirty deed insulates them from later scorn. Still, criticism came from Corrections Secretary Matthew Cate, who replied that the equivalent of "emptying 10 full prisons into our neighborhoods" isn't needed because he believes that his programs on prison reform are already working.

However, the only true reduction in California prison population has come from sending up to 8,000 of its prisoners out of state to private prisons, where their healthcare is at the peril of contractors whose profit depends upon the types of cost controls that gave rise to 20 years of litigation in California's federal courts. In fact, the Receiver recently concluded that his authority extends beyond California's

borders to include those displaced prisoners. Between the state's budget crisis, constitutional medical care demands made by the federal courts, and the old saw that releasing a prisoner necessarily means increasing crime, politicians will eventually have to make practical population reductions in California's prisons. Nonetheless, a recalcitrant California Attorney General Jerry Brown, running

for Governor in 2010, announced he is appealing this ruling to the U.S. Supreme Court. See: *Coleman v. Schwarzenegger*, *Plata v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, Three Judge Court *Tentative Ruling*, February 9, 2009. The ruling is posted on PLN's website. 📄

Other sources: *San Jose Mercury News*, *New York Times*, *Associated Press*.

\$3.6 Million Settlement in Michigan Prisoner's Segregation Cell Death

The family of Timothy Souders has agreed to accept \$3.25 to settle a wrongful death claim relating to Timothy's death. Timothy, 21, was the subject of a May 2007 *PLN* cover article, and a February 11, 2007, report on *60 Minutes*.

Timothy was one of the millions of mentally ill prisoners held by our nation's prisons. Like many of them, Timothy was experiencing difficulty adjusting to the rigors of prison life. In his first four months in prison, he received seven misconduct reports.

After being charged with "unruly behavior" for taking a shower without permission, prison officials stripped him and four-pointed him to the bed in a small, windowless cell. Over the next four days, he was chained to the bed for up to 17 hours at a time. Combine those conditions with 106 degree heat, no water in his cell, and the effects of psychotropic medications that prevented his body cooling; and the results were predictable. On August 6, Souders was "found to be unresponsive and without pulse and res-

piration." His death was officially caused by dehydration.

Souders's parents filed a wrongful death lawsuit in federal court on November 21, 2006. That claim was brought against Correctional Medical Services and various Michigan Department of Corrections officials and guards. On June 3, 2008, the parties reached a settlement with the assistance of a facilitator.

The settlement cares for Timothy's entire family. His father, Steven Souders, receives a structured settlement with a \$550,000 cash value and an additional lump sum of \$179,538.11. Timothy's mother, Theresa Vaughn, will receive a structured settlement of \$300,000, and a lump sum payment of \$429,538.08.

Each of Timothy's brothers, Kyle, Jacob, and Nicholas, will receive a structured settlement of \$200,000. The structured settlements for all of the family members are stated as "cash value," but the structure will provide significantly larger payouts.

The structured payouts provide for set payments at various times for each family member. While the cash value of those

settlements equate to \$3.25 million with attorney fees, they actually equal \$3.6 million. The structured payments range from monthly to annually to every 5 years.

The Souders family's lawyers, who are from the Southfield, Michigan law firm of Fieger, Fieger, Kenney, Johnson, and Giroux, will receive \$1,191,723.81 in attorney fees and costs. See: *Souders v. Burt*, USDC, E.D. Michigan, Case No: 2:06-CV-14353. 📄

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Selling Segregation

by Josh Rushing

US high-security prisons are a big export, but critics doubt their success.

Conflict has long been a source of misery for innocent people around the world. But it has equally long been a source of profit for big business.

The Sofex exposition in Amman, Jordan, is one of the world's largest showcases of the latest developments in the art of war.

Passing through the throng of exhibits one can do anything from being voluntarily "Tasered" to opening negotiations on a ballistic missile.

Tucked in among the 7,500 buyers and sellers is a booth run by the Kerik Group purveying one of the latest exports of US defense, a weapon of mass detention – supermax prisons.

Criminal detention has become big business

The consulting company is seeking to answer the question of what to do with alleged terrorist suspects once they are in custody.

Frank Ciaccio from the group says that business has been brisk at Sofex and amongst interested clients is the Palestinian prison authority while the group is already helping construct a facility for the Jordanian government.

"Billions of dollars are being spent by military and law enforcement in fighting the war on terror. No money's going back to the prison systems to increase security," he says.

"If we can help a country who's having a problem with their prisons then we're doing a good thing."

'Prisoners are prisoners'

The business' founder, Bernard Kerik, has plenty of experience with prison systems, having served as former New York mayor, Rudy Giuliani's, police commissioner between 2000 and 2001 and as the interim interior minister in Iraq in 2003.

He is also a controversial figure, having withdrawn the acceptance of his nomination as US homeland security secretary in 2004 for ethical reasons. Pending federal charges, including for tax fraud, mean his passport has been suspended and he was unable to be in Jordan.

The high-security supermax system

the Kerik Group is exporting gained popularity in the US throughout the 1990s and Kerik cites his own success with the prison on New York City's Riker's Island.

When *Al Jazeera* met Kerik in New York he refused to discuss his clients, but did discuss reasons why nations should be keen to buy in to his products.

"You know what, prisoners are prisoners, and inmates are inmates. I don't care if they're in New York City, if they're in Hong Kong, if they're in Saudi Arabia.

Social isolation

"It makes no difference. When you walk through a facility in any one of these places, pretty much they look the same, they smell the same, and they think the same."

Kerik's stark vision of criminal internment is not one that is shared universally, however.

"The essence of supermax confinement is a couple of things: it is almost complete social isolation," David Fathi of Human Rights Watch says.

"It is a level of social isolation and environmental deprivation that certainly most of us cannot even imagine ... These conditions are extremely damaging for some people."

Fathi claims the success of supermax prisons has been overstated and that their decrease in popularity in the US mirrors a similar decline in efficacy.

"The environment was so stark, so deprived, so harsh, that some prisoners became more defiant, and more oppositional, and more difficult to manage.

"It is ironic that just as the fad had run its course in this country, it seems to be being exported to at least some other countries."

One of those countries is Iraq, yet the US-run prisons there have provoked huge criticisms and outrage in the last few years, most notoriously at Abu Ghraib where prisoners were routinely abused by US personnel.

"The biggest problem for Abu Ghraib, besides the problem itself – the mismanagement, the failure to supervise, the crimes that were committed – The bigger problem for us in my opinion, is world opinion," Kerik says.

He denies he is exporting one of the

worst aspects of the US justice system and that his firm is advising countries how to implement proper training procedures.

"As bad as things may seem at times, our management systems in government are some of the best in the world," he says.

Different approach

The need for secure and effective prison management is a point General Douglas Stone concurs with Kerik upon.

When he arrived to take command of Camp Bucca, a huge prison in southern Iraq, 84 of the facility's compounds were on fire.

The 24,000 Iraqi inmates were running the show to an extent that Stone labeled the country's detention facilities as "Jihadist universities."

"It belonged to extremists, that's the group who was controlling it through fear and intimidation – through violence," Stone says. "Cutting eyes out, cutting tongues off, breaking legs, killing."

When *Al Jazeera* visits Camp Bucca it is outwardly very much the epitome of a US high-security prison and order has been restored.

But Stone has taken a very different approach to that espoused by Kerik, adopting a policy he calls to "sift and winnow," separating moderates from so-called extremists.

About 2,000 prisoners the US military says are known al Qaeda members have been segregated and housed in a facility called the Rock.

Armed soldiers man the gate and protective goggles are required when walking along the gangways to avoid damage from projectiles launched at the guards by prisoners below.

US soldiers tell *Al Jazeera* that the extremists are, unsurprisingly, not particularly communicative.

However by speaking to many of the separated prisoners considered more moderate, the camp authorities say they have been able to form a portrait of a typical prisoner who is a family man, economically motivated, but not particularly ideological or religious.

Stone decided to wage the battle for these hearts and minds with an open approach that encourages regular prison

visits for family members where there are no glass partitions separating them so the men can embrace their children.

Open hearings

Another innovation has been open hearings where detainees can respond to the charges brought against them.

"Nobody sat down with them and said, 'what was your side of the story?'" Stone says.

Imams, considered moderates by the US, are also brought in to educate prisoners, many of whom are illiterate.

Stone admits that he gets "pounded" by critics who believe the US is making judgments on what is acceptable or not in religion but he believes by educating moderate prisoners, the more radical forces in Iraq will become marginalized.

He says release rates of prisoners are up and that these former prisoners provide valuable intelligence.

"Only eight per cent of inmates were being released. Today, the corps is on balance releasing 50 per cent of everybody they talk to."

"That equates to 8,400 in the space of 10 months in 2007 and 2008, with only 28 recaptured engaging in "insurgent activity."

Such figures might seem impressive but prompt the question of why so many innocent men are detained in the first place, and it is worth noting there are financial rewards for prisoners who complete rehabilitation courses, such as reading.

Chakar, a doctor, was held for 70 days before being released. As he prepares to walk out of the camp gates he informs *Al Jazeera* he was well treated.

"It is harmful, but when you study the situation in Iraq, you can realize that everything could happen these days, mistakes happen," he says.

"But what is good – they have corrected their mistake and they are releasing me."

Stone admits that mistakes have been made in Iraq

"Abu Ghraib was a shameful act on behalf of the United States, towards a people," he says.

"And you can never assume that it won't happen again. If you do not pay attention to it, the best of people will do the worst of things."

After allowing *Al Jazeera* rare access inside Bucca, Stone's tenure as head of the camp came to an end and he admitted

his successor may revert to more austere policies.

While firms such as the Kerik group promote the use of more supermax prisons that may reap profits for the merchants of war, their value as a decisive weapon in the battle against terrorism remains an open question. ■

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California Appellate Court Grants Writ, Reverses Governor, Reinstates *PLN* Writer's Grant of Parole

by Marvin Mentor

The California Court of Appeal, 6th District, has twice granted the habeas petition of *PLN* contributing writer John Dannenberg, whose favorable Board of Parole Hearings (BPH) decision in 2005 was reversed by Governor Arnold Schwarzenegger based solely on the Governor's politically skewed readjudication of Dannenberg's second-degree murder case.

The appellate court initially found on December 3, 2007 that there was no evidence of a nexus between Dannenberg's 1985 commitment offense and any purported dangerousness at the present time. [See: *In re Dannenberg*, 68 Cal. Rptr.3d 188 (Cal.App. 6th Dist. 2007)]. Accordingly, the court vacated the Governor's decision and reinstated the BPH's parole decision.

However, the California Supreme Court granted review pending its opinions in the related cases of *In re Lawrence*, 190 P.3d 535 (Cal. 2008) and *In re Shaputis*, 190 P.3d 573 (Cal. 2008). Following those rulings in October 2008, the Supreme Court vacated and remanded Dannenberg's case to the Court of Appeal for reconsideration. In its latest ruling on January 23, 2009, the Sixth District again granted Dannenberg's petition, reinstating his grant of parole. He was finally released from San Quentin State Prison on January 31, 2009.

Sentenced to 15-years-to-life and now 69 years old, Dannenberg had been repeatedly adjudicated not to be a danger to society if released. He was granted bail for the year pending his trial in 1986. On post-conviction in 1988, the trial court found there was "no evidence" that Dannenberg would be a danger if released pending appeal. In 2001, the Marin Superior Court granted Dannenberg's pro per petition wherein he complained that he was wrongfully denied parole, holding (after a full evidentiary hearing that included testimony from former BPH Chairman Albert Leddy) that there was "not an iota of evidence of dangerousness if released."

The California Court of Appeal (1st District) affirmed these findings [*In re Dannenberg*, 125 Cal.Rptr.2d 458 (Cal. App. 1st Dist. 2003)], but the California Supreme Court reversed in a hotly dis-

puted 4-3 ruling [*In re Dannenberg*, 34 Cal.4th 1061 (Cal. 2005)] that created a new judicial standard for parole denial: "if the crime exceeded the minimum elements of the offense."

The three dissenting justices labeled this standard "essentially meaningless" and said it would result in the "rubber stamping" of BPH decisions by any reviewing court. Indeed, the *Loyola Law Review* published a spirited 39-page criticism of the Supreme Court's impossible standard, titled "*In re Dannenberg: California Forgoes Meaningful Judicial Review of Parole Denials*." (See: 39 LoyL 907, Aug. 2006.) The Supreme Court later conceded in *Lawrence* that its "minimum elements of the offense" standard articulated in *Dannenberg* was in fact "unworkable."

Subsequent to the California Supreme Court's 2005 *Dannenberg* ruling, Dannenberg was granted parole at a regularly scheduled BPH hearing. However, Governor Schwarzenegger, following his policy of rejecting 90 percent of the BPH's few grants of parole to lifers, and based solely upon an "inference" of greater culpability than the conviction offense, reversed the parole decision.

Dannenberg petitioned the Santa Clara County Superior Court for habeas relief but was summarily denied. The court ruled that "because there would always be 'some evidence'" (e.g., an "inference") that Dannenberg was guilty of something more than his conviction, he was in essence doomed to being forever found unsuitable for parole unless and until he confessed to that greater offense (of which he had been affirmatively acquitted during his jury trial).

Dannenberg then complained to the 6th District in a new writ that this process violated many legal protections, including double jeopardy, an inadequate legal burden of proof (California Evidence Code § 115 requires proof in administrative hearings to be a preponderance of the evidence), and the absence of any evidence of his current dangerousness.

The appellate court focused on the latter issue, asking the Governor to state what evidence linked Dannenberg's 1985 offense to his current propensity for dan-

gerousness. The Governor had already conceded in his parole-reversal decision that Dannenberg's pre- and post-conviction records were "blemish-free," and upon the appellate court's order to show cause, the Governor was unable to muster "some evidence" proving otherwise, save – allegedly – the commitment offense.

In oral argument, the Court of Appeal asked the Attorney General (AG), "So, if Dannenberg has a hearing and is found unsuitable based solely on the crime, there's no reason to ever give him another hearing?" The AG replied that another parole panel could have a different opinion. Dannenberg rebutted that this was arbitrary, in violation of due process. The AG then argued that the District Attorney had also opposed parole, and because he was a peace officer, that carried extra weight. However, the Court agreed with Dannenberg that the DA's objection was simply a duplication of the Governor's objection based upon the original offense.

Citing recent case law, the Court of Appeal held that it can be a violation of due process to "eternally" hold a prisoner to be an "unreasonable risk of danger to society if released" based solely on the immutable fact of the offense itself. While the Governor's finding that Dannenberg's crime was "especially egregious" would be permitted to stand as an exercise of his discretion, his reversal of the BPH's decision could not stand because there was no evidence of Dannenberg's current dangerousness. In addition to the passage of time, the appellate court relied upon Dannenberg's spotless record both before and during his incarceration, as well as his exemplary programming history – an evidentiary record it declared was "undisputed."

Importantly for all California lifers, the Court observed that neither the Governor's nor the District Attorney's opinions rise to the level of "evidence." Dannenberg had argued that were their opinions to be considered "evidence," that would amount to a tautology because there would then always be "some evidence" to support the denial or reversal of favorable parole decisions.

With the appellate court's 2009 or-

der, Dannenberg's two other state court cases, related to a 2007 BPH decision denying him parole (reversed by the Superior Court) and a 2008 ruling granting him parole (again reversed by the Governor), were mooted. Dannenberg represented himself in all of the court pleadings, but substituted San Jose, Cali-

fornia attorney Steve Defilippis for oral argument before the appellate court. See: *In re Dannenberg*, 2009 Cal. App. Unpub. LEXIS 556 (Cal.App. 6th Dist. 2009).

[Editor's Note: It is with great pleasure to see John finally released. His court saga illustrates that a writ of habeas corpus isn't what it used to be. That it took mul-

tiplie habeas petitions and favorable court rulings before John was actually released makes one wonder what happens to those prisoners who are wrongfully denied parole who are too mentally ill, too illiterate, too non English speaking or too "not with it" to be able to successfully litigate their way out of prison?] ■

Reverend Sues, Wins Right to Register Alabama Prisoners to Vote

by David M. Reutter

The Alabama Dept. of Corrections (ADOC) has agreed to let Reverend Kenneth Glasgow enter state prisons to register prisoners to vote. The settlement agreement came after the NAACP Legal Defense Fund (LDF) filed suit on Glasgow's behalf, alleging that previous permission he had received from the ADOC to register prisoners was revoked following objections from the Alabama Republican Party.

After Glasgow had a meeting with ADOC commissioners on July 30, 2008 concerning Alabama voting law, a memorandum was issued on September 5 that allowed him to contact prison wardens to schedule visits so he could educate prisoners about their voting rights and register them to vote by absentee ballot.

Upon Glasgow's arrival at the prison, the warden was to provide him with a list of prisoners eligible to vote under Alabama law and let him meet with them. He was also to be allowed into segregation areas. From September 10 to 17, 2008, Glasgow registered 80 prisoners at three prisons.

Since Alabama law prohibits only felons convicted of crimes involving "moral turpitude" – an undefined term – from voting, Glasgow restricted his voter reg-

istration ministry to prisoners convicted of drug offenses, a crime the Attorney General had opined did not involve moral turpitude. [See: *PLN*, Aug. 2008, p.30].

A September 17, 2008 *Associated Press* article about Glasgow's voter registration efforts caused a furor among Alabama Republicans. Shortly after reading the article, titled *State Inmates Register to Vote in Prison*, Mike Hubbard, chair of the Alabama Republican Party, sent an e-mail to ADOC Commissioner Richard Allen.

Hubbard affirmed the Republican Party's "full support of increasing the amount of registered voters in the state," but also asserted that "we do not support the registering of individuals who have committed crimes and are currently incarcerated in the penal system." Hubbard raised the possibility of voter fraud.

Glasgow was advised on September 18 that his access to ADOC prisons had been withdrawn by Commissioner Allen "until things cool off." With an October 24 deadline to register voters for the November elections, the NAACP LDF sued on Glasgow's behalf for injunctive relief in the U.S. District Court for the Middle District of Alabama.

"The GOP and the Alabama Depart-

ment of Corrections cannot decide on their own which constituencies are going to have access to the vote, and which will be barred from it. We live in a democracy, after all," Glasgow stated.

ADOC settled the suit on October 21, 2008, allowing Rev. Glasgow to continue his voter registration efforts. "Now I can continue the ministry God gave me: helping to give a voice to the voiceless by reaching out to people in Alabama's correctional facilities who are eligible to vote," said Glasgow, who served time himself for robbery and drug convictions.

"This significant development strengthens the integrity of Alabama's democratic processes by guaranteeing that eligible voters who seek to vote will have their voices heard," noted Ryan P. Haygood, Co-Director of the LDF's Political Participation Group.

More than 6,000 ADOC prisoners were eligible to vote in the past election, though many were unaware they could do so. See: *Glasgow v. Allen*, U.S.D.C. (M.D. Ala.), Case No. 2:08-cv-00801-WKW-SRW. ■

Additional sources: *LDF press release*, www.ballot-access.org, *Alternet*

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Texas Parole Officials Caught Lying to Federal Court With Impunity

As Texas federal court has dismissed as moot a parolee's challenge to parole restrictions which prevented him from having unsupervised contact with his son. During the course of the litigation, parole officials repeatedly misled the court.

Gerald Grant, a Texas parolee, was convicted of possessing four photographs of child pornography which, according to court documents, he was persuaded to take in a sting-like operation involving a prostitute who worked with the San Antonio District Attorney's Office.

He was sentenced to five years in prison and released on mandatory supervision two years later. As a condition of his release, the Parole Board imposed portions of Special Condition "X" (onerous parole conditions for sex offenders), which stated Grant could not "reside with, contact, or cause to be contacted any person 17 years of age or younger, in person, by telephone, correspondence, video or audio device, third person, media, or any electronic means" unless approved by his parole officer. Parole Division/Policy and Operating Procedure (PD/POP) 3.6.2.

Grant had a five-year-old son, Ethan. The parole restriction prevented him from living with his wife and son or even visiting his son without the supervision of a person unanimously approved by the local parole panel. At the time, Subsection I of the PD/POP authorized parolees who had managing conservatorship or custody of a child via divorce, adoption or judicial decree to have contact with the child. After unsuccessful attempts to administratively remedy the restrictions, Grant filed a 42 U.S.C. § 1983 civil rights suit in federal district court against parole officials, complaining of interference with his parental relationship and seeking injunctive and declaratory relief.

During the litigation, Grant's wife began divorce proceedings and a state court signed an order giving Grant unlimited, unsupervised visitation rights. The parole official defendants filed a motion to dismiss, claiming the issue was moot because the state court had granted Grant the visitation rights he was seeking in his lawsuit.

However, the defendants failed to tell the court that (1) the Parole Board and its officers were ignoring the state court order and continuing to restrict Grant's visitation with his son, and (2) around the time the motion was filed, the Parole

Board deleted Subsection I so there was no longer an exemption for parolees with court orders.

"To say that the Defendants' briefing in this Court has been disingenuous would be generous. The Defendants' statements and briefs appear to have been filed in complete disregard of what Texas parole officials were actually doing," the federal magistrate judge noted in a report and recommendation.

Eventually, the Parole Board modi-

fied the conditions of Grant's parole, allowing him to visit and live with Ethan. The defendants then filed another motion to dismiss the case as moot. The U.S. District Court granted the motion and, because the change was "voluntary" rather than pursuant to a court order, denied Grant's request for attorney fees. Grant was represented by attorneys William T. Habern and Richard Gladden. See: *Grant v. Owens*, U.S.D.C. (WD Texas-Austin), Case No. 1:2005-cv-00316-LY. ■

Report Finds Increase in Michigan Prison Population Attributable to Political Policy Changes, Not Crime Increase

by David M. Reutter

A report issued by the Citizens Research Council of Michigan (CRC) concludes that "Michigan's historical incarceration rate growth was not the product of increasing crime rates, but was most prominently influenced by changes in criminal justice policy and practices." The comprehensive report reviewed here examines the policies, events behind those policies, and the consequences therefrom that have resulted in Michigan's prison population increasing 538 percent from 1973 to 2004. The fiscal result is Michigan expends the largest portion of their budget (5.2 percent) to run its prison system, which is an increase from 1.6 percent of the budget in 1973, of any in the nation.

This report is unique in that it was not compiled by a governmental or prisoner interest group. Rather, the CRC's Board of Directors and trustees is a who's who of Michigan and national business leaders. The report said it was not intended to identify precise aspects of policies needed to slow the growth of incarceration, but it does lay the groundwork to determine future specific policy changes.

A historical perspective broke the last 34 years (from 1973 to 2007) into five specific periods of population growth and stability. From 1973 to 1978, Michigan's prison population grew at an annual rate of 13.9 percent, swelling the number of prisoners from 7,874 to 14,944 in that period.

There were found to be several political causes behind that growth. A 1974 U.S. Law Enforcement Assistance Adminis-

tration program provided discretionary grants to certain local prosecutor's offices to be used to set up units devoted to the prosecution of habitual offenders, which provided more staff and resources to increase the prison sentences for Michigan's habitual offenders. Then in 1978, a graduated good-time credit system for certain offenses was eliminated by a ballot initiative.

The prison population between 1979 and 1984 was stable, which was attributed to "parole approval rates [that] reached near-historic highs, averaging 68.5 percent annually." This also resulted in "record low recidivism rates, averaging 30 percent annually." From 1985 to 1989, the prison system's growth caused its budget to grow by 19.5 percent, draining 9.1 percent of the total in Michigan's General Fund in FY1989.

The main cause for that growth was attributed to high profile crimes that resulted in lower parole approval rates. One such instance was the 1984 murder of an East Lansing police officer and a housewife by a parolee released under the Prison Overcrowding Emergency Powers Act (POEPA). That crime was to blame for parole approval rates plunging by 10 percent in 1985 from 1984 rates. In addition, those murders were the driving force behind repealing the POEPA in 1988.

Steady growth of the prison population followed from 1990 to 2002, growing 3.6 percent annually to 50,591 prisoners in 2002. "Two pivotal changes in policy during these years increased the size of Michigan's prison population," says the

report. "The first was the change in the Parole Board from civil servants to appointees in 1992."

That restructuring was seen as the cause of the "nine-point increase in the recidivism rate." That results from "the number of technical rule violators returned to prison has increased, accounting for only 9 percent of new prison commitments in 1976 and for 26 percent of new prison commitments in 2006.

The second policy change was to increase the length of the average stay. This was done by "changes in policy aimed at being tough on crime and decreasing parole approval rates. The average prison stay has increased from approximately 28 months in 1981 to 44 months in 2005, or 57% annually.

While "Michigan's truth-in-sentencing" policy decreased early release programs that raised the prison population, decreasing parole approval rates also contributed to that rise. That rate went from 66 percent in the years prior to 1992 to 52 percent in the years since. Meanwhile, the recidivism rate increased from 36 percent in 1976 to a rate of 46 percent in 2004. In fact, the report graphically shows that the lower the approval rate, the higher the recidivism rate.

The prison population has remained relatively stable from 2003 – 2007. Its current 50,591 prisoners have a longer average stay than other state prisoners nationally. Michigan first timers serve an average 3.7 years, which is 1.2 years more than the national average. With the fifteenth highest cost annually per prisoner, Michigan spends two percent more of its budget on prisons than does the average state, which only devotes about 3.4 percent on prisons.

Current projections show Michigan's prison spending growing by 6.8 percent

annually between 2008 and 2012. Such spending makes little sense in light of the report's core conclusion.

"Given that the annual crime rate declined by 42 percent and the violent crime rate remained stable from 1976 to 2006, Michigan's historical incarceration rate growth was not caused by increased crime rates," states the report. "As the timeline portion in Michigan was principally the result of specific changes in the policies and practices at all levels of the criminal

justice system."

Although this report is specific to Michigan, the same policies and political dynamics have spread throughout the United States. It clearly debunks the "tough on crime" crowd within the prison industrial complex when it comes to why we need more prisons. The June 2008 CRC report, entitled, *Growth in Michigan's Corrections System: Historical and Comparative Perspectives*, is available on PLN's website. ■

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Maryland Prison Employees Strip Searched After False Alert by Drug Scanning Machine

by Derek Limburg

Nine prison employees at the Maryland Correctional Training Center (MCTC) received the same treatment as prisoners upon their arrival at work on August 12, 2008. The employees, including guards and counselors, were strip-searched.

By request of MCTC's Warden, D. Kenneth Horning, the Maryland Department of Corrections (MDOC) Contraband Interdiction Team set up an IONSCAN drug detection system at the front gate of the prison. As employees passed through the machine, it sounded an alert on nine staff members.

Those employees were escorted to a separate room and strip-searched. Females were searched by female guards and males were searched by male guards. No drugs were found on any of the employees or in their vehicles.

Larry Kump, regional governor of the Maryland Classified Employees Association (MCEA), noted that the IONSCAN detector was either faulty or had been improperly operated. MCEA is the union that represents prison guards and other state employees; Kump stated they would file a grievance and were considering a lawsuit.

According to Warden Horning, the reason for the stepped-up scrutiny of drug smuggling by prison staff was a recent spike in prisoner overdoses, including one fatality. MDOC Commissioner J. Michael Stouffer admitted that mistakes had been made in regard to the staff strip searches.

The nine MCTC employees who were searched met with three local state delegates to discuss the incident. Delegate Christopher S. Shank stated that many, but not all, of the searches had included full cavity probes.

"They were humiliated by almost being treated like an inmate," said delegate Leroy E. Myers, Jr. Of course, lawmakers rarely get upset when prisoners are subjected to unjustified strip searches, or when prison visitors are searched or denied visits due to false positive results from drug scanning machines.

Maryland prison rules state that anyone inside a prison may be searched at any time. However, Myers and Shank believe

the searches were performed in violation of the regulations. The MDOC's policy for strip searching employees was changed on August 27, 2008 to require the authorization of the Corrections Commissioner or the Secretary.

"I'm the commissioner, I'm responsible for this, and I'm accountable for it," said Stouffer. "If we did something wrong, we're going to fix it." Stouffer suspended the use of the IONSCAN on MDOC employees – but not as to prisoners or prison visitors. Gary Maynard, Secretary of the Dept. of Public Safety and Correctional Services, promised that such incidents would not happen again.

Apparently the administration at Maryland's Eastern Correctional Institution didn't get the memo about improper employee strip searches, because in October 2008 three female staff members were strip-searched at Eastern in violation of MDOC policy.

No contraband was found, and Warden Kathleen S. Green apologized. "We had no right to do this," she stated. "It is unfortunate that in our diligence to accomplish our mission that we have failed to follow our own directives."

On February 10, 2009, MCEA issued a press release stating there had been no response from the MDOC concerning their formal grievance, which was being referred to an administrative law judge. Although the MDOC's Internal Investigations Unit had completed a report into the August 12 strip searches, the department refused to release a copy of the report to one of the employees who had been searched, stating they were not a "person of interest" with an enhanced right of access to the record in this case."

Evidently, the MDOC treats its employees little better than its prisoners. ■

Sources: *The Gazette*, *Associated Press*

Georgia Judges, Other Officials Indicted on Corruption and Human Trafficking Charges

by David M. Reutter

Federal authorities have been investigating Georgia state court judges and county officials for the past several years. The result thus far is numerous indictments and three guilty pleas on charges ranging from fraud and extortion to human trafficking.

The federal investigation has centered on the Alapaha Judicial Circuit, which comprises Clinch, Lanier, Berrien, Cook and Atkinson Counties in southern Georgia. On July 21, 2008, the FBI arrested five people who were at the epicenter of corruption in Clinch County's court system.

Named in the 19-count indictment were former Judge Brooks E. Blitch, III; Berrien Sutton, a juvenile court judge and Blitch's former law partner; Berrien's wife, Lisa Sutton, who worked under Blitch as a court administrator; George Bessonette, a local attorney; and Hayward Collier, a friend of Blitch's.

The Grand Jury charged that Blitch had engaged in a fraudulent conspiracy by

creating unnecessary court positions, finding this allowed him to receive free legal services from the Suttons and Bessonette, who later served as Blitch's law clerk.

In exchange for those services, Blitch created an unneeded juvenile court judgeship for Berrien, an unnecessary court administrator job for his wife Lisa, and various appointed positions such as a temporary superior court judge assignment for Bessonette.

While Berrien did little or no work as a juvenile judge, Bessonette stayed busy in his law clerk position by acting as a part-time judge, collecting "under the table" payments from Berrien to handle his case load.

After Lisa Sutton created a program called "In the Best Interest of the Children," Blitch began ordering all divorcing spouses with children to attend the \$30-per-person counseling class. Additionally, Blitch and Berrien Sutton were charged with conspiracy to commit mail fraud over their imposition of illegal \$10 to \$15 fees

in certain criminal cases. The “proceeds,” amounting to over \$73,000, went to two court clerks, a sheriff’s deputy and other county employees in addition to their salaries, and were not taxed.

Blitch also faces two counts of extortion, one of which was based on his offering to “fix or get rid of” certain DUI cases. The other extortion charge involved Blitch giving former Magistrate Judge Linda C. Peterson a \$14,000 raise after she helped him and his son resolve a legal claim.

Peterson was convicted on July 14, 2008 on federal charges of perjury and making false statements. However, the U.S. District Court granted her motion for acquittal on November 3, 2008, finding the evidence presented at trial did not sustain the verdict. The U.S. Attorney’s office has asked for reconsideration.

Blitch is further accused of retaliating against a witness – a retired longtime agent of the Georgia Bureau of Investigation – for telling a convicted murderer that he had no problems with him owning a gun for hunting. Blitch was charged with aiding and abetting possession of a firearm by a convicted felon.

After his arrest, Blitch was released on \$50,000 bond; his prosecution is ongoing, as are the criminal charges against Berrien and Lisa Sutton.

In January 2009, Blitch’s friend Haywood Collier pleaded guilty to a charge of perjury. He was accused of accepting payments from criminal defendants seeking judicial favors from Blitch. Previously, charges were dropped against Bessonette

and two other defendants accused of lying in the case, after they agreed to enter a pre-trial diversion program.

Another casualty in the investigation into Blitch and his associates was Timothy L. Eidson, chief public defender for the Cordele Judicial Circuit. Eidson was charged with obstruction of justice and making false statements to the FBI. He was questioned about his attempts to get Blitch to delay criminal proceedings against his wife, who had been arrested on a felony cocaine charge. At the time Eidson was trying to land the chief public defender position, and he didn’t want it known that his wife was facing drug charges – or that he was reportedly involved in buying and using cocaine himself.

PLN previously reported on judicial ethics charges filed against Blitch and Berrien Sutton, as well as the federal indictments of Clinch County Sheriff Winston C. Peterson, former Magistrate Judge Linda Peterson (who is married to the Sheriff’s brother), and former Clinch County Court Clerk Daniel V. Leccese, Sr. [See: PLN, July 2008, p.36].

In an unrelated incident involving judicial misconduct in Georgia, Fulton County Magistrate Judge D. William Garrett, Jr., his son Russell Garrett (a deputy sheriff) and Russell’s wife, Malika Garrett, were charged in June 2008 with nine counts of human trafficking, alien harboring,

witness tampering and making false statements.

They allegedly induced a female Indian national to enter the United States under false pretenses to serve as a nanny for Russell and Malika’s children. The Garretts later stopped paying her, curtailed her freedom, kept her in an unheated basement room, and threatened to have her jailed and deported if she didn’t work 16-hour days for them.

On January 23, 2009, Russell and Malika Garrett pleaded guilty to charges of harboring an alien for private financial gain and making a false statement to federal officials. They will be sentenced in April; Russell was terminated from the Sheriff’s office. The charges against D. William Garrett, who is no longer a magistrate judge, are still pending. See: *United States v. Garrett*, U.S.D.C. (N.D. Ga.), Case No. 1:08-cr-00231-ODE-ECS. ■

Sources: *Atlanta Journal-Constitution*, *Fulton County Daily Report*, *Associated Press*, www.walb.com

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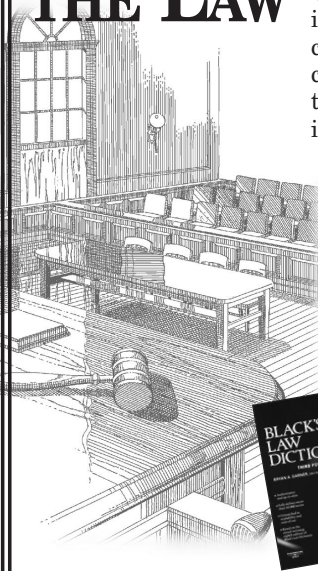
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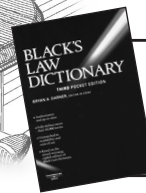
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Former Illinois Prison Director Convicted and Fined

Former Director of the Illinois Department of Corrections Donald Snyder was sentenced, on July 30, 2008, to two years in federal prison for accepting \$50,000 in bribes from lobbyists.

Snyder tried to minimize the damage by admitting his guilt and turning state's witness. A remorseful Snyder admitted taking \$30,000 from lobbyist Larry Sims. He also implicated former Cook County undersheriff John Robinson and prisoner advocate Michael J. Mahoney in the remaining \$20,000 pay off. Judge Zagel was not impressed.

"I didn't believe much of your testimony and I didn't believe much of your testimony because of your claimed lack of memory," said Zagel.

Neither did Zagel hide his distaste as he made it clear that Snyder had set a terrible example as a public servant and had impugned the stature of government officials through his actions.

"You hear over and over again that all government officials are corrupt," the judge said. "You should have stayed in Pittsfield," said Zagel as he ignored numer-

ous personal affidavits from friends and neighbors, in upstate Pittsfield, vouching for Snyder's character.

Snyder was defended by Springfield attorney Michael Metnick who tried to get his client a 16-month sentence. Metnick argued that in spite of his client's ethical lapse in accepting the bribe he had done a good job in managing the state's prison system.

Federal prosecutor Joel Levin countered that Snyder's tenure was filled with "waste, mismanagement, cronyism and abuse of office" and filled with "lavish wining and dining [Snyder] received at the expense of IDOC vendors."

Still, Levin put in a good word for Snyder and urged the court to take Snyder's cooperation into consideration. Snyder aided the investigation by wearing a wire and recording conversations of his illegal dealings. He also testified at trial against one of the lobbyists in exchange for leniency.

Sims and Robinson pleaded guilty to the charges against them. But at a bench trial Mahoney insisted he had done nothing illegal. As executive director of the

John Howard Association, Mahoney had used funds to curry Snyder's favor. While admitting the questionable ethics of his actions, Mahoney insisted that he had technically done nothing illegal.

Judge James B. Zagel called Mahoney's defense "inherently unattractive" but essentially correct and acquitted him of all charges.

Levin requested that Snyder receive a 23 to 30 month sentence. In spite of his obvious disdain for the former prison chief, Judge Zagel sentenced Snyder to two years in federal prison, 300 hours of community service and fined him \$50,000.

A humiliated Snyder exited the courtroom with the words, "what I did was absolutely wrong." He then turned to his daughters and apologized saying, "I'm sorry girls." Snyder also expressed a hope that his actions would not unfavorably affect his girls' prospects for future employment.

Snyder served as director of the Illinois DOC from 1999 to 2003. ■

Sources: *Associated Press, Chicago Tribune*

News in Brief:

Arizona: On December 19, 2008, Damon Rossi, 38, a criminal defense attorney, was arrested at home for allegedly giving his client a piece of candy during a trial in Yavapai superior court. His client was a jail prisoner in shackles. Sheriff's spokesman Dwight D'Evelyn said the jail prohibits giving prisoners food and that Rossi was warned not to feed his client and responded "what are you going to do, arrest me?"

Arizona: On January 15, 2009, a federal Bureau of Prisons bus was hit by another vehicle which left the scene. Eight prisoners were treated for minor injuries.

Arizona: On November 8, 2008, Juan Nunez, 39, a guard at the Corrections Corporation of America run Central Arizona Detention Center was charged in federal court with accepting bribes from an unidentified prisoner to smuggle cocaine into the prison. Nunez met with an undercover FBI agent and received \$1,600 and a half ounce of cocaine and agreed to smuggle the drug into the prison.

Florida: On December 15, 2008, Calhoun county jail guard William Strawn pleaded no contest to bribery and so-

licitation of prostitution charges. Strawn was videotaped propositioning former jail prisoner Lisa Vaughn for sexual favors whereby he would give her jailed husband favorable treatment. Two weeks earlier, Strawn had pleaded no contest to two charges of sexual misconduct for extorting sex from two female jail prisoners he was transporting back to the Liberty county jail. For both charges he received five years probation, to run concurrently, and agreed to surrender his law enforcement license.

Germany: On November 21, 2008, an unidentified 42-year-old Turkish prisoner escaped from the Willich prison by hiding inside a box which was then carried outside the prison's industrial area where he cut himself out of the box and jumped off the truck to freedom.

Indiana: On December 30, 2008, Joseph Neill, the maintenance supervisor at the Pendleton Correctional Facility, was stabbed ten times in the leg and lower body by prisoner Jeffrey Treadway, 49. Neill was stabbed for having filed a disciplinary report against Treadway for theft.

Iowa: On November 9, 2008, Dallas

county parole officer Lance Summers was ordered by an appeals court to begin serving a five year sentence after he was convicted of stealing supervision fees and fines from probationers and parolees.

New Mexico: On November 13, 2008, Tobias Rodriguez, 30; Casey Young, 29; Erika Jimenez, 28; Gabriel Flores, 20 and John Amador, 32, guards at the Grant County Detention Center in Silver City, were charged with forcing 8 jail prisoners to fight in boxing matches which were then recorded. At least one prisoner was knocked unconscious and one suffered a broken hand during fights that occurred on September 13 and 14, 2008. The guards were charged with kidnapping and conspiracy to commit kidnapping. The guards apparently bet on the fights where the prisoners wore boxing gloves, but no protective gear. Prisoners were rewarded with cigarettes. The guards recorded the fights using cell phones which are now being used as evidence against them.

Oklahoma: The state department of health solicited bids from companies to operate a special nursing home for con-

victed sex offenders but received none. In July, 2008, Oklahoma enacted a law requiring the state to build a special nursing home for sex offenders, purportedly to make other nursing homes "safer" despite the absence of any known risk from elderly people who have at some point in their lives been convicted of sex offenses.

Texas: Chris Saunier, a guard at the Denton county jail, was placed on restricted duty at the jail after he told jail prisoner Aruto Ntel, 25, who was arrested on an outstanding warrant when pulled over for speeding while on his way to vote, that he would release him if he voted for John McCain that day. Ntel was released on bond later that day when a friend posted the \$187 bail and then voted for Barack Obama.

Texas: On November 14, 2008, Emmanuel Cassio, a guard at the Val Verde Correctional facility, was sentenced to 16 months in federal prison for punching a prisoner.

Texas: On November 16, 2008, Benjamin Franklin, 30, a guard at the West Texas Detention Facility, was charged with first degree murder for shooting Monica Beasley.

Virginia: On January 10 and 11, 2009, 41 visitors to the Coffeewood Correctional Center in Mitchells were arrested in a prison and police sting operation. 15 visitors had suspended drivers licenses; 13 had drugs or paraphernalia; 8 had liquor or beer; four had firearms or ammunition and one had false identification.

Wisconsin: On November 11, 2008, Terrance Davis, a prisoner at the Fox Lake Correctional Institution, allegedly attacked two prison guards with a hammer in the prison's furniture shop industrial area. Davis was convicted of killing two Milwaukee policemen in 1985. 📰

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Washington Jury Awards \$202,500 to Ex-Prisoner for Injuries from Top Bunk Fall

A Washington state jury awarded a former prisoner and his wife \$202,500 for injuries incurred after he fell from a top bunk at the Washington Corrections Center (WCC).

Robert Emerick entered the Washington Dept. of Corrections (WDOC) as a frail 62-year-old man. Prior to his arrival in prison in February 2005, Emerick's attorney provided the WDOC with extensive medical records and doctor notes showing that Emerick suffered from complex medical conditions. Specifically, he had advanced osteoporosis, osteonogenesis imperfecta, and restless leg syndrome. He was placed on numerous medical restric-

tions and given a low bunk pass.

After completing intake at WCC, Emerick spent nine uneventful months at Athanum View Correctional Complex. It was while making a temporary stop at WCC on his way to work release that he was seriously injured. Guards assigned him to a top bunk despite his medical restrictions, and on November 22, 2005 he fell from the bunk.

The fall caused a non-union fracture in Emerick's left humerus that required two surgeries. He also suffered a fractured nose and abraded forehead. The aftermath was worse, as those injuries caused a delay in his planned hip replacement, which

had been diagnosed with bone-on-bone degenerative arthritis.

In January 2007, Emerick's left femur broke through his pelvic floor, resulting in emergency hip replacement surgery. He later suffered a mass thrombosis and permanent hematoma from the bone shatter.

In July 2008 a state jury awarded \$195,000 to Emerick for his injuries, plus \$7,500 to his wife for loss of consortium. They were represented by Seattle attorney Mark Leemon. See: *Emerick v. Washington Department of Corrections*, King County Superior Court, Case No. 06-2-29898-5. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Gay & Lesbian Prisoner Project

Provide limited pen pal services and information for GLBT prisoners, and publishes Gay Community News several times a year, free to lesbian and gay prisoners. Volunteer-run with limited services. G&LPP, P.O. Box 1481, Boston, MA 02117

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrong-

ful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

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Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi; Seal Press, 295 pages. \$15.95. Best book available explaining and covering the issues of imprisoned women. Detailed account of a crisis hiding in plain sight. 1066

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$19.00. Documented first hand reporting on law enforcement's war on the poor. Covers paramilitary policing, the INS and prisons. 1002

Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Celling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$29.95. Exposes the dark side of America's 'lock-em-up' political and legal climate. 1041

The Celling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 pages. \$22.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$14.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

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Crime and Punishment In America, by Elliott Currie, 230 pages. \$16.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

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States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$15.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

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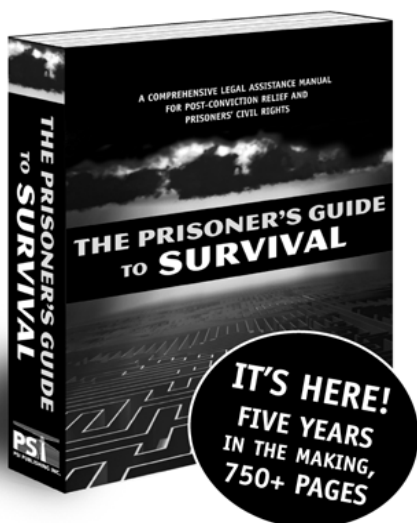
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April 2009

Economic Crisis Prompts Prison Closures Nationwide, but Savings (and Reforms) Are Elusive

by David M. Reutter

With the current economic crisis adversely affecting state tax revenues, lawmakers across the nation are seeking ways to cut costs and slash spending. Many states have proposed reducing their prison budgets by closing correctional facilities; however, by shuffling prisoners to other locations rather than releasing them, this amounts to little more than a shell game.

Further, politicians, guards' unions and local businesses often protest the potential loss of jobs from prison closures, which they say will hurt the local economy. The result is that when prisons close, most of the affected employees are

moved to other facilities and few are actually laid off.

The main benefit of proposed prison closures appears to be the stoking of public fear over the mere suggestion of releasing prisoners and losing prison jobs – which translates to a greater willingness to cut costs in other areas. Apparently our society is so vested in prisons as sources of employment and revenue that closing them is extremely unpopular and releasing prisoners early practically impossible.

When the United States was facing an economic crunch in the 1980s, rural economies that relied on manufacturing and farming began to crumble. Combined with the “war on drugs” this provided the fuel that spawned the prison industrial complex, which has resulted in more than 2.3 million prisoners in the U.S. – the largest per capita incarceration rate in the world. And that’s not including another 5 million people on probation or parole, according to a March 2009 report by the Pew Center on the States.

The U.S. Department of Agriculture’s economic research service found that an average of four prisons per year were built in rural America in the 1960s and 70s. That number quadrupled in the 1980s, and reached an average of 24 prisons a year in the 1990s.

The prison building boom provided not only employment in local communities but also a cycle of dependency. With prisons offering decent-paying jobs with benefits, the surrounding region was able to support businesses subsidized by spending from corrections employees. And since

prisons supplied both jobs and revenue, community leaders put little effort into attracting other industries.

New York’s Franklin County is one example of a rural area that flourished due to prison expansion. Located in Adirondack Park, any local development must abide by strict rules designed to complement the bucolic scenery, which promotes tourism. The terrain is carved by mountains, streams and lakes that provide limited farmland.

“Everyone around here either works in the prisons, or has a relative who works in the prisons, or knows someone who knows someone who works in the prisons,” said Mary Keith, supervisor of the town of Franklin. “My kids were able to build their homes and raise their families here because of the prisons. If it weren’t for the prisons, they would have had to leave the area.”

The economic reliance on prisons by Franklin County and its residents is near total. The county’s 1,678 sparsely populated miles contain five state prisons and one federal facility; not only do the prisons provide the only real gainful employment in the region, they provide a means of legislative influence. Since census population counts include the prisoners (who, of course, have no voting rights), legislative district lines are artificially increased, which gives the county more political clout.

Seeking to trim spending to address a multi-billion dollar budget gap, New York officials have recently proposed closing four of Franklin County’s prisons. Faced with a crushing loss of jobs and economic

Inside

From the Editor	12
Prisoner Self Care	14
MRSA in Chicago Jail	18
Michigan Dialysis Report	22
California Juvenile Parole	24
Let Freedom Ring Review	26
Prisoner Parents Report	28
Bush Pardons Two	37
Florida Jail Phone Rip Off	38
Punitive Judges	40
Federal Death Row	46
Arizona Deports Prisoners	48
News in Brief	50

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Prison Closures (cont.)

resources that would result from the prison closures, local residents and union officials have rallied against this threat to their livelihood.

Nationwide Budget Cuts

The story in Franklin County is typical of rural communities that have lobbied for prisons as a form of economic development. Absent the influx of cash that comes from prison jobs, the local economy is threatened with collapse when the facilities close.

A December 2008 survey by the American Correctional Association (ACA) asked adult and juvenile prison officials to respond to budgetary questions. Forty-one state adult systems, the federal Bureau of Prisons and New York City responded. Of those, thirty-one reported cuts to their current fiscal year budgets, while four said they expected reductions in the near future. The responding prison systems reported an aggregate \$691.8 million in spending cuts. New York was the hardest hit, with a projected four percent decrease in its Dept. of Corrections budget amounting to \$100 million.

While state officials are moving to close some prisons, they are also trying to appease the public by crowding prisoners into other, existing facilities rather than releasing them, and by offering guards jobs at other prisons instead of firing them. In many cases, job "losses" result from eliminating vacant positions. Regardless, skirmishes over potential prison closures have resulted in lawsuits and vocal protests.

Some states are considering early prisoner releases or related ways to cut costs. In 2008, for example, Arizona, Kentucky, Mississippi, New Jersey and Vermont reduced the sentences of thousands of parole and probation violators who had been returned to custody. But closing prisons as a solution to the economic crisis has become increasingly popular. "Many states are trying to cut corrections budgets, and the only way you can cut them is to close facilities," said criminologist James Austin.

The United States is not the only country contemplating prison closures. England plans to shut down 15 women's jails; the motivation for that move, however, is based more on compassion and rehabilitative efforts than economics. U.K. officials want to create custodial units

closer to where women prisoners will live after their release, to help them maintain family relationships and assist in their reintegration into society.

Northern Region

As noted above, New York has proposed the largest cuts to its prison budget. To save \$26 million, the state has suggested closing Camp Gabriels, Camp McGregor, Camp Pharsalia and the Hudson Correctional Facility. State officials hope to save an additional \$12 million by discontinuing farm programs at twelve prisons.

Guards from Camp Gabriels protested by marching with signs in front of the town hall while state and local officials met inside with 300 concerned citizens. In addition to losing jobs in the community, residents were worried about the loss of free prisoner labor, which is used to clear snow from fire hydrants, maintain parks and hiking trails, mow the lawns at cemeteries and unload trucks at food pantries.

Because the prisoners will be moved to other facilities, and employees offered jobs at other prisons, some question how budget savings will occur. Further, critics argue that closing the prison farm programs is a questionable way to cut costs.

New York's prison farms produce more than 2 million quarts of milk and 161,000 pounds of beef for in-house consumption. Rather than having prisoners produce that food, it will now be purchased from vendors once the farms close in the spring of 2009. Typically, these items can be purchased cheaper on the open market.

Local farmers, businesses and community groups call the move short-sighted; they contend that closing the prison farms will not only have an adverse economic impact but also a negative effect on rehabilitative efforts. "I estimate the local economic impact is between \$1 million and \$1.5 million," remarked Roger Brucher, whose Fasterdale Equipment company provides tractors and other machines to the prison farms. Local purchases of feed, fertilizer and other supplies, and veterinary services, will be lost.

Erik Kriss, a spokesman for the New York Corrections Department, said closing the farms was the correct move because they "are not part of our core mission, our core operation." He noted that most prisoners return to urban areas after their release, not rural communities, thus they do not learn viable job skills in the farm programs.

Others contend the farms instill a

Prison Closures (cont.)

work ethic and sense of responsibility. "When somebody knows they have to go to work, report to a boss, get along with people, these are traits that stay with you for the rest of your life," stated Phil Coombe, Jr., a former New York prison commissioner.

Officials in Camden, New Jersey hope to get back to their core mission with the 2009 closing of the Riverfront State Prison (RSP). When the state built the facility in 1985, city officials and residents protested. RSP, a medium-security 1,000-bed prison, sits just north of the Benjamin Franklin Bridge on 17 acres of prime real estate.

Camden County freeholders plan to introduce a resolution asking the state to demolish and remove "every inch of that prison ... to start the revitalization in North Camden." It's said that the guard towers at RSP offer a striking view of the Philadelphia skyline.

After RSP was built in a declining industrialized area, the surrounding region attracted an amphitheater, minor league baseball stadium, aquarium and other amenities. City officials hope that whatever replaces the prison will bring in more development. "I would hope it would be something that would bring some ratables [property that provides tax income]," said Mayor Gwendolyn Faison. "Boy, do we need the jobs."

But prison guards and their union representatives want RSP to remain, and have engaged in a campaign to frighten local citizens to prevent the closure. During the week of Christmas 2008 they launched a \$40,000 ad campaign that warned people to "Lock your doors!," implying that prisoners would run rampant if RSP closed. The ads were placed in flyers and appeared

on transit buses and the Riverline train.

The campaign was nothing but rhetoric, as New Jersey's prison population has declined in recent years, with sufficient space remaining in other facilities. The prisoners and employees at RSP would simply be transferred elsewhere. The state plans to auction off the prison property, which has an assessed value of almost \$41 million.

"Certainly because of the dire financial times we're in, we're looking at the efficiencies, looking at everything," said New Jersey Corrections Dept. spokeswoman Deirdre Fedkenheuer. "If you can close a prison, you have to do it."

The residents of Charleston, Maine had a different view of the prison in their community. Rather than focusing on lost jobs, they were concerned about losing the free or ultra-cheap labor provided by prisoners at the Charleston Correctional Facility. "Oh my goodness, gracious, they are such an asset — they are our public works department," said Selectwoman Terri-Lynn Hall.

Charleston's prisoners performed 39,337 hours of community work last year, the equivalent of 19 full-time employees. Prisoners maintain the five local cemeteries, set up election booths, hang Veteran's Day flags, and help break up beaver dams in local streams. They also built a log cabin "snack shack" at a community park.

To keep their prison labor pool, Charleston officials did some lobbying and found a way to save the state \$100,000. The prison is heated by wood harvested by prisoners on state property. Only the first and second shifts at the facility are heated with wood, while the third shift uses heating oil. The savings came from employees volunteering their time to offset the cost of keeping the third shift heated. Citing that move, and the benefits of Charleston's transitional release program, the State Appropriations Committee delayed a closure decision until June 30, 2009.

Maine is further considering sending prisoners out-of-state, laying off 40 prison employees, and closing housing units at the Bolduc Correctional Center and Downeast Correctional Facility to reduce costs. The out-of-state transfers would save money because private prison companies typically charge less to house prisoners with their non-union work force.

In New Hampshire, the governor's office has proposed cutting 90 prison staff positions, closing the 315-bed Lakes

Regions Facility, expanding home confinement with electronic monitoring for some prisoners, and speeding the deportation of incarcerated illegal immigrants. In Massachusetts, prison officials have suggested double-bunking at maximum-security facilities as a way to save money.

Midwest Region

Union officials representing Illinois prison guards used a more aggressive tactic to prevent the closure of the Pontiac Correctional Center (PCC): They filed lawsuits which alleged that moving prisoners from PCC to medium- and minimum-security facilities would pose a safety threat. Many of PCC's prisoners are in segregation due to assaults on staff or because they are on death row.

Three lawsuits were filed against the Illinois Department of Corrections (IDOC) by Council 31 of the American Federation of State, County and Municipal Employees (AFSCME). In November 2008, a state court judge issued a temporary restraining order preventing prisoners from being transferred under the state's closure plan.

IDOC spokesman Derek Schnapp dismissed claims that prison guards would be in jeopardy because of the transfers. "Any inmate that is transferred has to fit the criteria of the [receiving] facility," said Schnapp. "The review process of an inmate's security level has not changed. IDOC has always reviewed and transferred inmates on a daily basis and will continue to do so."

The state's plan to close PCC would save \$4 million a year over the next two years. IDOC intended to move half of the prisoners to a facility in Thomson, which has been largely vacant since it was built in 2001. The decision to transfer prisoners from PCC to Thomson, however, is immersed in politics.

Former Governor Rob Blagojevich, who was impeached in January 2009 by a unanimous vote of the Illinois legislature, decided to close PCC rather than the Stateville prison in Joliet after a Democratic state senator from Joliet declined to support a recall measure that targeted the governor. Republican lawmakers from Pontiac had voted for the measure. Federal investigators who charged Blagojevich with influence peddling are now looking into the former governor's decision to close PCC [see related article, this issue of *PLN*].

Schnapp supported transferring prisoners from PCC to Thomson, noting

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it is "the most modern, state-of-the-art facility that we have and we're not using." While the IDOC spent \$140 million to build Thomson, it has sat empty for the past eight years, costing \$5.2 million to maintain.

Prison guards, AFSCME officials and community leaders in Pontiac argued the state recently spent \$17.33 million to upgrade PCC. But an economic study on the impact of the facility's closure indicated the real concern was the revenue that the prison generates for the Pontiac area. The study found the closure would mean the loss of \$54 million in Pontiac and a 15 county-wide region in central Illinois.

The study, conducted by the Illinois Commission on Government Forecasting and Accountability, said the largest impact would be in the areas of hospital care, nursing homes, restaurants, bars and the service industry, due to the loss of an estimated \$18.2 million in disposable income should PCC's 500-plus employees move elsewhere.

"Right off the bat, your service industry will be hit hardest," said Mike Stoecklin, chairman of the Greater Livingston County Economic Development Council. "Your restaurants, gas stations, and other service providers would all take a pretty good hit as that revenue source would be taken out of the equation."

Another study, by the Illinois Institute for Rural Affairs, estimated that closing PCC would result in economic losses of \$16 to \$26 million. While that study had initially found the closure would result in a \$4 million per year gain, which was cited by state officials as justification for shutting down the prison, the study's author later recanted and said he had used inaccurate data.

The controversy over PCC's closure

was resolved on March 12, 2009, when the state agreed to keep the facility open. The decision was lauded by union officials. "The state prison system is dangerously overcrowded, and closing any prison would make a bad situation much worse," said ASCME Council 31 Director Henry Bayer.

Meanwhile, officials in Michigan are having little difficulty closing prisons. The state obtained permission from a federal court overseeing the *Hadix* litigation to close the Southern Michigan Correctional Facility in 2007. [See: *PLN*, Dec. 2007, p.26]. The closure was expected to save about \$36 million, but it spread the chronically ill prisoners held at the facility all over the state, which will lead to higher medical costs.

The recent economic downturn, which has resulted in the need to curb spending, combined with Michigan's prison population dipping below 49,000 for the first time in seven years, has allowed Governor Jennifer Granholm to close additional prisons. Early releases of up to 4,000 prisoners are also being considered.



The 1,200-bed Deerfield Correctional Facility and the 710-bed Camp Branch will shut down by April 2009, while the Robert Scott Correctional Facility in Plymouth, Michigan, a women's prison, is scheduled to close by May.

The closure of the Robert Scott facility is expected to save \$12 million in 2009 and \$36 million per year afterwards in operating costs. Local community residents, who live in \$1 million homes, and local officials are ecstatic about the closure, as the 35-acre prison site should be attractive to developers.

"There's got to be developers just out there salivating," said Chip Snider, Northville Township's manager. "This piece of property is right in the cortex of this community. This is a prime piece of land. It'll be exciting to see what comes

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Prison Closures (cont.)

out of this.”

Apparently affluent communities don't mind when prisons shut down, as they aren't as economically dependent on prison jobs and revenue, unlike their impoverished rural counterparts.

Michigan officials are looking at other ways to curb prison costs, too. “I want to make significant cuts in corrections,” stated Rep. George Cushingberry, chair of the House Appropriations Committee. Cushingberry is pushing for the release of prisoners who pose little risk, more spending on programs to help parolees re-enter communities, and hiring more parole officers.

Russ Marlan, spokesman for the Michigan Dept. of Corrections, said fewer people are being sent to prison, parole rates are up and a parole program aimed at preventing recidivism is working. Despite the recent prison closures, Michigan still spends \$2 billion a year on its corrections system, which is more than it devotes to higher education.

In Ohio, Gov. Ted Strickland increased funding for prisons by \$100 million. To his credit, he increased the funding for state education by a historic level of \$321 million in 2010 and \$606 million for 2011. Strickland said he intends to close a prison in 2011 if there is no decrease in the number of state prisoners.

Oklahoma corrections director Laura Pitman wants to reduce the state's female prisoner population and close the Eddie Warrior women's facility in Taft, though the prison would not be abandoned. Rather, it would likely be used to house male prisoners, Pittman stated.

And in Kansas, with \$8.3 million in proposed prison budget cuts, the cor-

rections department is closing several prison units as well as a sex offender treatment program and two residential supervision programs for parolees. The Lansing Correctional Facility's South Unit closed on February 6, 2009, while the El Dorado Correctional Facility East Unit suspended operations three weeks later. Employees were offered positions at other prisons.

“We anticipate there will be additional programs and services that will be reduced or eliminated, and obviously a great deal of it depends on how long it takes the economy to turn around and for the state to not be in the fiscal situation it is in right now,” stated Bill Miskell, public information officer for the Kansas Dept. of Corrections.

Although the Winfield Correctional Facility was also slated for closure, the state expects to receive sufficient funds in federal stimulus money to keep the prison open. A task force of local community members, including city managers, school officials and a business that uses prison labor, had lobbied against closing the Winfield facility.

Rural correctional camps in Toronto, Osawatomie and Stockton, however, were ordered to shut down by April 1; about 160 prisoners at the camps will be moved to other facilities. The closures upset local residents who relied on prison work crews.

“For years, inmates have been our main source of labor. Probably 98 percent of the improvements we've had in the last 20 years have been from inmate work,” said Kim Jones, a state park manager.

“It's a very difficult situation because it looks like the state is adding back to the budget with one hand and taking it away with another,” added Kelly Johnston, chair of the Kansas Department of Wildlife and Parks Commission.

Western Region

California was experiencing budgetary strains long before the current economic crisis. Regardless, the state's prison population has continued to expand. The blame for the increase is often placed on illegal immigrants, but it is more the result of sentencing laws – such as the state's onerous three-strikes statute – and parole policies that make obtaining parole virtually impossible for many prisoners.

Despite an enormous budget shortfall, California planned to cut its \$11 billion prison budget by a mere 0.33%,

or \$36 million. When Governor Arnold Schwarzenegger proposed reducing the number of state prisoners by 22,000 (and firing 4,000 guards), union officials and Republican lawmakers raised such strenuous objections that he was forced to back down.

Regardless, on February 9, 2009, a three-judge federal court issued a preliminary ruling that will require the California Dept. of Corrections and Rehabilitation to release more than 40,000 prisoners over the next few years due to overcrowded conditions in the state's prison system that deprive prisoners of constitutional medical and mental health care. [See: *PLN*, March 2009, p.40.]

Unlike California, officials in Washington State have no qualms about taking action to cut prison costs. “It was pretty clear that based upon the fiscal constraints we're going to be facing, that we need to close a facility,” observed Dick Morgan, director of the Washington Department of Corrections' (WDOC) prison division.

To save about \$14 million over two years, WDOC plans to close the women's Pine Lodge Correctional Center and convert the men's Larch Corrections Center into a women's prison. The male prisoners would be transferred to other facilities.

WDOC has also proposed closing two units at Walla Walla, firing 40 staffers at headquarters, saving \$3 million by cutting nurses and medications, freezing all pay raises, and reducing or eliminating firearms training at some prisons.

The state has further suggested releasing 12,000 prisoners on probation, which would allow the WDOC to cut 400 staff positions (though some of those employees presumably would be rehired as probation officers). Under this proposal, the sickest prisoners would be released and non-citizens convicted of drug and property crimes would be deported. These moves will hopefully save \$125 million.

The Utah Department of Corrections had \$11 million whacked from its budget, which eliminated the planned opening of a 300-bed Parole Violator Center in Salt Lake City. The Center was intended to meet violators' specific needs to help them transition back into society in 45 to 60 days.

Losing the \$5.73 million needed to open the Center will force those violators, who are usually returned to prison for minor technical violations, to be housed in secure facilities. As a result, parole violators are expected to serve an average

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of nine to ten months, which will lead to increased costs.

Additionally, Utah's budget cuts are expected to eliminate 40 administrative positions that prison officials were trying to fill. The prison system anticipates it will have to scale back sex offender, substance abuse and mental health programs, and is cutting \$3 million from reimbursements to county jails that house state prisoners.

To help meet a \$1 billion budget shortfall, Colorado proposed closing three prisons – the Rifle Correctional Center, the Colorado Women's Correctional Facility and a medical clinic at the Colorado Mental Health Institute.

No prisoners will be released due to these closures, and few staff will lose their jobs. "When they talked to me about the Department of Corrections, they said they can absorb the staff as they follow the prisoners [to other prisons], and that makes sense," said state senator Abel Tapia.

As in New York and Illinois, however, the closure of the Colorado prisons met with strong resistance, and on Feb. 21, 2009, Governor Bill Ritter announced he was dropping plans to shut down the minimum-security, 192-bed Rifle Cor-

rectional Center. "After listening to the concerns of people in Rifle and working closely with the department and the Joint Budget Committee, we believe we can close the budget shortfall without closing this facility," Ritter said.

While Nevada lawmakers have ordered \$41.5 million in cuts to the state's prison system, they are critical of the Dept. of Corrections' plan to close several facilities. The Nevada State Prison (NSP) is one of the oldest continuously-operated prisons in the U.S. Established in 1862, it is now so deteriorated and obsolete that it costs \$10 per prisoner per day more to operate than other facilities. Thus, it would seem natural to shut NSP due to its inefficiency.

By closing NSP and the 500-bed Southern Nevada Correctional Center, and not building a planned 100-bed transitional housing unit at the Florence McClure Women's Correctional Center, the state would save at least \$37 million. Another \$1 million per year will be saved by not filling 26 prison staff positions, most of which are presently vacant.

Yet the facility closures, proposed by Nevada Corrections Director Howard Skolnick, were criticized due to the impact

they would have on local economies. Closing NSP would involve transferring over 700 prisoners and terminating about 130 prison employees. "There would be a loss of jobs [if it were closed] and the governor wants to avoid that at all costs," said the governor's spokesman.

When the Nevada legislature approved \$300 million for 2,400 more prison beds in 2007, the facilities were going to be built in southern Nevada. To preserve the local economy that is dependant on prison dollars, the state is now considering building those prisons in northern Nevada if NSP is shut down. As of March 2009, state lawmakers were still debating whether or not NSP will face the budget axe.

Southern Region

The Southern region of the United States not only has the most callous criminal justice policies, it is also the most reliant on the prison economy because it has few other major industries. Many parts of the South are stuck in a Jim Crow era mentality, when blacks and poor whites were sent to prison to perform agricultural work that had been done by slaves. This later progressed to chain gangs, and even today prisoners in the

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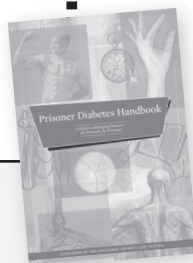
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Prison Closures (cont.)

South labor in fields under the watchful eye of guards on horseback.

Thus, the desire to maintain and build more prisons below the Mason-Dixon Line is a strong one, and some southern states have bucked the growing trend to close facilities to save money. Others, however, have made the painful choice to shut prisons due to economic realities that trump their get-tough criminal justice policies.

Florida is one example of a southern state that refuses to back down from prison spending. Despite facing a \$3.3 billion budget deficit, in the last year no cuts have been made to Florida's correctional system. In fact, the state legislature decided to increase prison expenditures.

To build 10,000 more prison beds, Florida lawmakers cut the state's education budget by \$330 million and spent \$310 million to expand the prison system. With one of the lowest-ranked school systems in the nation, Florida's reduced spending on education will create a self-fulfilling need for those new prison beds in coming years.

South Carolina's legislature authorized the state's prison system to operate with a deficit of \$14.5 million, which increased to \$36 million when state agencies were ordered to impose a 7% across-the-board budget cut.

With lawmakers resistant to closing prisons and laying off guards, Corrections Director John Ozmint has suggested a few novel remedies. He recommended that a few thousand dollars could be saved by not performing autopsies on executed prisoners; that dead prisoners' savings accounts could be tapped to recover the \$450 cremation cost when families do not claim their bodies; and that fees for prisoners in work release programs could be increased.

Although South Carolina operates the lowest-cost prison system in the country, lawmakers have suggested the department's budget deficit could be "because of poor management." Ozmint countered by saying state prisons and equipment are in wretched condition. In regard to weapons in poor repair, he said, "We've got to replace some of those or we literally are not going to have weapons on our perimeter; not going to have weapons in our vehicles [that transport prisoners]."

Kentucky has axed nearly \$18 mil-

lion, or 4%, of its corrections budget, yet the state is not expected to close any facilities due to an increasing prison population. In 2008, the legislature approved early releases for more than 1,800 prisoners in an effort to save \$30 million over a two-year period. That move prompted a lawsuit by Kentucky's own attorney general, who objected to releasing prisoners early.

Virginia is one of several southern states that have recently closed prisons, having shut down the medium-security Southampton Correctional Center in January 2009. The prisoners were transferred to other facilities, as were most prison employees. Only three staff members at Southampton were terminated. "Some employees went into the same or a reduced level" of seniority, stated David Robinson, regional director for the prison system's Eastern Region, while "some may have taken a demotion."

Additionally, Virginia lawmakers have introduced legislation that would allow low-risk prisoners to be released up to 90 days before their sentences end, resulting in projected cost savings of \$50 million. The bill is presently under consideration.

Georgia has closed two facilities – the Rivers State Prison and Milan State Prison. The prisoners and staff were absorbed into other facilities. While these two aged prisons have been closed, 3,000 new beds are under construction. In the meantime, to crowd all of the state's prisoners into its existing corrections system, triple-bunk beds have been installed in many Georgia prisons.

In North Carolina, local lawmakers are fighting an attempt by state officials to close the 128-bed Haywood Correctional Center to accommodate budget cuts. The prison was built in the 1930s. Advocates for keeping the facility open cite 44 staff positions and prison labor for community work projects that would be lost. Two other minimum-security facilities are on the chopping block; the closures would save a combined \$3.4 million a year.

Tennessee faces a projected \$1 billion budget gap by the end of the fiscal year. State officials plan to close Brushy Mountain Prison, which is the state's oldest facility, in the summer of 2009. The Dept. of Corrections may achieve additional savings by not using 612 beds created as part of a \$155 million renovation of the Morgan County Complex, which were intended to house prisoners moved from

Brushy Mountain. Prison officials are also promoting less expensive alternatives to incarceration, such as community corrections programs.

The economic downturn is affecting private prison companies, too. Nashville-based Corrections Corp. of America (CCA) announced in February 2009 that it was suspending construction of a new 2,000-bed facility located in Trousdale County, Tennessee, because it had not obtained contracts to fill the prison.

"A lot of states are taking the approach that until they understand what their long-term revenues will be, and what assistance they would be realizing from the federal stimulus package, they're delaying decisions on contracts for additional space from companies like CCA," said Tony Grande, the company's chief development officer.

Juvenile Programs Curtailed

"If you raise a child in prison, you're going to raise a convict," observed South Carolina Juvenile Justice Director Bill Byars. Yet sending juvenile offenders to adult prisons has been a popular move that is gaining wider acceptance in this time of severe budget shortfalls. With schools cutting costs, more juveniles are dropping out or failing to graduate, which leads to more delinquency and crime.

Five states that responded to the ACA's December 2008 survey reported they were making cuts to juvenile justice programs. On average, those cuts amounted to 3.1 percent of their juvenile system budgets. Texas, Virginia and Louisiana reported the largest cuts, with reductions of \$24 million, \$10.9 million and \$8 million, respectively.

Louisiana is closing the Jetson Center for Youth. Actually the closure, which follows on the heels of brutality and sexual abuse by staff and prisoners, is not really a closure at all. The facility is being renamed the Capital Area Center for Youth and the offender population is being reduced from 216 to 99.

That seems to be a way to skirt the legislature's order to close Jetson and create new programs with smaller populations. "It will be considered our first smaller, regional facility," said Jerel Giarrusso, an Office of Juvenile Justice spokesman.

California is closing two of its eight juvenile prisons. The Division of Juvenile Justice presently houses around 1,700 youths, down from a high of 10,100 in

1996. This significant drop was largely due to placing more juveniles in county programs rather than state-run facilities. California officials are not saying where the prisoners from the two closed juvenile prisons will be housed, but the only other beds available are in the adult corrections system.

South Carolina is cutting a program that sports a 22% recidivism rate, which is less than half the rate for juveniles in large state facilities. The program, run by Florida-based non-profit Associated Marine Institutes (AMI), provides intense counseling and wilderness camps for at-risk youths.

Lex Wilbanks, 18, spent time in both the counseling program and juvenile justice facilities. He claimed the juvenile facilities were counterproductive. "When you did something wrong or you fight or you disrespect staff, they just throw you into lockdown," he said. "They just throw you in and make them fight to survive. You're making them a hardened criminal."

In contrast, the AMI program responded to misbehavior with counselors who "talk you through problems and how you can actually change," said Wilbanks. "It gives you hope."

Florida has cut three AMI programs to save \$1.7 million, while Michigan's Adrian Training School, a facility for teen girls, closed its doors in January. Ohio plans to shut the Marion Juvenile Correctional Facility by June 2009; the prison might then be used to house adult offenders in order to avoid the loss of 300 jobs. Conversely, adult facilities in Georgia

are being "revamped" to accommodate juvenile prisoners.

Other Cuts and Innovation for Revenue

In addition to facility closures, budget cuts have resulted in the loss of other criminal justice-related programs and services. For example, California has canceled a specialized program that allowed nonviolent prisoners to work and repay a portion of their court-ordered restitution. Residents at the California Restitution Center in Los Angeles will be sent to low-security prisons to serve the remainder of their time.

Massachusetts is discontinuing a jail diversion program that helps the mentally ill. Half of the \$120,000 budget used to fund the non-profit agency Advocates, Inc. has been eliminated. The program included two medical clinicians who responded with police to calls that may involve people with mental illness. "It's almost like a paramedic going to the scene of a medical emergency," said Framingham Deputy Police Chief Craig Davis. "We wanted to create compassionate justice for the mentally ill." In 2007 there were 457 joint interventions with 82 people diverted from arrest for nuisance-related crimes.

In Michigan, the Department of Corrections (MDOC) has finally rid itself of its watchdog, Prison Legal Services of Michigan (PLS). In 2003, MDOC pushed PLS out of its office space at the Egeler prison in Jackson. When inside the facility, PLS had direct contact with its incarcerated clients and was able to employ

prisoners as paralegals for \$1 an hour.

The \$150,000 annual budget for PLS, a non-profit, was provided using prisoner benefit funds generated from commissary sales and in-house programs. MDOC successfully eliminated those funds by raising commissary prices, restricting hobby craft programs and imposing co-pays for healthcare. Since the early 1980s, PLS has filed prisoner appeals, investigated prison deaths, assisted prisoners' families and friends, and advocated with the state legislature. No more; the valuable oversight services provided by PLS ended as of November 1, 2008.

Budget cuts have forced West Virginia to close the National Corrections and Law Enforcement Training and Technology Center. The Center will continue the annual Mock Prison Riot training program, but will discontinue its mock disaster exercise.

A budget proposal in Georgia would limit and realign specialized K-9 units used to track criminals. The units are operated by the Georgia Department of Corrections, but are often utilized by local police to find fleeing suspects, missing children and evidence. Over a two-month period the K-9 units responded to 57 tracking requests, resulting in 56 captures.

In Utah, the state legislature is considering a bill (HB 100) that would require prisoners to foot the bill for higher education and vocational programs; prisoners who participate in such programs would have to repay approximately \$1,500 within five years of their release. Whether saddling ex-prisoners with debt is a good idea, and what would happen if they are unable

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Prison Closures (cont.)

to pay, are matters of debate.

The Georgia legislature is considering a bill that would charge prisoners a co-pay for all prescription medications, so they “can pay a reasonable amount toward their healthcare,” according to state Rep. Barbara Massey Reece.

On the federal level, legislation has been filed to reform sentencing laws (H.R. 1459), end mandatory minimums for drug offenses (H.R. 1466), and reduce prison terms through increased good time (H.R. 1475), which will decrease the number of federal prisoners and cut prison costs. All three bills were introduced in March 2009.

Lastly, at least eight states, including Maryland, Colorado, Kansas, Nebraska and New Mexico, are considering doing away with the death penalty as a way to curb costs, since capital punishment cases are much more expensive to prosecute. This seems to indicate that the death penalty debate may be less about moral issues, deterrence or eye-for-an-eye justice, and more a matter of simple economics.

“This is the first time in which cost has been the prevalent issue in discussing the death penalty,” said Richard Dieter, who heads the Death Penalty Information Center.

On March 18, New Mexico Governor Bill Richardson signed legislation abolishing the death penalty in the state.

Closing Thoughts: An Opportunity for Reform

The current financial crisis that has enveloped the U.S. is being called the worst economic downturn since the Great Depression. While there is presently no end in sight, it is anticipated a turnaround will occur sometime in 2010 – though some experts say the recession could extend until 2011. Thus, states can expect a continued slowdown in tax revenue and a continued need to reduce spending.

The economic crisis comes on the heels of an enormous expansion in our nation’s prison population and prison infrastructure over the past two decades. It is frightening to think what could happen should more people turn to crime to meet their basic needs in these difficult times. Certainly, the prison industrial complex is capable of expanding to accommodate even more prison beds.

“The economy has changed priori-

ties,” noted North Carolina state senator Joe Sam Queen. “Though it doesn’t necessarily change the demand for prison beds in our state. It may actually exacerbate the demand.”

While some states have closed or threatened to close correctional facilities, with rare exceptions those closures – when they actually occur – do not achieve substantial savings because prisoners and staff are simply shuffled elsewhere in the prison system. Further, efforts to cut prison expenses in the short term may have longer-term negative consequences, such as deferred costs or increased recidivism.

Several states have continued building prisons while curtailing social services. The most puzzling approach is cutting school budgets and education programs, which provide the youth of today with the skills and opportunities that will prevent them from becoming the criminals – and prisoners – of tomorrow.

The present need to reduce spending on prison-related programs and services presents a golden opportunity to achieve much-needed improvements in our criminal justice system, from sentencing and parole policies to alternatives to incarceration.

Some states are leaning towards reforms, such as New York, where officials announced on March 27, 2009, they were rescinding the draconian Rockefeller drug laws that have caused the state’s prison population to soar. Other states, however, may squander this opportunity for reform if they adhere to the mindless mantra of more prisons and more prisoners.

“Many political leaders who weren’t

comfortable enough, politically, to do it before can now, under the guise of fiscal responsibility, implement programs and policies that would be win/win situations, saving money and improving corrections,” observed Marc Mauer, director of the Sentencing Project.

The United States cannot expect to be successful in the global economy when its local rural economies rely on the prison-based business model of warehousing prisoners. Lawmakers must stop catering to lobbyists, union officials and for-profit companies that clamor for more prisons. Instead, our communities need to invest in meaningful job industries that do not depend on the incarceration of our fellow citizens. ■

Sources: *Washington Post*, *Detroit Free Press*, *Detroit News*, *State Journal*, *freep.com*, *Albany Herald*, *redding.com*, *Metrowest Daily*, *American Correctional Association*, *The Courier Journal*, *The Star Ledger*, *The Marion Star*, *The Advocate*, *timesonline.co.uk*, *Macon.com*, *bizjournals.com*, *Tidewater News*, *The Virginian-Pilot*, *forbes.com*, *KOLO TV*, *Daily Record*, *Associated Press*, *The Chieftain*, *Salt Lake Tribune*, *gjsentinel.com*, *daileynews.net*, *The Colombian*, *cincinnati.com*, *Daytona Daily News*, *Pontiac Daily Leader*, *Herald-Review*, *pantagraph.com*, *Bangor News*, *Courier Post*, *Philly Inquirer*, *New York Times*, *Macomb Daily*, *Times-Herald*, *Wichita Eagle*, *El Dorado Times*, *smokeymountainnews.com*, *Tennessean*, *The Morning Sun*, *www.mpbnet.net*, *Morning Sentinel*, *stateline.org*, *Las Vegas Review-Journal*, *afscme31.org*, *AlterNet*, *CNN*

Illinois Governor Bases Prison Closure Decision on Politics

by Derick Limberg

In the late 1990’s and early 2000’s, Illinois spent at least \$17 million to transform the 137-year-old Pontiac Correctional Center (PCC) into a specialized facility to house the state’s most violent prisoners.

However, in May 2008, Illinois Governor Rod Blagojevich announced plans to close PCC in a move supposedly aimed at reducing a budget deficit of roughly \$700 million. According to Blagojevich, closing PCC would save about \$8 million over the next two years.

Lawmakers and members of the American Federation of State, County and Municipal Employees (AFSCME), the union that represents Illinois Dept. of Corrections (DOC) guards, argued that cutting \$8 million from a total state budget of \$59 billion made little sense.

While the conversion of PCC into a maximum-security facility was in progress, the state had also built a brand new \$140 million prison in Thomson. That facility opened in 2001 but has sat nearly empty

since then, costing the state around \$5.2 million to maintain.

About 570 jobs are at stake with the pending closure of PCC, which would “devastate” the local economy, according to the Illinois Commission of Government Forecasting and Accountability. Lawmakers and AFSCME representatives said the state should not choose between the facilities in Pontiac and Thomson.

Blagojevich decided to close PCC instead of a prison in Joliet after a democratic state senator declined to support a recall measure aimed at the governor. That senator happened to be from Joliet, where the Statesville Prison is located. Blagojevich’s decision as to which facility would close therefore appears to be grounded in politics.

State Senator Dan Rutherford, whose district includes PCC, blamed Blagojevich for putting new spending measures before existing needs, and said the state can afford to keep PCC open. “Since the closure of Pontiac was announced, it was obvious the decision was not made as a planned effort to improve the correctional system,” he said.

AFSCME representative Anders Lindall agreed, stating, “to have the principal policy initiative out of the governor with respect to corrections be the closure of such a facility, or any facility at all, entirely fails to respond to the crisis in our prison system.” Illinois has about 45,000 state prisoners, which is more than 130% of the DOC’s rated capacity.

Despite Blagojevich’s wishes and an originally-scheduled Dec. 31, 2008 closure date, PCC has remained open. AFSCME has filed three lawsuits over the governor’s decision to close the prison; a hearing in one of those suits was postponed indefinitely in January 2009, while an injunction to keep the facility open was entered in another.

Governor Blagojevich, who previously served as a prosecutor, has other worries beyond the closure of PCC. He was indicted on federal charges of trying to benefit personally from appointing a U.S. Senator to fill the position left vacant after former Sen. Barack Obama became president, and was impeached by the Illinois Senate and removed from office on January 29, 2009.

The federal investigation into former Gov. Blagojevich’s misdeeds has reportedly expanded to include his decision to

shut down the Pontiac facility, with the FBI and U.S. Attorney’s office investigating the circumstances of the prison’s closure.

On March 12, 2009, newly-installed Illinois Governor Pat Quinn put an end to the controversy over PCC by announcing the facility would not close. The controversy – and investigations – into Blagojevich’s decision to close the prison, however, remain. ■

Sources: *Chicago Tribune*, www.bloomberg.com, www.kwqc.com

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From the Editor

by Paul Wright

I generally don't write about books in my monthly editorial but this is an unusual month. PLN's first book, the long awaited and much anticipated *Prisoners' Guerrilla Handbook to Correspondence Programs in the US and Canada* has been printed and is now being shipped. The third edition of the book has been completely updated and is revamped and professionally laid out and designed, and remains the only comprehensive book of its type written by an imprisoned distance learner, Jon Marc Taylor, a Missouri prisoner, who can accurately state what schools have to offer. We are very pleased with the outcome.

PGH is the first in a line of books PLN will be publishing and we plan to focus on self-help reference books that are of interest to prisoners. We welcome suggestions on topics as well as book proposals by qualified writers.

PLN columnist Mumia Abu Jamal has also released a book, *Jailhouse Lawyers: Prisoners Defending Prisoners v. The USA*, which PLN is also distributing. I was honored when Mumia asked me to be the keynote speaker at the party launching the book to be held in Philadelphia on April 24 at the Church of the Advocate. April 24th is also Mumia's 55th birthday. I will also be speaking at the Riverside Church in New York City the next day, April 25, and other events around the country related to Mumia's book. This is one of the few books to examine the role that jailhouse lawyers play politically and legally within the prison system in this country. At a time when prisoners face more obstacles than at any time in the past 40 years in gaining meaningful access to the courts, this book is timely and important. We will run a more detailed review of it in an upcoming issue of *PLN*.

The headlines have been filled with scare stories of breaking state budgets and even some prisons being closed. But a funny thing has happened on the way to prison closures: prisoners are generally not being released. Rather marginal prisons that long ago ceased to be cost effective to operate have been shuttered and prisoners are being consolidated in larger, more cost efficient prisons. Typically the media reports plans to release prisoners and this duly ensures that legislators ap-

propriate whatever amount of money is needed to keep the prison machine running and filled to capacity. PLN will report these developments as they occur.

Last month's issue of *PLN* included our reader survey. I hope you will take a few minutes to complete and return the survey to us so we will know how we can

better help and serve you, our readers. Next month marks *PLN*'s 19th anniversary and we want to continue bringing our readers the best prison and jail news coverage we can and, most importantly, news you can use.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

Pennsylvania Prison Crowding, Parole Crisis Result in New Laws, Parole Suspension

by Matt Clarke

On September 29, 2008, Pennsylvania Governor Ed Rendell ordered a moratorium on paroles. Three weeks later he lifted the suspension of paroles for non-violent offenders, and the moratorium was completely withdrawn last December. These are the latest developments in a crisis caused by overcrowding in Pennsylvania's prison system, budgetary concerns, and a series of violent crimes committed by parolees.

The catalyst for the moratorium on paroles was the murder of Philadelphia police officer Patrick McDonald, who was shot by parolee Daniel Giddings on September 24, 2008. The fatal shooting followed the May 2008 murder of police Sgt. Stephen Liczbinski by three parolees who had just robbed a bank. According to police union officials, five of the nine Philadelphia officers shot in the past year were shot by parolees.

"Heartbreaking losses such as these have shed light on the need to thoroughly review the process by which Pennsylvania paroles violent offenders," Gov. Rendell wrote in a letter to Temple University criminal justice department chairman John S. Goldkamp, who was appointed to head a review of the state's parole procedures.

"We all understand it was the action of individual criminals that caused these deaths, however, I need to know that we are doing everything we can to reduce the possibility of future recurrences." Rendell announced a suspension of all paroles, but lifted the suspension for non-violent prisoners three weeks later on Goldkamp's recommendation.

Police officials and union members were angered at Giddings' release on

parole; he was serving a 6-to-12 year sentence for aggravated assault and robbery. Parole officials noted that he had already served ten of the twelve years and previously had been denied parole due to poor behavior in prison. Giddings' behavior had improved between his previous denial of parole and the decision to grant him parole. Police also criticized judges they claimed were handing down short sentences, including the judge who had sentenced Giddings.

Ironically, Gov. Rendell's moratorium on paroles was imposed just four days after he approved a package of bills that reformed the parole process and made it possible to release certain non-violent prisoners earlier. The new statutes give non-violent prisoners an option for early release if they complete education and on-the-job training programs while exhibiting good behavior; allow the early release of some terminally ill prisoners; and require prisoners with sentences of more than two years to be transferred to state prisons instead of staying at local jails.

Dr. Goldkamp's report largely vindicated the state's existing parole policies. The report recommended placing high-risk violent offenders in community corrections programs after they are paroled, and found that parole officers should work to assist released prisoners with their reintegration into society.

"We need to be predicting as well as we can," Dr. Goldkamp said, referring to parole release decisions. "But everybody in criminal justice and criminology knows that prediction is useful but imperfect." The suspension of paroles was completely lifted on December 1, 2008, but a clear message had been sent to parole officials.

While paroles resumed, the parole approval rate of 62% in fiscal year 2008 plummeted to 46% by February 2009. With fewer prisoners being paroled, the state's prison population is expected to increase accordingly.

Pennsylvania's prison system has 27 facilities that hold 47,000 prisoners, with an annual budget of around \$1.7 billion. The current population exceeds the prison sys-

tem's capacity of 43,300 prisoners by 8%.

The state plans to build four new prisons to generate additional bed space. The first facility, on the grounds of SCI Rockview in Centre County, will not be completed until at least 2011. The second will be built somewhere in Fayette County and the sites for the third and fourth have not yet been selected.

Clearly, new prison construction will

not solve Pennsylvania's prison overcrowding crisis in the near future. Nor is building more prisons a viable long term solution, as prison populations habitually expand to fill – and then exceed – available bed space. ■

Sources: *Philadelphia Inquirer*, *Associated Press*, *Pittsburgh Post-Gazette*, *Patriot-News*, *The Bulletin*

Prisons Flush Drugs, Contaminate Water Supply

by Mark Wilson

Each year, tons of unused pharmaceuticals are flushed by America's state and federal prisons, hospitals and long-term care facilities, contaminating the nation's drinking water, according to an *Associated Press* (AP) investigation.

"We flush it and flush it and flush it – until we can't see any more pills," admits nurse Linda Peterson, who works at a state prison in Oak Park Heights, Minnesota. She reported that the prison hospital unit which serves prisoners statewide disposes of up to 12,000 pills annually. Heart medications, antibiotics, tightly regulated narcotics and other drugs which cannot be thrown in the trash are flushed down the toilet or poured down the sink.

Noting the presence of a nursing home, hospital and another prison nearby, Peterson asks, "So, what are all these facilities doing, if we're throwing away about 700 to 1,000 pills a month?"

While few facilities record the amount of their pharmaceutical waste, a sampling by the AP suggests a projected annual

national estimate of at least 250 million pounds.

"Obviously, we're flushing the medications, which is not ideal," acknowledges Mary Ludlow, who works for a South Carolina pharmacy which services long-term care facilities. Environmental Protection Agency (EPA) Water Administrator Ben Grumbles, agrees, stating the obvious: "Treating the toilet as a trash can isn't a good option."

Why? Because the practice has resulted in a constant presence of minute concentrations of pharmaceuticals in the nation's drinking water supplies, affecting at least 46 million Americans. Researchers are finding that such residues harm fish, frogs and other aquatic species in the wild. More alarming is the fact that human cells fail to grow normally in the laboratory when exposed to trace concentrations of certain drugs, according to researchers.

Some flushed pharmaceutical waste is laden with both germs and antibiotics, notes microbiologist Thomas Schwartz at

Karlsruhe Research Center in Germany. Scientific studies have linked drug dumping in America and Europe to virulent antibiotic-resistant germs and genetic mutations which may promote cancers.

"Something should be done now," declares pharmacist Boris Jolibois, a French researcher at Compiègne Medical Center. "It's just common sense." Yet, while the EPA classifies pharmaceuticals as "major pollutants of concern," and is considering imposing national standards on how much drug waste may be released into the waterways, Grumbles acknowledges that a decision is not imminent.

Drugs the EPA classifies as hazardous cost up to \$2 a pound to incinerate. "When you can flush it down the toilet for free, why would you want to pay, unless there is some significant penalty?" asked Tom Clark, an executive at the American Society of Consultant Pharmacists.

Why, indeed. ■

Source: *Associated Press*



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Prisoner Self Care: Hypertension

by Michael D. Cohen M.D.

Introduction

This article is about high blood pressure, also called hypertension. Hypertension is a common chronic disease that arises slowly and continues for years. It generally causes few or no symptoms. Treatment is directed at controlling the blood pressure, not curing the underlying disease. Hypertension does not “get better”. A lifetime of uncontrolled high blood pressure may result in disability or death.

What is Hypertension

When the heart pumps there is a squeezing time when the blood is pushed out. The highest pressure occurs at this time. Then there is a relaxed time when the heart is filling up with blood when the lowest pressure occurs. Both the high peak and the low trough are measured with a blood pressure cuff inflated on the upper arm. The blood pressure is reported as the high and the low, for example “110 over 70” and written down like a fraction, 110/70.

Blood pressure greater than 140/90 is too high. Hypertension generally does not have warning symptoms. You would never know you had it unless they take your blood pressure as part of a nursing assessment at the clinic. Hypertension causes long term complications by damaging the heart, kidneys, and arteries. This damage in turn can result in heart attack, heart failure, kidney failure, and stroke.

Hypertension is only one of the common conditions that cause organ damage over time. High blood fats (like cholesterol and triglycerides), obesity, smoking, and diabetes are all common conditions that act together to cause heart attack, heart failure, stroke and blocked arteries.

Diagnosis of Hypertension

The diagnosis of hypertension is based on the blood pressure measurements.

- Normal blood pressures are when the high pressures are in the 110's to 120's and low pressures are in the 60's and 70's.

- Pre-hypertension blood pressures are when the high is in the 130's or lows in the 80's. These pressures are abnormal, but not yet high enough to be called a disease

and treated with medicine.

- Stage 1 hypertension is when the high is in the 140's or 150's or the low is in the 90's.

- Stage 2 hypertension is when the high is over 160 or the low is over 100.

Since there are usually no symptoms to alert you that your blood pressure is too high, you have to get health care from a doctor or clinic to be diagnosed. Blood pressure should be measured sitting down, at rest and relaxed. The pressure must be found to be elevated on three separate visits to confirm the diagnosis of hypertension.

Each time a nurse or doctor takes your blood pressure they should share the results with you. You need to know your usual blood pressure. If you know what your pressure is, you can keep track for yourself. Is it normal? Has it risen above the normal range, but not yet high enough to treat? Stage 1? Stage 2? Are you doing better, worse or the same since the last time it was measured?

As people get older, they are more likely to develop hypertension. One of the important reasons to have regular health assessments is to diagnose new problems, like hypertension. It is best to begin treatment as soon after onset of the disease as possible.

Different Types of Hypertension

There are a few different types of hypertension. The most common is called “essential hypertension”. It can only be controlled, not cured. There are also a few uncommon but curable diseases that can cause hypertension. For example, when the artery to a kidney is partially blocked, the kidney may produce a hormone that causes high blood pressure. In that case, opening the artery cures the blood pressure problem. Also, some rare tumors produce a substance that causes high blood pressure. Finding and removing the tumor will cure the problem. The pressure tends to be quite high when these conditions are present. Kidney disease, thyroid disease and other hormone diseases can cause hypertension too.

Occasionally the pressure goes so high that there are symptoms such as headache, blurred vision, dizziness, altered consciousness and seizures. This is called “malignant hypertension”. It is a medi-

cal emergency because it can cause brain swelling or literally blow out an artery in the brain causing bleeding and stroke.

Why Treat Hypertension?

If the pressure doesn't cause symptoms that bother you, why does hypertension need to be treated? Over time, hypertension damages the heart, kidneys and arteries causing heart attacks, heart failure, kidney failure or stroke that can result in long term disability and death. Treatment of hypertension is intended to control the blood pressure close to normal levels. Successful treatment over a lifetime prevents or reduces the long term damage to the heart, kidneys and arteries.

What you do now to control your blood pressure can save you from death or disability later. Even though you may not feel it, the high pressures are doing you harm every minute of every day.

Treatment Goals

For most people, the treatment goal is to control the blood pressure to less than 140/90. For people with diabetes or chronic kidney disease, the goal is less than 130/80. These lower levels are needed because hypertension is more damaging to people who already have kidney disease or diabetes.

Taking Care of Yourself

What you do to take care of yourself can make all the difference to your health.

Most people who survive well in prison have a strong will and self-discipline. You can use those strengths to help you lose weight, choose what to eat, reduce salt intake, exercise more, take your medicines regularly and advocate for your needs with health staff.

Choosing to limit your diet is hard for everyone whether free or in prison. It is particularly hard in prison for three important reasons. First, there are very few choices available. Second, deciding what to eat is one of the last freedoms that a prisoner still has. It's hard to give that up to manage a disease. Third, satisfying desires for sweets or favorite snacks is one of the few true pleasures you can give yourself.

But, you are also free to choose to lose weight, eat a better diet, be physically

active, control chronic disease, and stay healthy. One man I know had the right idea about taking care of his chronic disease. He wants to stay healthy to beat the system and walk out of prison one day ready and able to live actively in the world.

Treatment of any chronic disease is a partnership between patients and health professionals. Patients need to do the things that will help reduce blood pressure: lose weight, eat a healthy diet, reduce salt intake, stop smoking, exercise regularly, and take the medicine as directed. Health professionals need to listen to the patients well, understand their problems, keep them informed and genuinely try to help. Patients need to advocate for themselves to make sure they get the care they need: medication renewals before they run out, follow-up visits to check their weight and blood pressure, second or third drugs if blood pressure is not coming down toward normal levels, and periodic lab tests to look for side effects of medicines. Doctors and prison health systems need to follow established national treatment guidelines and be ready to intensify treatment when pressures are not coming down enough.

Lose Weight if You are Overweight

People who are overweight should lose weight to stay healthy in general and to help control blood pressure. The only way to lose weight is to do more and eat less. You do more by deciding to exercise regularly and keeping to a schedule. You eat less by deciding to choose on purpose what you eat and how much you eat. The first step in dieting is deciding to stop eating high fat snacks like candy bars and chips and high fat desserts like cake and ice cream. The simplest diet plan that actually works is this: take your usual servings at each meal, push half of it to one side of the plate and only eat the other half. Eating half a piece of cake satisfies a desire for sweets and is better than eating the whole piece.

Eat a Healthy Diet

Public health organizations have made recommendations for a healthy diet for people with hypertension. They recommend less salt, more fruit, more vegetables, only low fat or no fat dairy products, and reducing both total fat and saturated fat (mostly animal fat) in the diet.

Unfortunately, most prison diets have few fruits and vegetables and are relatively high in salt and fat. To eat a healthy diet,

you have to take advantage of every opportunity available to you. For example:

- Cole slaw is often the only fresh vegetable that is regularly provided on prison menus. Eat it whenever you have the chance.

- Locally grown fruits are often on the menu, apples in the northeast and northwest for example, because they are cheap. Even though it is boring and they are usually not the best quality, eat them whenever you have the chance to do so.

Fresh fruit is an important part of a healthy diet.

- If you can, trade high fat menu items like hamburgers, hot dogs, and cake for more fruit and vegetables. Apples, oranges and bananas can be carried out of the mess hall to use as snacks instead of chips and candy bars.

Most prisons sell food at a commissary. You can get some of the food you need from commissary, but the processed foods often have too much salt or too

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Hypertension (cont.)

much fat. Learn to read the nutrition labels on foods you buy. The labels tell you about sodium (salt), total fat and saturated fat, among other things. Don't use high sodium or high fat foods very much. Here are some more tips about commissary foods:

- Canned vegetables are better than no vegetables, but a lot of salt is added to them in the processing. Pour off the water and rinse the vegetables with fresh water several times to remove that extra salt before you cook it up.

- The flavor packages with Ramen noodle are very high in salt. Use only half the flavor package, or less, if you can. A small amount really can give it enough flavor to satisfy your taste.

- Canned tomatoes, tomato sauce, tomato juice and V-8 juice all have enormous amounts of salt in them. Use them sparingly for flavor only.

- Salami, "summer sausage", and other sausage products are very high in animal fat. Use them sparingly for flavor only. Also, processed deli meats of all sorts, even turkey, are very high in salt.

- Chips of all kinds are very high in salt and fat.

- Canned tuna and other canned fish are pretty good as they are low in saturated fat and have fish oils that contain special fats that are necessary for good health. Fish oils are better for you than animal fat from red meat.

- Peanut butter and jelly or tuna salad sandwiches on whole wheat bread are good snacks or meals to make for yourself.

The first thing to do to reduce salt in the diet is to stop adding salt to food at the table. If you never touch the salt shaker you have taken a very big step toward improving your diet. At first, people who are used to a lot of salt on their food find meals without added salt tasteless. But over a pretty short time, maybe a week or two, the food starts to have taste again. You may even begin to notice subtle flavors that you couldn't appreciate before. Instead of table salt use herbs like dill or cilantro to add flavor, if you can get them.

Physical Activity

Many prisoners work out a lot, so there is little need to give advice about exercise. But for those who don't already

work out regularly, remember: doing something is better than doing nothing. You don't have to be Hercules to improve your health through exercise. In fact, people who over do it at first get too sore and often give up. If you are older and have not been doing much physical activity recently, start out with a limited program and build up slowly. Walking for 20 minutes or a half hour daily or every other day is a good start and does provide health benefits. Activities that build up muscles, like weight lifting, do not improve heart and lung health as much as sustained activities like walking, climbing stairs, and running.

Standards of Care

Most hypertension will be well controlled when guidelines based on national recommendations for treatment of hypertension are followed. Adequate prison health programs have written clinical guidelines for management of hypertension. Guidelines provide direction to the doctors on how to proceed, step by step, to manage blood pressure in their patients. Guidelines establish a basic standard of care for the system that the doctors and other providers are expected to follow.

Medicine

There are many different drugs to treat hypertension. There are five different classes of medicine that are commonly used, and 5 or more different drugs in each class. Some medicines are available that have two different drugs in one pill. The names of the five classes are related to their chemical actions on the body. The five classes are: thiazide type diuretics; calcium channel blockers; angiotensin converting enzyme (ACE) inhibitors; angiotensin receptor blockers; and beta blockers.

Treatment must be adjusted to the needs of each individual patient. Generally doctors establish a treatment goal with the patient and start with one drug at a relatively low dose. If that works and the goal blood pressure is achieved, simply maintain that drug and dose. If pressure is not at the goal, the dose is increased. If the goal is not achieved with one drug at maximum dose, a second drug is added from a different class. Later, if needed, a third drug may be added from a third class. That is why it is worthwhile to know the names of your drugs and what class each one comes from.

Each patient responds differently to

the medicines, so drugs and doses must be adjusted to suit each individual. Dose adjustment and adding second or third drugs in patient care is not "experimenting". "Experiments" or research studies are done to show that a drug works on populations in general. Experiments are highly structured and human subjects must be informed about the research study and consent to their participation. Dose adjustments are done to tailor the available medicines to the needs of individual patients.

For stage one hypertension, treatment generally starts with one drug, usually a thiazide type diuretic. Thiazide diuretics work well and have been used for decades. There is a lot of good evidence that they lower blood pressure and prevent long term complications of hypertension. They are inexpensive and readily available from generic drug makers.

For stage two hypertension, doctors often start with two drugs, usually a thiazide plus another drug from a different class.

Medicine won't work unless the pills are taken regularly as ordered by the doctor. It doesn't work well to skip doses, or to start and stop medicine over and over again.

Followup and Monitoring

The facility's clinical guidelines usually establish the frequency and content of medical followup for patients with hypertension. People with high blood pressure need regular followup by health staff to check how their blood pressure is responding to treatment. It is also important to check your weight and ask about side effects of medicines. Blood tests for potassium and kidney function need to be done every 6 months to one year to make sure there are no new complications from the drugs.

At first, people with stage one hypertension need to be checked monthly. Followup should be more frequent for people with stage two hypertension or those with other serious chronic diseases such as diabetes, heart disease or kidney disease. It may take many visits over 6 months or a year to arrive at a treatment program that works for some patients.

Followup can be less frequent once the medicines have been adjusted to achieve the patient's blood pressure goal. When blood pressure is stable at the patient's goal pressure, followup may be reduced to every 3 to 6 months.

Clinical Inertia

When doctors fail to take action to improve blood pressure control in a patient, it is called "clinical inertia". When your blood pressure is not at your goal pressure, but the doctor doesn't increase the dose or add another drug or seek specialist consultation to help with management of a difficult case, that is clinical inertia.

You need to know what your blood pressure is and what pressure you are trying to reach through treatment. You need to do your part. Take your medicine regularly as prescribed, try to lose weight, limit salt intake, exercise regularly, quit smoking if you can. If you are doing these things but are not at your goal, you need to advocate for more treatment. Ask the doctor: Can the dose be safely increased? Maybe we need to add another drug?

When the patient is doing everything he can, including taking the medicine as ordered, and the doctor has prescribed three or more different drugs, and blood pressure is still not at goal, then additional medical evaluation is needed. Tests need to be done to determine if one of the unusual forms of hypertension is caus-

ing the disease. Such tests would include ultrasound of the kidneys to look at the renal arteries, and blood tests for various hormones and chemical substances called catecholamines. When the doctor's usual approach to hypertension has not succeeded, it is necessary to consult a specialist in blood pressure management.

Conclusion

Hypertension is a common chronic disease characterized by high blood pressure. Over time high blood pressure damages the heart, kidneys and arteries leading to heart attacks, heart failure, stroke and kidney failure. There are usually no symptoms with hypertension. The diagnosis is made at regular health care visits when blood pressure is measured. Treatment controls the blood pressure but does not cure the condition. Effective treatment brings the blood pressure down to near normal levels and prevents long term complications.

People can do a lot for themselves to help control their blood pressure such as losing weight if they are overweight and eating a diet with many servings of fruits and vegetables that is low in fat and saturated fat. Other things people can do

for themselves include reducing salt in the diet, exercising regularly, stopping smoking, and taking medicines regularly. A doctor will prescribe medicine to control blood pressure and followup to see if the goal pressure has been achieved. You can advocate for yourself to get more treatment or specialty consultation if you are taking your medicine as prescribed and blood pressure control has not been achieved.

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Releasing The Disease: Is Overcrowded Cook County Jail Responsible For The Rise Of MRSA On The Outside?

by Kelly Virella

The sudden death of a 17-month-old boy in Hyde Park brought Dr. Robert Daum to the Cook County Jail. Out of town the April morning in 2004 when Simon Sparrow woke up screaming in his crib, Daum, chief of pediatric infectious diseases at the University of Chicago's Comer Children's Hospital, followed the case by telephone. Simon's blood pressure dropped, his major organs began to fail, his skin turned purple and scabby, and his body bloated as if he were drowning. A day and a half later he was dead.

The attending doctors didn't know why. But Daum had a hunch. Just a year earlier, a nine-month-old girl had died with similar symptoms. Her autopsy showed that she had a virulent and once rare form of staph infection known as community-associated methicillin-resistant staphylococcus aureus, or CA-MRSA (pronounced "mersa"). Since 2000, dozens of children had been admitted to the hospital with the infection, often manifested by lesions, abscesses, and pus-filled boils, but most had been cured with antibiotics.

Daum had seen a spike in CA-MRSA cases before. The prevalence of the disease among Comer patients with no known risk factors skyrocketed from 10 per 100,000 admissions between 1988 and 1990 to 259 per 100,000 admissions between 1993 and 1995. Now the infection was on the rise again. Unlike Simon, most of the patients Daum had seen were poor and black. Also unlike Simon, about 60 percent had relatives or friends who'd been detained at Cook County Jail.

People typically pick up the community-associated form of staph infection through direct contact with others infected with it, but since staphylococcus bacteria are carried in the nose as well as on the skin, it may even be possible that it can be spread by a sneeze.

Daum believed that detainees were returning to their communities and spreading a strain of the bacteria they'd picked up in jail. They would pass the bacteria on to their children, who would pass it on to playmates, who would pass it on to their parents. Eventually, even a middle-class kid like Simon, the son of

two PhDs, might get it.

Shortly after Simon died, Daum spoke on the phone with Dr. Sergio Rodriguez, medical director of the clinic at Cook County Jail, who confirmed that he was dealing with a CA-MRSA outbreak. Daum arranged for a tour of the facility. What he saw startled him: a man with a CA-MRSA abscess on his toenails washed his feet in a bucket, then rinsed the bucket out and cavalierly set it aside. It was still contaminated with pus.

CA-MRSA has been a serious and persistent problem at the jail for at least four years. At the time of his first visit, Daum learned that 10 to 12 cases of CA-MRSA were diagnosed every day, and that it was the cause of 85 percent of the skin infections reported by detainees. "It's the highest rate I've ever seen," Daum says. The jail has since gotten more vigilant about early detection, but Dr. Chad Zawitz, infection control officer at Cermak Health Services, the jail's clinic, estimates that among the average daily population of 9,000, they're still seeing five to ten new cases a day. The problem is so rampant it's difficult to isolate the sick from the healthy. "There are so many we would need to build a 1,000-bed facility just to house them," Zawitz says. Although no one has died of CA-MRSA during his three-year tenure, he says about four or five cases per month become serious enough to warrant his personal attention.

David Cummings spent 18 months at the jail, from December 2004 to May 2006, for armed robbery and attempted robbery. He never came down with CA-MRSA himself, but he says he knew plenty of guys who did. According to Cummings, they often misattributed the infection to a spider bite and thought the best way to avoid breaking out in bumps and boils was to stop drinking the jail's water supply.

The Centers for Disease Control and Prevention reports that 25 to 30 percent of the population carries staphylococcus aureus bacteria in their nose without any adverse effects. Although it occasionally causes skin infections, most people can recover in just a few days with the aid of antibiotics. One percent of the population, however, carries MRSA, a mutant form of staphylococcus that can't be treated

with beta-lactams, a class of potent and cheap antibiotics that includes drugs like methicillin, penicillin, amoxicillin, and cephalexin. MRSA requires more expensive medications like bactrim or vancomycin, a drug that can only be delivered intravenously.

When someone who hasn't been hospitalized or received medical treatment in the last year comes down with a MRSA infection, it's classified as community-associated MRSA. CA-MRSA causes boils and lesions that can be healed 77 percent of the time by lancing and draining. About 6 percent of cases, however, are serious or fatal. The bacteria can eat flesh, causing gangrene. It can also cause pneumonia and severe sepsis, a toxic-shock-like condition that leads to organ failure. Simon Sparrow developed sepsis, as did at least one of the other six Chicago children who have died of CA-MRSA since 2003.

CA-MRSA has been spreading like wildfire in the jail in part because of overcrowding and unsanitary living conditions. The jail allows almost all detainees to spend most of their day in a dayroom or gym, with lockups at 1:30 PM and 9:30 PM. Daum says he saw more than a dozen detainees crowded around a television in a five-foot-by-ten-foot dayroom on his first visit. The crowding is particularly bad in Division Two, a dormitory that houses twice as many people as the 300 men it was designed for.

The detainees that Daum spoke with during his visit said that many of those infected with CA-MRSA didn't realize they had a potentially deadly disease and got others to help them drain their boils. Some told him they don't like to shower at the jail out of fear they'll be sexually propositioned. When Daum examined the alcohol-free soap given to the detainees for showers, he worried that it might be too weak to kill the bacteria. Many detainees, including some with CA-MRSA, said they often used the same soap to hand wash their jail-issued clothing in cold water.

Zawitz says the jail has stepped up its efforts to contain the epidemic in the last five months. Jail clinicians now check for CA-MRSA upon intake and during a detainee's annual physical. They've opened a

clinic that specializes in the treatment of the infection and started an educational campaign, telling patients not to allow other detainees to change their bandages or drain their boils. Zawitz himself has caught the disease twice in the last three years. "This is an issue that affects every doctor, every nurse, every guard, every stockperson," he says. "It's almost impossible for you not to get colonized."

Meanwhile, CA-MRSA has been spreading throughout Cook County. According to a May 2007 report published in the *Archives of Internal Medicine* by doctors at John H. Stroger, Jr. Hospital, the rate of infection among patients of the county's health care system increased from 24 cases per 100,000 in 2000 to 164 cases per 100,000 in 2005.

Young children are more susceptible than adults, because the bacteria incubate better in the skin cells in their noses, but anyone who comes into contact with others in a close-quarters situation—day care centers, health clubs, high school locker rooms—is potentially at risk.

Dr. Robert Weinstein, chief of infectious diseases for Stroger Hospital and an author of the May 2007 study, believes the infection could be just as common in suburban areas of Cook and Du Page counties, which have lower rates of arrest and incarceration, as it is in the city. "If you have a population that has no jail exposure," he says, "you're still going to see CA-MRSA if they have close person-to-person contact." But doctors at Comer Children's Hospital say that's highly unlikely. A comparison of data from Comer with data from other area hospitals indicates that not only is the infection more widespread among Chicago children than suburban children, it's more common among children on the south and west sides of the city than on the north.

Half of all detainees released from Cook County Jail are concentrated in just seven of Chicago's 77 communities, according to a 2005 study by Urban Institute, a social-policy think tank in Washington, D.C. Four of those communities—Austin, Humboldt Park, North Lawndale, and East Garfield Park—are on the city's west side. Three—West Englewood, Roseland, and Auburn Gresham—are on the south side. The Stroger study identifies areas in all seven communities with unusually large numbers of CA-MRSA cases. It also reports that countywide, African-Americans and those who have been incarcerated within one year are twice as likely to have CA-MRSA than strains of staph that can be treated with beta-lactams.

Some say that without a comprehensive study there's no way to conclusively link a community's rate of CA-MRSA infection with its rate of incarceration. But Zawitz says the anecdotal evidence suggests the link is more than coincidental. "Many people, if not most, are coming in clean," he says. "It's more likely that they're getting this stuff in the division. The person comes into the jail, gets it, goes home, and gives it to their families."

When children with no risk factors for infection first started showing up at Comer Children's Hospital with lesions and boils on their bodies, 89 percent were toddlers aged three to 36 months; 77 percent were African-American. What Daum saw there astonished him. Since the 1970s, staph infections that could survive antibiotic treatment had mostly been confined, in the U.S., to hospitals. The only people who got it outside the hospital were the chronically ill and intravenous drug users. But Daum's analysis revealed that the drug-resistant staph these children had was a genetically modified organism, with different mechanisms for infecting people

and resisting drugs. He and a team of University of Chicago doctors published their findings in the *Journal of American Medicine* in 1998. The medical community reacted with skepticism at first, but one year later, when four children in Minnesota and North Dakota died from CA-MRSA infections, the skepticism subsided.

Over the next few years, researchers across the country discovered CA-MRSA in halfway houses, on Native American reservations, even in the locker room of the Saint Louis Rams. Outbreaks were

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MRSA Rise (cont.)

reported in jails and prisons in Mississippi, Georgia, and California, and a 2003 study of the entire Texas penal system—a total of 145,000 people—revealed that there had been nearly 11,000 cases of CA-MRSA between January 1996 and July 2002. One hundred and eighty-nine were serious. Three were fatal.

The infection first appeared in Cook County Jail under the watch of Dr. James McAuley, who was medical director of Cermak Health Services from 1999 to 2003. He can't quantify the outbreak, but says the initial number of cases was negligible and there was no increase in skin and soft-tissue infections. McAuley worried, however, that a policy instituted in the late 90s, reducing access to clean towels from four times a week to two, would aggravate the problem. "Any decrease in the level of hygiene can lead to an increased risk for CA-MRSA," he says. As a countermeasure he made sure detainees used a strong antibacterial soap, and he mandated changes to the way doctors treated skin boils and lesions.

When detainees get sick, they fill out a form and put it in a call box located in their division. Clinicians then review the sick calls to determine who needs immediate care and who can wait. Under McAuley's new guidelines, when clinicians saw someone with a skin or soft-tissue infection, they were to administer bactrim and clindamycin and culture the wounds so they could amass electronic records about the prevalence and incidence of the disease. But few doctors took the cultures because they cost time and money and wouldn't necessarily help the patient heal. "We never saw anything that we could clearly pin down as a true outbreak," McAuley says. "We saw a steady stream of cases, but never at the volume where we could feel confident there was person-to-person transmission."

McAuley left the jail to become the director of pediatric infectious diseases at Rush University Medical Center in 2003, just as the number of cases was mushrooming from a troubling blip to a major epidemic. "I don't know the number of cases," says Dr. Jack Raba, Cermak's chief operating officer from 2003 to 2005, "but it was in the many hundreds per year. It would not surprise me if someone said there were thousands."

Dr. Sergio Rodriguez had only recent-

ly been hired as the new medical director of Cermak Health Services when Daum made his first visit to the jail in 2004. When the two met, Daum says, "It was love at first sight." The jail had a growing problem and Daum was confident that with his team's expertise they could develop a solution. Almost immediately he and a colleague at the University of Chicago went to work on a grant proposal for a study.

Daum and Rodriguez worked with doctors from each of their institutions over the course of the next three years to design a three-year study with an estimated budget of \$900,000. They worked with the director of the jail guards, Scott Kurtovich, to ensure they had his support and that he understood the study's logistical requirements, which would require frequent movement and close monitoring of detainees. According to Raba, who was at Cermak during the study's early planning stages, it also had the support of top officials at Cermak and Cook County Jail. The Centers for Disease Control and Prevention also liked the study, and in September 2006 it awarded Daum an \$863,000 grant. Around the same time, the study won the support of the institutional review boards of the jail, the University of Chicago, and the federal Office for Human Research Protections, all of which are charged with protecting the rights of individuals involved in scientific research projects. The last hurdle was to have the University of Chicago's lawyers sit down with the jail's lawyers and draw up a contract for the work. Daum was confident the contract would only take a few days and the study would start the following month, in January 2007. But that didn't happen.

As Daum was gearing up for the study, new Cook County Board president Todd Stroger was devising a strategy to address a \$500 million deficit in the county's 2007 budget, a strategy that included countywide layoffs. In charge of the layoffs at Cermak Health Services was Dr. Robert Simon, a Cook County administrator whose approach to cost cutting in the health care industry has been controversial. As the director of the Cook County Board of Health Services, Simon decided to shave 25 percent off Cermak's budget, partly by laying off the clinic's four most senior doctors, including Rodriguez and his two principal investigators for Daum's study, Dr. Connie Mennella and Dr. Muhammed

Mansour. The day before all three were fired, Rodriguez told the *Chicago Tribune*, "With this staffing level we will not be able to support our primary care and public health initiatives."

After the firings, Daum tried to win the approval of Dr. Eileen Couture, Cermak's acting medical director, but at an April 9 meeting she voiced some concerns: She said the study used detainees who would be onerous to transport because of their maximum-security status, an issue Daum had already addressed with Kurtovich, the director of the jail guards. Moreover, Couture said, Cermak's shrunken staff was already devoting extra hours to the emergency room and didn't have time to take part in the study.

"At no point did I ever hear from her, 'Bob, CA-MRSA is an important problem,'" Daum says. "'You've got the study. Times have gotten a lot harder at the jail. We've gotta get this done. Let's figure out how to do it.'" The study for which he and his colleagues had spent three years securing funding and approval was dead. Officials at Cermak declined requests for an interview. Instead, they issued the following statement through Don Rashid, the clinic's public information officer:

"We started skin surveillance with annual health maintenance as routine care in July 2007. There have been no referrals needed or wounds identified to date from the surveillance clinic. We also have a wound clinic where the detainees are followed for abscesses drained. All cultures are reviewed in the wound clinic. Detainees are also given education on skin monitoring and hand washing. Hibiclens skin wash is provided under direct observation as needed. Detainees are seen in clinic until the wounds heal."

Each year Cook County Jail has 110,000 admissions. Every three days, one-third of the population of 9,400 detainees turns over. In two weeks, two-thirds turns over. In 30 days, 90 percent turns over. Chad Zawitz believes that all of the roughly 1,000 detainees who have been in jail longer than a month have been screened for CA-MRSA. But he says there's too much turnover among the other 8,400 detainees to know who has been screened and who hasn't.

Robert Daum remains frustrated by the jail's refusal to push ahead with the study, which he maintains could be a valuable weapon in the fight to pinpoint, contain, and even prevent the spread of CA-MRSA. He is stunned by what he

termed the shortsightedness of jail officials. "People were asking us how was this going to benefit Cook County," he says. "I couldn't believe that was a real question."

Rather than lose the CDC funding, Daum began negotiating with jails in Los Angeles and Dallas, both of which have high rates of CA-MRSA, to find a new place for the study. On August 3, he picked Dallas.

Still, he's disappointed that he won't be able to conduct the research in the city where he works and lives. "What I want to do here is stop the detainees from getting CA-MRSA," he says. "The reason I care about that is because I care about the kids. I want to stop them from getting the disease."

As Daum made his evening rounds on the fifth floor of Comer one Friday this summer, five of his 15 patients had CA-MRSA. All were black and all came from poor neighborhoods, including West Englewood, one of the most popular destinations for newly released detainees of the Cook County Jail. ■

This article first appeared in the Chicago Reader and is reprinted with permission.

Illinois Guards Protest Prison's Failure to Treat Scabies Outbreak

An outbreak of scabies, a mite infestation that causes itching and rash-like symptoms, has hit the Illinois River Correctional Center. Guards protested outside the facility on October 1, 2008 to decry prison officials' refusal to address the problem, which the guards said was "spreading like wildfire."

Over 30 prisoners were reportedly infected; however, prison administrators refused to admit there was an outbreak or remedy the situation. The guards said they feared getting scabies themselves.

"On shakedowns, we have to go through clothes. There's a huge chance we're going to contract this just through the shakedowns," stated Sgt. Nick Conklin. He said many prisoners failed to seek treatment because they were afraid or ashamed about possibly having scabies. "I've heard cases where guys had it and didn't say anything for two weeks."

Union officials representing the guards claim fiscal realities are at the root of prison officials' deliberate indifference to the outbreak. "There's no reason for this. They're

not going to provide every inmate medication because of money" said Dick Heitz, president of Local 3585 of the American Federation of State, County and Municipal Employees. "The inmates are becoming more and more irritated," he added, presumably with no pun intended.

Meanwhile, prison officials have denied there's a widespread outbreak, saying they were treating a few prisoners with topical creams and throwing away contaminated mattresses. Of course there is little outrage by guards or the unions that represent them when prisoners are denied medical care for conditions that do not affect prison staff, or when they have to pay medical "co-pays" for non-existent or ineffectual treatment.

An unrelated scabies outbreak occurred at the Iowa Medical and Classification Center in Oakdale in September 2008. Dozens of prisoners were reportedly infected, and an entire unit at the facility was temporarily quarantined. ■

Sources: *The Journal Star*, WMBD/WYZZ TV, Associated Press



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California Class-Action Suit Reinstates \$1.5 Million Illegally Siphoned From County Jail Inmate Welfare Fund

by John E. Dannenberg

Santa Clara County, California (SCC) agreed to settle a class-action lawsuit seeking recovery of funds unlawfully taken from its jails' Inmate Welfare Fund (IWF) between July 2003 and January 2008 to pay guards' salaries. The \$1.5 million lump sum ordered paid into the IWF will be used to fund programs directed at prisoner rehabilitation and reintegration.

The lawsuit was filed in 2005 by the Public Interest Law Firm and Fenwick & West on behalf of 4,600 prisoners housed at the County's Main and Elmwood jails, after prisoner programs were cut in response to budget problems. While surcharges on prisoner phone calls and commissary sales were still collected, the funds were redirected. The recovered \$1.5 million, added to an existing \$4 million IWF balance, will provide individual and group counseling for 800 prisoners who have suffered from abuse and trauma. Another 500 prisoners, in maximum security, will gain the Roadmap to Recovery program. Additionally, literacy classes will be provided and subscriptions to the *San Jose Mercury News* will be reinstated.

\$100,000 of the settlement was earmarked for the non-profit group Friends Outside to pay for a third employee to aid jail prisoners in successfully reintegrating upon their release. Friends Outside assists prisoners in cleaning up loose ends in their personal affairs, such as recovering their cars that were left on the streets, packing their belongings for storage and aiding financially stranded family members. Friends Outside also delivered 2,654 books and 696 pairs of reading glasses to jail prisoners in the past year. Dave Gonzales, Director of Friends Outside, said that its programs have notably reduced tension in the jails.

The court order expressly enjoins SCC from using any IWF funds towards prisoners' incarceration, meals, clothing, housing, or medical services. Also banned are payments for booking officers, visiting staff, mandated services for pro per prisoners, disciplinary hearing functions, ADA requirements, court-mandated services and programs, translator costs, religious services, kitchen officers, commissary delivery guards, rehabilitation

guards, and landscaping. From this list it is apparent that SCC had become quite creative in snatching IWF funds, when no court oversight was in place. To maintain the status quo, an audit process and IWF Committee were ordered put in place for five years. Moreover, any kickbacks from telephone companies (estimated at \$200,000) were to be paid to the IWF, not to the SCC general fund. Finally, the 21 page settlement agreement provides for a "needs assessment" team to determine the best use of IWF funds for rehabilitative purposes.

The SCC settlement may spawn similar recovery suits throughout California because prisoner welfare fund accounts are controlled by state law (Penal Code § 4025). Most jurisdictions have felt free to dip into such funds to pay for self-justified "emergency" needs. However, the law re-

quires such funds collected from prisoners to be used solely for their direct benefit. The settlement agreement requires that SCC amend its internal operating policies to comply with the law. This includes capping SCC's internal administration costs of these programs at 31% of IWF funds expended annually.

The prisoners were represented by attorneys Kyra Kazantzis and James Zahradka of the Public Interest Law Firm. The settlement provides that class counsel may additionally seek an attorney fee award up to \$450,000. Further, the several individual named plaintiffs in the class action are to be awarded \$1,000 each. See: *Hopkins v. Flores*, Santa Clara County Superior Court Case No. 1-05-CV035647 (January 2008). ■

Other source: *San Jose Mercury News*

Court Monitor Criticized Care to Michigan Dialysis Treatment Afforded Prisoners

by David M. Reutter

Before the Michigan Department of Corrections closed the Southern Michigan Correctional Facility (SMCF) in late 2007 to avoid further litigation in the long-running class action known as *Hadix*, the federal judge overseeing the case and lawyers representing prisoners argued that closing SMCF would not only transfer the problem to another prison, it would worsen the situation of inadequate medical care for chronically ill prisoners.

In our May 2007 cover story and two other articles that followed that article, *PLN* reported on the horrid care provided to Michigan prisoners by the private medical vendor, Correctional Medical Services (CMS). Those articles detailed the circumstances surrounding the needless deaths of several prisoners. Now, the callous attitude of prison officials has resulted in the needless death of another prisoner.

After U.S. District Court Judge Richard A. Enslen entered an order preventing the closure of SMCF, Michigan prison officials appealed that and several other

orders. While the matter was on appeal, Judge Enslen suddenly requested the matter to be transferred to another judge. Based upon that and other unresolved factual matters, the Sixth Circuit Court of Appeals remanded for reconsideration of the orders.

The new judge allowed SMCF to close, but retained jurisdiction over the chronically ill prisoners being transferred to the Ryan Correctional Facility (RCF). The Court found in that order "that there are serious deprivations of medical care affecting dialysis patients," which included the failure to provide timely chronic care, timely medication renewal of chronic medications, and timely access to specialty care.

The Court monitor, Dr. Robert Cohen, entered his Corrected Sixth Report on September 5, 2008. He wrote that the "serious, ongoing problems in the medical care" in the prison dialysis unit "have harmed or have the potential to harm the prisoners receiving dialysis there." He warned that it "is not a trivial matter," for "[i]nadequate

dialysis results in substantial, but preventable increases in morbidity and mortality.”

CMS failed to implement standing orders to develop plans for prisoner’s dialysis treatment. This is an unsafe practice that can result in an indefinite error in treatment. In addition, a low percentage of patients receive dialysis three times a week, which was found to be “extremely disturbing and unexpected.”

Moreover, there is no advanced care planning for these prisoners. They face 12–15 hours a week attached to a dialysis machine, the multiple medications they take cause multiple side effects that are often painful, they must eat bland food and forego things they enjoy, their fluid intake is restricted, they undergo frequent and often painful surgical procedures to maintain a viable venous access site, and they have shortened life spans. Thus, many suffer depression. Their fragile medical conditions require advance care planning discussions to make decisions regarding the kind of end-of-life care they wish to receive.

There also exist systematic problems with overall specialty care services. The report detailed numerous specific cases of deprivation of prisoner care for known chronic ailments. By far, the dialysis care is the worst, having caused a prisoner’s death on April 30, 2008.

A 17-station permanent dialysis unit was opened on July 7, 2008, but only 13 are in use. Dr. Cohen visited the on-site dialysis water filtration room and RCF on August 15, 2008. “The room was filthy. The floor had just been mopped prior to our arrival but still had standing muddy water,” wrote Dr. Cohen. “The floor under the bicarbonate tank had many broken tiles and was covered with rust. The floor under the filtration tanks was so dirty that the tiles were not visible. The bicarbonate tank was open to the air with no cover to prevent contaminants from getting into the solution.”

Those conditions were found to be “a substantial failure of infection control” that require immediate correction. In addition, efforts to investigate the prisoner’s death were impeded. After detailing the medical and care history of that prisoner, Dr. Cohen concluded that his “death was premature and his emergency care was unacceptable.” He noted the prisoner “survived dialysis for less than four months.”

Dr. Cohen then criticized Michigan prison officials for refusing to allow prisoners from receiving organ transplants, which is the “universally accepted medical opinion” for treatment of persons with end stage renal disease.

Michigan Corrections Director Patricia Caruso believes it “is not good law or social policy, and [we] decline to spend limited public resources on solid organ transplants for prisoners when there are neither sufficient organs or money available to meet the demand by civilian patients.”

Organs normally come from family members and transplantation is a cheaper course of care, noted Dr. Cohen. He also wrote, “Transplantation of solid organs is available to prisoners in the Federal Bureau of Prisons, in New York State, Virginia, California, and in Washington State.” The report is available on PLN’s website.

See: *Hadix v. Caruso*, USDC, W.D. Michigan, Case No.: 4-92-cv-110. *Corrected Sixth Report of the Independent Monitor Dialysis Services for Prisoners at Ryan Correctional Facility.* ■

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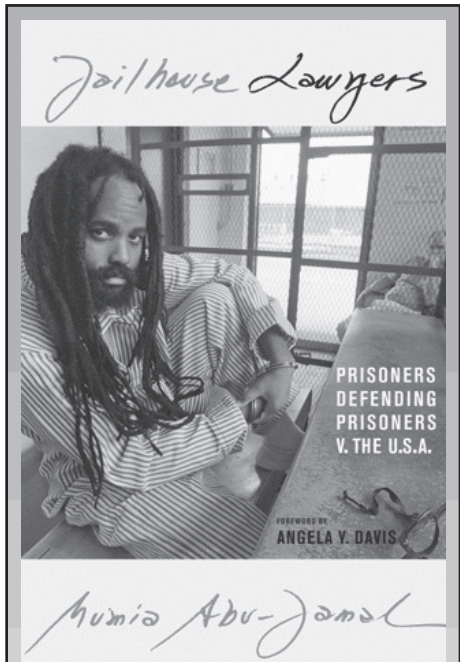
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California Juvenile Parolees Entitled to Two-Step Revocation Process; Case Settles

by John E. Dannenberg

The U.S. District Court for the Eastern District of California has held that the rights of California juvenile parolees were violated by the single-hearing revocation process used by the Juvenile Parole Board (JPB). Nevertheless, the court declined to require the initial revocation hearing to be held within ten days as it did for adult parole violators in *Valdivia v. Davis*, 206 F.Supp.2d 1068 (E.D. Cal. 2002). [See: *PLN*, Jan. 2003, p.16].

In Sept. 2006, L.H. and three other juveniles filed a class action complaint under 42 U.S.C. § 1983 and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, claiming that the JPB's policies and practices denied them due process of law in the parole revocation process. Among other issues, they claimed that the JPB's policy of not providing two hearings (a preliminary hearing and a revocation hearing) – and indeed, not even providing one hearing for up to 60 days – violated the seminal principles set forth by the Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The JPB defended its parole revocation policies for California's 2,300 juvenile parolees. It offered statements from two of its senior staff as to the agency's procedures, and asked the court to take judicial notice. The court declined to do so because the two affiants had failed to demonstrate personal knowledge of the procedures, as was required to satisfy judicial notice standards. Regardless, the court accepted the parties' representations that upon a "technical" parole violation (i.e., a rules violation rather than a new criminal act), the JPB's regulations didn't provide for a probable cause hearing. The JPB tried to excuse this deficiency by noting that when revocation hearings for technical violators were eventually held, 75% resulted in favorable outcomes for the parolee – e.g., to continue on parole.

For parolees charged with new crimes, in-custody detention pending revocation was automatic. The parolee was given a form to request a probable cause/detention hearing or to waive the hearing. If the form was not returned within five calendar days of arrest, the waiver was

deemed automatic and there was no hearing whatsoever, even though the law stated one must take place within 60 days.

Both sides moved for summary judgment. The plaintiffs asked that preliminary hearings be conducted within 10 days following detention, as was required in *Valdivia*. The court initially noted the similarity between the issues raised in this action and those in *Valdivia*, and declared that case to be its baseline.

Next, the district court rejected the JPB's attempt to limit the court's jurisdiction based on the Prison Litigation Reform Act's (PLRA) requirement that a prisoner's complaint demonstrate an adverse impact on public safety or on the operation of the criminal justice system. The court held that the PLRA applies only to "civil action[s] with respect to prison conditions," and that the instant complaint did not involve prison conditions.

Relying upon *Morrissey*, *Gagnon* and *Eldridge*, the court concluded that the Constitution requires a two-stage revocation process. The first is "at arrest and preliminary hearing" and the second is "when parole is formally revoked." The court observed that the JPB's policy of conducting revocation hearings as long as 60 days after detention far exceeded the 21 days set by the Ninth Circuit in *Pierre v. Washington State Board of Prison Terms and Paroles*, 699 F.2d 471 (9th Cir. 1983). The controlling touchstone of due process was the disruption of the parolee's family relationships, education, job, etc. The district court found the JPB's loose procedures violative of juvenile parolees' rights, and held that such rights outweighed those of the public's "social interest" in public safety.

Accordingly, on Sept. 19, 2007, the district court granted the plaintiffs' motion for summary judgment as to a declaration that their due process rights had been violated by the JPB's single-hearing revocation process. The court stopped short of requiring a firm minimum time limit in which to hold an initial revocation hearing, however, finding the plaintiffs had not demonstrated "that there is no genuine issue of material fact that the circumstances of juvenile parole revocation require that the probable cause determination be made within ten calendar days of

the parolee being taken into custody." The court termed such an order "premature" and denied summary judgment as to that claim. See: *L.H. v. Schwarzenegger*, 519 F.Supp.2d 1072 (E.D.Cal., 2007).

The case progressed on other contested issues, and on January 29, 2008 the court granted a preliminary injunction requiring the defendants to appoint counsel to represent all juvenile parolees during revocation hearings. See: *L.H. v. Schwarzenegger*, 2008 U.S. Dist. LEXIS 9632.

Rather than work cooperatively to resolve this litigation, the JPB decided to take an adversarial approach. State officials repeatedly frustrated the plaintiffs' discovery requests, resulting in multiple motions to compel and for sanctions. On May 1, 2008 the district court granted fees and costs to plaintiffs' counsel in the amount of \$58,227.15 due to the JPB's failure to fully and timely respond to discovery requests.

The district court also granted the plaintiffs' motion for sanctions on May 14, 2008, noting that the PBJ's continued delay in complying with discovery requests "has all the earmarks of purposeful foot dragging on discovery." The court again awarded fees and costs. See: *L.H. v. Schwarzenegger*, 2008 U.S. Dist. LEXIS 86829.

Evidently realizing it was fighting a losing battle, state officials agreed to settle the case on June 4, 2008. The JPB will appoint attorneys for juvenile parole violators within eight business days and ensure that revocation hearings are held within 35 calendar days. Parole violators will be able to call witnesses, and accommodations will be made for parolees with mental or physical disabilities or who do not speak English. Standards will be developed for juvenile parole revocations.

Gov. Schwarzenegger's office called the settlement, which took almost two years of litigation to achieve, "fair and equitable."

The district court had appointed former Washington DOC Secretary Chase Riveland to serve as Special Master in this case; the plaintiffs were represented by the San Francisco-based Youth Law Center. See: *L.H. v. Schwarzenegger*, 519 F. Supp. 2d 1072 (E.D. Cal. 2007). ■

Texas Prison Authority OK's Illegal Use of Prison Labor, but PIE Contract Not Renewed

by Gary Hunter

Even though a Texas legislator found the practice illegal, and even though it cost sixty people their jobs, the Private Sector Prison Oversight Authority of the Texas Dept. of Criminal Justice (TDCJ) announced in June 2008 that it would not cancel a contract that used prison labor to build flatbed trailers for commercial use. Despite that decision, the TDCJ later decided not to renew the contract after facing strong criticism.

The controversy arose in 2007 when Texas-based Lufkin Industries received notice that a competitor was selling similar flatbed trailers for considerably less money. Lufkin personnel did some digging, and learned their competitor was a company called Direct Trailer and Equipment Company (DTEC), which imported cheaper components from China and used Texas state prisoners at the Michaels Unit for the assembly process. [See: *PLN*, Nov. 2008, p.12].

Following that discovery, Lufkin filed a complaint with the Private Sector Prison Oversight Authority. Initially, the Oversight Authority announced in April 2008 that it would decertify the contract between the state and DTEC within 90 days if it was found to be in violation of state and federal law.

DTEC's contract originated under the Prison Industry Enhancement (PIE) pro-

gram. The company paid only \$1 a year to lease factory space at the Michaels Unit, and advertised it could sell its products for less by using prison labor. Under state and federal law, such contracts are permissible only if they do not create unfair competition with freeworld businesses.

By the time Lufkin discovered they were competing against DTEC, it was too late to reverse the financial damage. Lufkin closed its trailer division in January 2008 and moved 90 employees to other jobs within the company. About 60 others were let go.

On June 12, 2008, the Oversight Authority reversed its earlier decision and stated it would not take action to end DTEC's prison industry contract.

Paul Perez, Lufkin's general counsel, commented on the Oversight Authority's reversal. "I guess I am surprised and disappointed, not just for Lufkin Industries because we have already been affected, but it's not a good decision for the state of Texas and I'd be very interested in the rationale behind that decision," he said. "We've adjusted, but there are other manufacturers who are going to be unfairly impacted by that decision, competing with prison labor and products."

The decision also surprised state Sen. Robert Nichols. "I am disappointed in today's action by the Authority," he remarked.

"It is difficult to understand how this state can allow a contract to continue illegally."

Sen. Nichols was not alone in his objections. State Agriculture Commissioner Todd Staples and state Rep. Jim McReynolds also called for an end to DTEC's contract.

In spite of the Oversight Authority's decision, and facing criticism from both lawmakers and the Texas Workforce Commission, the TDCJ announced on December 10, 2008 that it would not renew DTEC's contract under the PIE program, which expired on March 1, 2009.

Sen. Nichols applauded the TDCJ's action. "It's the right thing to do," he said. "Hard-working citizens shouldn't have to compete for jobs with cheap prison labor and facilities paid for by taxpayers." Nichols also noted that "What's at stake is not just the jobs lost but also the jobs not created because employers feared the competition from companies using prison labor." ■

Sources: *Lufkin Daily News*, Press release from Sen. Robert Nichols (Dec. 12, 2008)

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California Female Parole Supervisor Awarded \$859,000 for Gender Discrimination by Female Superior

A Los Angeles jury has awarded \$859,000 in damages to a female state parole supervisor who claimed that her superior, also a woman, discriminated against her based on gender, which caused great emotional distress.

Rebecca Hernandez, 46, was a district supervisor for the Huntington parole office in South Central Los Angeles, and reported to a district administrator. Hernandez developed new programs to aid parolees in their return to the community.

In 2005, a new district administrator, Maria Franco, was hired. Within a few days Franco put Hernandez under investigation, ultimately charging that she had illegally spent department funds and had taken kickbacks from program vendors.

Investigations by the then-California Department of Corrections (CDC) led to a mediation hearing, where Franco's accu-

sations were taken as true after Hernandez declined to be interviewed. Months later, Hernandez claimed that Franco's assistant put a urine-like substance in her office; she filed an EEOC complaint, which was later dismissed.

Hernandez was then transferred to the El Monte parole office, but never went to work there because she was out on sick leave due to mental health issues and ulcers. Nine months later, in June 2006, the CDC advised Hernandez that the investigation had gone against her. She was demoted to Parole Agent II.

Hernandez sued the CDC alleging gender discrimination, retaliation, defamation and intentional infliction of emotional distress. The trial court dismissed all of the claims except discrimination and resultant emotional distress. The essence of the gender discrimination claim, which involved female on female, was that because there were relatively few

women promoted to higher administrative positions, Franco saw Hernandez as a threat to Franco's own advancement potential. The defense countered that there could be no cause of action for gender discrimination between members of the same sex.

The jury found that the CDC had retaliated against Hernandez. It further determined that Franco's acts willfully and wantonly aggravated Hernandez's emotional distress. The jury also expressly found for Hernandez on her claims of discrimination and intentional infliction of emotional distress. While Hernandez had initially demanded \$6.7 million, the CDC did not make a counteroffer to settle.

The jury awarded Hernandez \$700,000 in non-economic damages plus \$159,000 in economic damages. She was represented by Compton attorney Larry Hopkins. See: *Hernandez v. CDC*, Los Angeles (CA) Superior Court, Case No. BC350875. ■

Let Freedom Ring: A Collection of Documents from the Movements to Free U.S. Political Prisoners, by Matt Meyer

Book Review by Ian Head

In October, 2008, activist and (disbarred) attorney Lynne Stewart, who writes the afterword in *Let Freedom Ring*, spoke at the National Lawyers Guild's annual convention in Detroit, Michigan.

"For those of you who are not aware of my case, the government tried to make an example of me to scare others," she began. Stewart was convicted in 2005 of "conspiracy to provide material support to terrorists," among other charges, in a case that many felt was brought only to intimidate fellow lawyers who defend political activists on the Left. In *Let Freedom Ring*, historian Dan Berger echoes her sentiments when he writes, "The state uses the imprisonment of political leaders and rank-and-file activists as a bludgeon against movement victories. Their incarceration is a reminder of the strength, potential and, just as crucially, the weaknesses and vulnerabilities of radical mass movements...political prisoners serve collective prison time for all those who participated in the movements from which they emerged."

That importance of political prisoners in the United States within the context of radical and progressive movements is the central theme in Meyer's book. He has attempted to gather a broad selection of documents – speeches, poetry, interviews, essays and news articles – and create a "resource manual" for future generations of activists. Meyer, a longtime activist and former chair of the War Resisters League, hopes that the text he has collected and assembled in this 700-plus page volume will "inform our collective thinking about the movements we must build today."

If there is a central argument within the pages, it is that U.S. political prisoners, as well as the discussion of U.S. political prisoners, has been marginalized both by the majority of the media and the progressive movement itself. The authors urge past and present-day radicals – especially white activists – to recognize political prisoners as central to the discussion of fighting for the rights of the oppressed in this country.

The book is divided into a number of sections, each with a different theme,

but all connected to anti-racist, anti-imperialist thought. Each section contains a variety of writing, the bulk of it authored by political prisoners themselves. *Pulling out the Stops to Free Mumia Abu-Jamal* focuses on the broad international campaign to free the most well-known political prisoner in the United States. *Critical Resistance and the Prisoner Rights Movement* discusses the links between the political prisoner movement and prisoner rights activists. *Resisting Repression: Out and Proud* focuses on writing and speeches that link queer struggles with political prisoners.

While many names in the table of contents were recognizable, I had not heard or read many of the voices before. Two of my favorite articles were those that touched on topics not primarily focused on political prisoners but instead offered honest critiques of progressive movements that need to be built in order to free those prisoners. In *Not Something We Can Postpone*, freed prisoner Dhoruba Bin-Wahad addresses the group Queers United in Support of Political Prisoners, and confronts

the dynamics of privilege as a straight male while also living as a Black Muslim in a white supremacist society. He speaks on his own struggles in dealing with sexism while challenging the mostly white, gay rights groups of the time, which may be doing solid work around homophobia, to confront racism within their ranks and in how they organize with others. The speech reads as both deeply serious and honest, but also positive and uplifting.

In the section focusing on the government's targeting of the Black Liberation Movement and Black activists generally, Meyer and Meg Starr interview escaped prisoner and now exiled activist Assata Shakur. Shakur speaks in detail on a broad range of topics, but there are two that I found most compelling. One of the first things she discusses is trying to create "a style of writing and a style of work that is contra-arrogant." She continues, "I think arrogance is one of the things that has really stifled the world revolutionary movement and really hindered communication between people." By highlighting the attitude and tone in which ideas and politics are expressed, Shakur addresses the issue progressives must focus on if we are to move forward in fighting oppression.

Shakur also is asked about the "role of guns" in the movement. Acknowledging the importance of (violent) self-defense and Malcolm X's call of defending communities "by any means necessary," she goes on to speak about keeping a politics that says "We don't like violence." She concludes her answer talking about how "all kinds of elements of society are experiencing oppression," whether it's unions, students, farmers or others, and so the struggle must be on all fronts, not just "armed struggle."

Even though the conversation with Shakur deals with various aspects of communication and organizing, it is grounded in the need to gain amnesty for political prisoners and learning ways of coming together despite ideological differences in order to make this happen. Much of the book seems organized in this fashion – it is less of a "who's who" of political prisoners and what they stood for but more of a compilation of strategies, lessons and critiques of where they were and are coming from, and how it can inform building a movement to free those oppressed and locked down by this government.

The volume of voices speaking throughout these pages makes this book

an incredible compilation. However, the organization of the chapters and sections within the book occasionally seems randomly jumbled. Meyer admits in his introduction that "this book was quickly thrown together." Certain articles contain explanations that contextualize them or give them a date, while others do not. There are a number of excerpted pieces that are very brief – just one or two pages – that I wish I had more of, while other articles seem to cover historical events already detailed in an earlier section. Poetry and flyers for past events seem inserted at random moments. But the book is meant as a reference more than as something to read front to back, and so these are really minor complaints. The table of contents does a good job of listing each article and author, and there is a thorough index as well as a resource guide in the back.

Meyer's book is an important reference point linking past and present struggles, such as Black Liberation Army prisoners framed and tortured in prison in the 1970s to people like Sami Al Arian in 2008. If we are to build strategies for the future, the words and voices contained within these pages will be an essential tool. 📖

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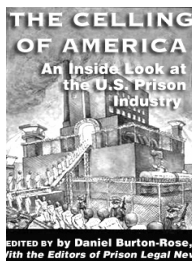
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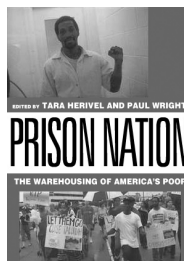
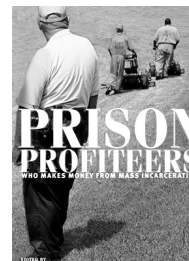
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Minnesota Sex Offenders' Requisite Disclosure in Treatment Can Violate Fifth Amendment

Minnesota state prisoners Frank Johnson and John Henderson individually petitioned for writs of habeas corpus in 2005 after 45 days were added to their sentences for noncompliance with a Sex Offender Treatment Program (SOTP), which required them to admit their guilt.

The state Supreme Court ruled that prisoners with appeals pending or available to them, and those who denied their offense in court proceedings, could not be forced to prejudice their future appeals or to subject themselves to perjury charges, and thus could not be punished for such nondisclosures as part of an SOTP.

Johnson was convicted of assault, criminal sexual conduct and burglary in 2003, and sentenced to four years and ten months. While Johnson's appeal was pending he refused to participate in the SOTP, asserting his Fifth Amendment right against self-incrimination, and refused to admit his guilt. As a result of his noncompliance, the Commissioner of Corrections (Commissioner) added 45 days to his incarceration as punishment. Johnson's burglary conviction was overturned on appeal in 2004, but his other convictions were affirmed and further review was denied.

Henderson was convicted of criminal sexual conduct and sentenced to seven-and-a-half years in 2002. His appeal and further review were both denied in 2003; his refusal to participate in the SOTP also resulted in a 45-day extension of his incarceration.

As applied to the states through the Fourteenth Amendment, the Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." That privilege allows a person to refuse to "answer official questions ... in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Both compulsion and incrimination must be present for the privilege to apply, and the compulsion must present a "risk of incrimination."

Both Johnson and Henderson sought writs of habeas corpus arguing that their punitive 45-day sentence extensions compelled the waiving of their Fifth Amendment right against self-incrimination. In both cases the trial court ruled

that it was not compulsion because they had a choice. An appellate court reversed the decision in Johnson's case, holding the 45-day extension did constitute compulsion, but Henderson's ruling was affirmed because his time for appeal had expired. Henderson sought review of the affirmation and the Commissioner sought review in Johnson's case.

The Minnesota Supreme Court held that an extension of incarceration "represents a significant departure" from a prisoner's sentence, and the prisoner has a "protected liberty interest in his supervised release date that triggers a right to procedural due process before that date can be extended." The Court determined that compulsion which violates self-incrimination only exists if it poses an "atypical and significant hardship" on prisoners "in relation to the ordinary incidents of prison life," such as an extension of incarceration. Ordinary punishments, such as those that revoke privileges, do not invoke prejudicial compulsion for

self-incrimination purposes.

The Court further held that subjecting prisoners to potential perjury charges for past statements they made in court, and self-incrimination for admissions possibly prejudicial to their future appellate proceedings, constituted compulsion for Fifth Amendment purposes. Such actions were therefore precluded, as were any punishments for such constitutionally-based nondisclosures, such as refusal to admit guilt. The ruling in Johnson's case was affirmed, and Henderson's was reversed.

The dissent opined that "the basic conditions of the inmate's sentence should make no difference to a compulsion analysis," and would have held that "extending an inmate's supervised release date because of his failure to participate in a sex offender treatment program does not rise to the level of compulsion necessary to violate the inmate's Fifth Amendment privilege against self-incrimination." See: *Johnson v. Fabian*, 735 N.W.2d 295 (Minn. 2007). ■

BJS Report Finds 53% of Prisoners Are Parents

by Mark Wilson

About 809,800 (53%) of America's 1,518,535 prisoners in 2007 were parents of minor children, according to a Special Report of the U.S. Department of Justice's Bureau of Justice Statistics (BJS). Fifty-two percent of state prisoners and 63 percent of federal prisoners reported having 1,706,600 minor children, or 2.3 percent of U.S. residents under 18 years old.

The number of incarcerated parents increased 79 percent (357,300) from 1991 to 2007, and the number of children of incarcerated parents grew by 80 percent (761,000) during the same period. Most of that growth appears to be among state prisoners, with 413,100 incarcerated parents in 1991 growing to 686,000 in 2007 (60.2%) and children of incarcerated parents increasing from 860,300 in 1991 to 1,427,500 in 2007 (60.3%). The largest increases occurred between 1991 and 1997 with parents increasing 40 percent and children increasing 42 percent. Between 1997 and 2007, those numbers increased

by only 19 percent and 17 percent, respectively.

In 2007, 744,200 incarcerated fathers reported having 1,559,200 children, while 65,600 incarcerated mothers reported 147,400 children. Since 1991, the number of children with a father in prison has increased 77 percent while the number with incarcerated mothers has shot up 131 percent. "This finding reflects a faster rate of growth in the number of mothers in state and federal prison (up 122%) compared to the number of fathers (up 76%) between 1991 and midyear 2007," according to the report.

"Black children (6.7%) were seven and a half times more likely than white children (0.9%) to have a parent in prison," researchers found. "Hispanic children (2.4%) were more than two and a half times more likely than white children to have a parent in prison." In 2007, an estimated 1,559,200 children had an incarcerated father: 46% were black, 30% were white, and 20% were Hispanic. Of

the 147,400 children with an incarcerated mother, 45% were white, 30% were black, and 19% were Hispanic.

"Twenty-two percent of the children of state inmates and 16% of children of federal inmates were age 4 or younger. For both state (53%) and federal (50%) inmates, about half their children were age 9 or younger," according to the report. Forty-seven percent of children of incarcerated fathers and 53% of children of incarcerated mothers were between 10 and 17 years old.

The highest percentage of state (64.4%) and federal (74.1%) incarcerated parents were between 25 and 34 years old. Only 12.6 % of state and 23.8% of federal prisoners 55 years old or older were parents.

Federal and state prisoners convicted of drug and public order offenses were much more likely to be parents than violent and property offenders. However, for female federal prisoners, the likelihood of being a mother did not differ by offense. Offenders "with a criminal history were more likely to report being a parent than prisoners with no criminal history," the report found.

Only 37.1% of parents in state prison

reported living with their minor children within one month of arrest. Mothers (55.3%) were much more likely than fathers (35.5%) to have lived with their children. Federal prisoners were far more likely than state prisoners to live with their minor children, according to the report. "Mothers (52%) and fathers (54%) in state prison were equally likely to report that they provided primary financial support for their minor children prior to incarceration," researchers stated.

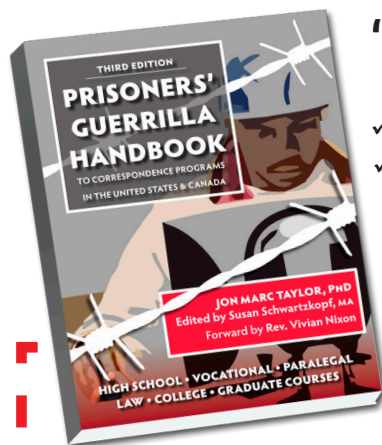
"Seventy percent of parents in state prison reported exchanging letters with their children, 53% had spoken with their children over the telephone, and 42% had a personal visit since admission," the study found. "Mothers were more likely than fathers to report having had contact with their children....A higher percentage of parents in federal prison reported contact with their children. In federal prison, 85% reported telephone contact, 84% had exchanged letters, and 55% reported having had personal visits." Additionally, "mothers (62%) and fathers (49%) who had lived with their children were more likely to report that they had at least weekly contact with their children than mothers (44%) and fathers (30%) who had

not lived with their children."

Contact with children also increased the closer the prisoner was to release. Researchers found at least weekly contact for: 47% of parents within 6 months of release; 39% who expected to be released within 12 to 59 months; and 32% who had 60 or more months to serve. Twenty-two percent of parents who did not expect to be released reported weekly contact with their children.

The report found that 57% "of parents in state prison met the criteria for a mental health problem and 67% met the criteria for substance dependence or abuse." The numbers were lower among federal prisoners with 43% reporting mental health problems and 56% having substance dependence or abuse issues. Sixty-five percent of mothers and 57% of fathers in state custody attended self-improvement classes, compared to 7% of federal prisoners. Copies of the report, entitled *Parents in Prison and Their Minor Children* (August 2008), are available on PLN's website. ■

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BJS Report Reveals Parole Supervision Characteristics

by Mark Wilson

In 2006, nearly 68,000 state employees supervised 660,959 adult parolees – about 83 percent of 798,202 total parolees – according to a Special Report of the U.S. Department of Justice's Bureau of Justice Statistics (BJS). Parole officers had an average caseload of 28 active parolees.

Approximately half of the nation's adult parolees are supervised by five states: California (125,067), Texas (101,175), New York (53,215), Illinois (33,354), and Pennsylvania (24,956), according to a 2006 Census of State Parole Supervising Agencies cited in the report.

Thirty-five of the 52 reporting agencies also supervised about one quarter of the 4,237,023 adults on probation as of December 31, 2006. These agencies supervised more than four times as many probationers (1,200,570) as parolees (269,416).

Thirteen of the 19 agencies responsible for release decisions reported that in 2005-2006, 126,641 prisoners were considered for release but only 57,850 (46%) were released. North Dakota released a high of 76% of prisoners, followed closely by Connecticut at 71 percent.

Sixty-six percent of parolees were required to have face-to-face contact with a parole officer at least once a month, according to the report. Of those, 14 percent were required to have weekly contact. Seventeen percent of parolees were required to meet with a parole officer less than once a month, or to contact only by mail, telephone or other means. Thirteen percent were no longer required to report on a regular basis, and the reporting status of three percent had not yet been determined. In all, nearly 80 percent of adult offenders were on active supervision.

Forty-seven agencies required parolees to participate in a drug treatment program. Twenty-one of those agencies reported an average of 10.9 percent of parolees (28,084 of 258,652) were in drug treatment. Forty-six agencies also required parolees to participate in "self help" or "drug awareness" programs, such as Narcotics Anonymous or Cocaine Anonymous. On June 30, 2006, seven of those agencies had 17.1% of parolees (4,510 or 26,333) enrolled in such a program. The other agencies could not determine the number.

Similarly, 46 agencies offered some type of housing assistance: 7 had working relationships with government housing agencies; 6 contracted with private rental agencies; 4 had in-house services to provide housing referrals; 10 operated other types of programs; and 4 agencies offered two or more types of housing assistance.

Twenty-five agencies offered formal employment assistance: 17 had a working relationship with a government employment agency; 8 contracted with private employment services; and 6 offered other types of employment assistance. Seven agencies offered more than one type of employment assistance.

Eighteen agencies were responsible for conducting parole revocation hearings. In 2005-2006, 16 of those agencies

held 67,534 revocation hearings. "A total of 317,828 parolees were at risk of re-incarceration" during this period, according to the report.

All 50 agencies drug tested parolees, and eight of those agencies provided statistics of reincarceration for dirty urinalysis tests, while 42 other agencies "could not" provide such statistics. Of those that did, Tennessee reincarcerated the lowest percentage of parolees at .5% and South Dakota represented the highest reincarceration rate at 15.8 percent. Florida, Hawaii, Michigan, Pennsylvania, Utah and Wyoming reported reincarceration rates ranging between 2.9% and 9.7%.

The report, entitled "Characteristics of State Parole Supervising Agencies, 2006" (August 2008) is available online at www.ojp.usdoj.gov/bjs. ■

CA Supreme Court Capitulates, Rewrites "Unworkable" 2005 *Dannenberg* Lifer Judicial Parole Review Standards

In a welcome reversal of its own "hotly contested" 4-3 decision in *In re Dannenberg*, 34 Cal. 4th 1016 (2005), concerning judicial review of Board of Parole Hearings (Board) lifer decisions and the Governor's reversal thereof, the California Supreme Court threw out its earlier "exceeds the minimum elements of the offense" test as being "unworkable."

The Court decided that the statutory language "shall normally set a parole release date" no longer means just "a hope" of parole but is in fact a mandate, and held that the deferential "some evidence" test for judicial review means some evidence of current *dangerousness*, not "some evidence" of the existence of the Board's regulatory factors.

Finding no such dangerousness in the record, the state Supreme Court upheld an appellate ruling that overturned the Governor's reversal of a favorable parole decision for a first-degree murderer. See: *In re Lawrence*, 190 P.3d 535 (Cal. 2008).

In a parallel decision issued the same day, the Court gave an example of where some evidence of current dangerousness did exist in the record, and affirmed the Governor's reversal of a grant of parole

by the Board. See: *In re Shaputis*, 190 P.3d 573 (Cal. 2008). These two decisions affect perhaps 1,000 pending lifer habeas corpus petitions in the California and federal courts.

In its 2005 *Dannenberg* ruling on judicial review of Board lifer parole decisions, the Court had crafted a rule holding that a term-to-life prisoner could be kept in prison forever if the Board (or Governor, since they operate under the same rules) made a finding that the commitment crime "exceeded the minimum elements of the offense." This odd judicial construct was sharply rejected by the three dissenting justices in *Dannenberg* as "essentially meaningless," because no one would ever have been convicted unless his criminal behavior exceeded the minimum elements of the offense.

Now, three years and dozens of dissonant appellate court rulings later, the Supreme Court's dissenters in *Dannenberg*, abetted by Chief Justice Ronald M. George, reversed course and made a new rule for judicial review of lifer Board decisions that comports with (1) the law [Penal Code § 3041], (2) bedrock rules of statutory construction ["shall" is mandatory]

and (3) the true mission of lifer parole determinations [no evidence of current dangerousness if released].

The Court also gave direction as to the Board's and Governor's exercise of discretion. No longer may a parole denial or reversal be based upon the conclusory "hunch or intuition" of the decision maker, and no longer may a rote recitation of the "egregious" facts of the crime serve to deny parole (after the full minimum term has been served). Rather, there must be a logical nexus between the offense – and/or the prisoner's earlier criminal record or in-prison record – and a determination of current dangerousness. The proper test upon judicial review is that a finding of current dangerousness must be based upon hard evidence of that nexus found in the record.

In this ruling, the Court overruled its strained logic in *Dannenberg* which had held that "shall normally set a parole date" meant "almost never," because "shall" was not mandatory language and "normally" had no meaning at all. The Court also abandoned its *Dannenberg* foray into the murky concept of "legislative acquiescence," which had held that lawmakers impliedly approved of recent lifer parole results of a fraction of one percent per year. Instead, the Court's recent rulings impliedly conceded the truth: lifers were being held indefinitely as political pawns due to a post-Dukakis

fear of approving any paroles.

The Court's dual rulings in *Lawrence* and *Shaputis* serve to guide lower courts in challenges to adverse parole decisions. While Sandra Lawrence had a prior criminal lifestyle, was on the lam for 11 years before being brought to justice and had polished off her mortally wounded victim with a potato peeler, it was her 24 subsequent years of impeccable behavior – which demonstrated great self-development and growth of maturity – that led the Court to find that although she certainly had past evidence of dangerousness, it was not linked to any demonstrable *current* propensity for being a danger if released.

By contrast, the Court panned Richard Shaputis, who had also served his minimum term (15-life for the second-degree murder of his third wife), because there was "some evidence" from Shaputis' checkered history of failed relationships – punctuated with numerous acts of violence and his denial of full responsibility for his crime – that could reasonably support a fact finder's doubt as to his lack of dangerousness upon release. The Court reached this conclusion despite Shaputis' spotless record in prison and his current failing health.

The essence of the *Lawrence* ruling is that California lifers now have both a workable legal standard and a meaningful chance of being released, at least by the

courts if not by the Board and Governor. Better yet, *Lawrence* gives back something that 99% of lifers had lost: a sense of hope and an incentive to conduct themselves so as to demonstrate their current lack of dangerousness and thus suitability for parole.

California presently has about 10,000 parole-eligible lifers. The namesake of the *Dannenberg* ruling, *PLN* writer John Dannenberg, was released from California's prison system on January 31, 2009 following three successful habeas petitions. [See: *PLN*, March 2009, p.44].

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Federal Prisoner's §2241 Petition Dismissed for Non-Exhaustion; Prisoner Sought Sentence Reduction for Revealing Weapons

A federal court in Michigan denied a federal prisoner's motion for relief from judgment summarily dismissing his habeas corpus petition. The court found that the prisoner failed to show that he exhausted his administrative remedies.

Federal prisoner Carl Green filed a federal habeas corpus petition under 28 U.S.C. § 2241 seeking a court order that the Bureau of Prisons (BOP) reduce his sentence on the basis of exemplary conduct. He relied on 18 U.S.C. § 3582(C)(1)(A)(i) and alleged that a reduction was warranted because "he may have saved the life of a staff member" and "he alerted prison officials to a small cache of homemade weapons that he found." The district court summar-

ily dismissed the petition, finding that § 3582(C)(1)(A)(i) permitted early release only for serious and terminal medical conditions. The Sixth Circuit Court of Appeals affirmed.

Green then moved for relief from judgment under FRCP 60(b)(5) and (6). He alleged "that a recent amendment to a policy statement interpreting § 3582 now permits a reduction in sentence for reasons other than a medical problem." The district court denied Green's motion, noting that prisoners are required to exhaust administrative remedies before filing a § 2241 petition, but Green "has not demonstrated that he exhausted administrative remedies for his new claim." See: *Green v. Morberry*, USDC No. 2:06-cv-12410 (ED Mich S.D. 2008).

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This Valentine's Lingerie Is Brought to You By the Prison Industrial Complex

by Beth Schwartzapfel

With Valentine's Day, perhaps you made a trip to Victoria's Secret. If you're a conscientious shopper, chances are you want to know about the origins of the clothes you buy: whether they're sweatshop free or fairly traded or made in the USA. One label you won't find attached to your lingerie, however, is "Made in the USA: By Prisoners."

In addition to the South Carolina prisoners who were hired by a subcontractor in the 1990s to stitch Victoria's Secret lingerie, prisoners in the past two decades have packaged or assembled everything from Starbucks coffee beans to Shelby Cobra sports cars, Nintendo Game Boys, Microsoft mice and Eddie Bauer clothing. Prisoners manning phone banks have taken airline reservations and even made calls on behalf of political candidates.

Still, it's notoriously difficult to find out what, exactly, prisoners are making and for whom. Most of the time, prisoners are hired by subcontractors who have been hired by larger corporations, which are skittish about being associated with prison labor. Paul Wright, an expert on prison labor with sources inside many prisons, has broken many labor stories in his magazine, *Prison Legal News*. It hasn't been easy. "As a general rule, you'll have an easier time finding out who Kim Jong Il's latest mistress is than finding out who these guys are working for," he says. (Starbucks, Nintendo, Eddie Bauer and Victoria's Secret did not return requests for comment; Microsoft declined to comment.)

Advocates of prison labor programs describe the arrangement as win-win: prisoners keep busy and stay out of trouble, and employers get low-cost labor with little or no overhead. But critics, from labor unions to prisoner rights advocates, raise a host of concerns about exploitation and unfair business competition.

In 1979 Congress created the Prison Industry Enhancement Certification Program (PIECP), which provides private-sector companies with incentives to set up shops in prisons using inmates as employees. States offer free or reduced rent and utilities in exchange for the decreased productivity that comes with bringing materials and supplies in and out of a secured

facility and hiring employees who must stop working throughout the day to be counted and who are sometimes unavailable because of facility-wide lockdowns.

Prisoners are often grateful for the work; when the system is working, they can learn marketable job skills and save money. "It provided a sense of independence," says Kelly DePetrìs, who worked for eight years in California state prisons at Joint Venture Electronics, doing everything from assembly to administrative jobs to materials control.

"You don't have to ask people for things," she says. "I have a son, so it was nice to send home money to help with little things—school clothes, things like that." As a Joint Venture employee, DePetrìs made about \$1.74 per hour after deductions, compared with the thirty cents she estimates she might have made working in the prison laundry. When she was released last May after serving fourteen years, she had saved \$16,000, with which she bought a used car, clothes and health insurance. "It's really come in handy," she says.

Relatively speaking, PIECP accounts for a tiny fraction of the number of prisoners in US prisons and jails. Some 5,300 of the 2.3 million inmates nationwide work for private-sector companies. "It's a small piece, but it's a significant piece" of the overall prison labor system, says Alex Friedmann, who served ten years in a Tennessee prison in the 1990s and worked making Taco Bell T-shirts in a PIECP silk-screening shop.

PIECP rules stipulate that work must be voluntary, that workers be paid a wage comparable to what free-world employees doing similar work are paid and that the program not compete unfairly with companies on the outside. But labor unions and companies on the outside have argued that this is impossible: there is no way for a company that pays no rent to compete fairly.

Talon Industries was a Washington State-based water-jet company whose competitor, MicroJet, had a PIECP shop inside a state prison. Rick Trelstad, a partner at Talon, contended that his company shut down in 1999 at least in part because MicroJet consistently underbid him for

work. (He and an association of his colleagues successfully sued the Washington State Department of Corrections to shut down PIECP, but voters reinstituted it last year.) Lufkin Industries, a Texas-based maker of tractor-trailer beds, claims it was run out of business because its competitor, Direct Trailer & Equipment Company, paid only one dollar per year for factory space in the local prison and so was able to offer much lower prices for the same product.

David Lewis, vice president and general manager of Joint Venture Electronics and Kelly DePetrìs's former boss, acknowledges that the setup has been great for his business. "They get no holiday pay. They get no vacation pay. There's no medical, dental: all that's paid for by the state," he says. What's more, if the company has to downsize, as it did recently, laid-off prison workers have few other places to look for work. When business picks up again, employees who on the outside would have found other jobs are still in prison, just waiting to be rehired. The waiting list for work at Joint Venture is up to 200 people long.

Advocates for prisoners' rights take issue with what they see as an inherently exploitative situation. Courts have consistently found that prisoners are not protected by the Fair Labor Standards Act. So they may not unionize. They can't agitate for better wages or working conditions, because any threats to walk off the job would ring hollow—where would they go?

What's more, by law, as much as 80 percent of PIECP employees' paychecks is deducted for room and board, taxes, family support, victims' compensation or charity. The National Correctional Industries Association, the nonprofit organization that certifies PIECP programs, found that participants kept only about 20 percent of their wages in the past two quarters. Friedmann, for instance, worked for two years in the late 1990s in the silk-screening shop. He estimates that after deductions for fines, fees and other charges, he left prison with \$30. "So while businesses get rent-free space, prisoners are paying for their 'room and board,'" says *Prison Legal News's* Paul Wright,

who himself served seventeen years in a Washington prison. "Prisoners pay their boss's rent."

So this Valentine's Day, if your shopper's conscience led you to check labels, don't bother looking for "Made in Prison." Of all the hundreds of goods and services produced by prisoners with

taxpayer subsidies, only one is labeled as such: a line of jeans and denim work shirts made at the Eastern Oregon Correctional Institution. It's called Prison Blues. [Editor's Note: The Ashurst Summers Act requires that all goods transported in interstate commerce made with convict labor must be labeled as such. However, PLN is

aware of no businesses that actually comply with the law, which is a criminal offense. There has been one prosecution in the law's 75-year history.]

This article originally appeared in *The Nation*. Reprinted with the author's permission.

Numerous Prison Systems Sign Up for Free Christian TV Programming

by Matt Clarke

Since 2007, Trinity Broadcasting Network (TBN), the largest religious network in the world, has been quietly spreading a faith-based rehabilitative TV program for prisoners.

Following a successful pilot program in South Dakota's prison system, TBN's Second Chance program is poised to expand nationwide. South Dakota, Alabama, Pennsylvania, Texas, Florida and Corrections Corp. of America (CCA) have already signed up for the free in-house television shows, and Ohio, Mississippi and South Carolina plan to start pilot programs.

TBN pays for all costs associated with the programming. Second Chance consists of up to four faith-based TV channels: TBN, the most popular faith-based channel in the nation; The Church Channel, which broadcasts teaching programs and church services from various denominations; TBN Enlace USA, a Spanish language channel airing faith-based programming from the U.S. and Latin American countries; and JCTV, a faith-based entertainment channel targeting 13- to 29-year-old prisoners.

The channels are broadcast on the Ku satellite band by Glorystar Satellite Systems, a free Christian satellite network, and TBN pays to have satellite dishes and

receivers installed and maintained. Buford Satellite Systems and Correctional Cable TV, the two largest providers of cable TV services to prisons and jails, have agreed to add the Second Chance channels to their lineups and provide them to their captive audiences without charge.

The programming is optional in that prisoners are not required to watch the shows. Both prison officials and experts such as Holyoke College criminology and sociology professor Richard Moran note that numerous studies and practical experience indicate a correlation between watching TV and violent behavior. Violent programs engender violence, while inspirational programs have a positive effect.

"Offenders need a fundamental shift in how they perceive the world, transitioning from a vengeful mindset to one of grace, forgiveness and self control," Prof. Moran observed.

CCA is already installing Second Chance equipment in the company's 65 facilities, which are located in 19 states and the District of Columbia and house over 75,000 prisoners. Budget-challenged state officials have praised the savings from TBN's free equipment and in-house TV shows.

"At a time when budgetary limitations allow for fewer program opportunities

for inmates, the availability of 24 hour messages of hope is an encouragement to all who work in corrections," said Alex Taylor of the Florida Department of Corrections.

No one seems to question whether allowing an evangelical Christian group to donate equipment that is exclusively used to receive evangelical Christian programming in facilities that house state prisoners in any way implicates the Establishment Clause of the First Amendment, which has been interpreted to require a separation of church and state. It is unlikely other religious faiths or secular groups would be afforded similar privileges.

Then again, the TBN broadcasts may be less intrusive than institutional faith-based programs (e.g., "God pods"), which have received court approval provided no government funds are used in the religious component of such programs. Also, many prisoners are appreciative of the religious programming. "We receive countless letters from prisoners thanking TBN for TV that has changed their lives," noted Second Chance program coordinator Amy Fihn.

Sources: *Associated Press*, *The Tennessean*, *Christian Newswire*, *Mississippi Link*, www.tbnsecondchance.org

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Colorado: When Suing Private Prison under Common Law Tort, Exhaustion of Administrative Remedies Not Required

The Colorado Court of Appeals held that prisoners in a private for-profit prison could sue the prison company, in a common law tort action, for nefarious acts of its employees during a 2004 riot without having first exhausted administrative remedies, because the remedies they sought were not available under the prison's administrative regulations or required by state law.

Eighty-five injured prisoners sued Corrections Corp. of America (CCA), owner and operator of the Crowley County Correctional Facility in Olney Springs, Colorado under contract with the Colorado Dept. of Corrections. The prisoners filed suit under Colo. Rev. Stat. § 13-17.5-102.3(1) (2007) in 2005 and 2006 in Crowley County District Court, seeking compensatory and punitive damages. Their common law tort claims included negligence, assault and battery, outrageous conduct and civil conspiracy.

The district court dismissed the complaints for failure to exhaust administrative remedies and dismissed the punitive damages demand as premature. On appeal, the plaintiffs argued that while exhaustion would normally be required, it was unnecessary in this case because the only claims brought were common law tort claims, for which there was no administrative remedy.

State law requires prisoners bringing "a civil action based upon prison conditions under any statute or constitutional provision" to first exhaust administrative remedies. But the prisoners did not sue under any "statute or constitutional provision." Rather, they relied upon claims based on common law (i.e., law derived from court decisions rather than from statutes or constitutions).

The appellate court recognized the legislative intent apparent from "omitting" any mention of common law in the statute, citing Colorado precedent holding that it "should not construe [such] [o]missions by the General Assembly as unintentional." Importantly, the court held that the statute "does not, by its plain language, require exhaustion of administrative remedies before bringing a civil action based on prison conditions when such action consists only of claims brought under the common law."

The defendants proffered many counterarguments, all of which were re-

jected by the court. They suggested that only statutory or constitutional claims rise to the level of being worthy of court consideration – essentially dismissing the concept of common law as archaic. Next, they argued that § 24-10-106(1.5) (a), C.R.S. 2007, under a sovereign immunity umbrella, bars common law claims brought by convicted prisoners. But this argument was not raised in the trial court, and thus was not ripe on appeal. Nonetheless, the court opined that the argument was not well taken, based on precedent.

The appellate court also rejected the defendants' suggestion, which relied on a different statute that disfavored frivolous or vexatious prisoner lawsuits, that the court's proposed interpretation of § 13-17.5-102.3(1) in effect defeated the General Assembly's intent in enacting the frivolous lawsuit statute. Yet parsing that statute's history showed that it, too, was grounded in "prison conditions under any state statute or constitutional provision," which was outside common law tort actions.

As to the defendants' attempt to graft an administrative exhaustion requirement onto common law, the court declined to

adopt that approach – particularly where, as here, it would tend to insulate private prison companies from willful and wanton misconduct.

Next, the defendants tried to have the battery claims dismissed for failure to state a claim. But the appellate court noted the record, which declared that the prisoners were handcuffed with self-tightening cuffs that caused their hands to go numb; were dragged by the ankles through flooded cells contaminated with feces, blood and broken glass; and were shot with pellets while trying to leave burning units. All of this, the court held, easily stated a claim for assault and battery.

Finally, while agreeing with the lower court that the punitive damages claims were premature, the Court of Appeals reversed the dismissal and remanded for further proceedings. See: *Adams v. Corrections Corp. of America*, 187 P.3d 1190 (Colo. Ct. App. 2008). The prisoners are represented by PLN board member Bill Trine, Cheryl Trine of Trine and Metcalf, and Adele Kimmel of Public Justice. ■

Additional source: *Pueblo Chieftain*

Massachusetts Suicide Prevention Procedures Found Lacking

by David M. Reutter

An independent study of suicide prevention practices within the Massachusetts Department of Corrections (MDOC) has found serious deficiencies in the care of prisoners at risk of suicide. Since 2000, there have been 18 suicides, but 12 of those occurred during 2005-2006. With a 10,500 daily population average, that equates to a suicide rate of 26.9 deaths per 100,000 prisoners, which is almost double the national average of 14.

The study was conducted at MDOC's request by Lindsay M. Hayes of the National Center on Institutions and Alternatives. He reviewed the investigative and/or mortality reviews of the 10 most recent suicides and visited seven prisons that experienced the suicides.

In each case, Hayes found similarities. He said that 9 of 10 suicides were by hanging in special housing units. Half of

the victims were discharged from suicide watch either a few hours or weeks earlier. Six had documented mental health histories and five had previous suicide attempts.

Hayes found MDOC was lacking in what is the key to suicide prevention: staff training of guards. He noted that "[v]ery few suicides are actually prevented by mental health, medical, or other professional staff." Guards "are often the only staff available 24 hours a day; thus they form the front line of defense in suicide prevention."

MDOC procedures only require pre-service training, which averages two to four hours, and no annual in-service training. Hayes recommended eight hours of pre-service and two hours of annual training, and that the training regimen be standardized in procedures.

The study also found inadequate identification and screening of prisoners

for suicide risk. Hayes said that research of jail and prison suicides reveals a number of characteristics that are strongly related to suicide, including: "intoxication, emotional state, family history of suicide, recent significant loss, limited prior incarceration, lack of social support system, psychiatric history, and various stressors of confinement."

Hayes recommended that all prisoners returning from court be screened. A brief discharge/transfer form should be created for the sending agency to alert the receiving prison about immediate concerns with a prisoner. Also, any time a prisoner is on mental health watch, it should be documented for future reference, which was not happening during the study. Finally, the highest priority should be to create adequate "alternative housing and programming" for "seriously mentally ill inmates who have co-existing disciplinary sanctions." Currently, no alternative housing exists.

Deficiencies existed in the three levels or communication that are essential to suicide prevention: "1) between the sending institution/transporting officer and correctional staff; 2) between and among staff (including mental health and medical personnel); and 3) between staff and the suicidal inmate."

While MDOC maintains a list of prisoners on a "Mental Health Risk list" that is reviewed daily by administration officials, "there is little that currently distinguishes the management of a mentally ill inmate on or off" that list. Hayes recommended that files be regularly audited to determine prisoners on the list, and those prisoners should receive "increased attention" from mental health staff and guards.

Housing of suicidal prisoners was a serious problem. For the most part, such housing is punishment. Rather than cloth-

ing being removed commensurate with the individual level of risk, "almost *all* suicidal inmates (regardless of risk level) are stripped of their clothing and issued safety garments." Hayes said such decisions should be made by mental health rather than security staff.

The routine loss of family visits, telephone calls, recreation, showers, and attorney visits for suicidal prisoners on watch are anti-therapeutic, said Hayes. The cells also need to be suicide-proofed, rather than have grates and bunk holes that can be used as anchors to hang from. Additionally, mental health staff need to transition prisoners down from mental health watch and conduct interviews privately instead of through cell "food flaps."

Supervision procedures of suicidal prisoners also needed improvement, as

they were varied and inconsistent. When released from watch, mental health staff should continue follow-up assessments. Finally, Hayes found that medical intervention during suicide attempts suffered from systematic problems. In two cases, it took staff 10 minutes to render aid after arrival at the prisoner's cell. In those cases, staff could not find proper medical equipment. Staff should hold mock suicide training and render aid immediately.

MDOC issued a Corrective Action Plan to implement all of the recommendations in the study report. The report is available on PLN's website. 📄

Source: *Technical Assistance Report on Suicide Prevention Practices Within The Massachusetts Department of Correction*

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Bureau of Justice Report on Sexual Violence in Juvenile Prisons

by Gary Hunter

Since the Prison Rape Elimination Act was implemented in 2003 the U.S. Department of Justice (DOJ) has accumulated statistical data on sexual activity in juvenile prisons in the U.S. A report issued in July 2008, by the DOJ, compiled information in the areas of youth-on-youth sexual violence and staff-on-youth sexual misconduct and harassment.

Data was accumulated from all state operated juvenile systems and the District of Columbia. The study also covered at least one private facility in each state. According to the report, private facilities fared better than state-run prisons. Figures indicate that the number of sexual misconduct allegations was five percentage points higher for state facilities than private prisons. All but three states – Montana, New Hampshire and Wyoming – reported at least one allegation in 2005 and 2006. During that same period one in 60 youths alleged being sexually victimized.

Just over one third of the allegations involved youth-on-youth nonconsensual sex. About one fifth involved youth-on-youth abusive sexual contact. Almost one third involved Staff sexual misconduct and eleven percent involved staff sexual harassment.

The report concluded that 732 of the reported allegations were substantiated. Of that number 432 involved youth-on-youth infractions and 295 involved staff-on-youth misconduct.

The study found that incidence of sexual violence in youth prisons is significantly higher than in adult prisons. However, the reasons for this may be that state laws are more punitive when it comes to sexual conduct with minors or it could be that cases against minors are investigated more thoroughly.

Just under two-thirds (64%) of the victims in juvenile prisons are male while about one-third (36%) are female. Over half (54%) of the victims were white; one-third (33%) black; and 11% were Hispanic. About half of the victims were between 16 and 17 years old.

Substantiated incidents of sexual violence in the youth-on-youth category tended to be overwhelmingly (73%) male. In the staff-on-youth category victims were evenly split at 49% male and 51% female.

The study also recorded such details

as the most common places and times that infractions occurred. Just under one-third (32%) of the sexual abuses involved threats or force while a relatively equal amount (35%) participated voluntarily. About a third (34%) of the older victims had either been physically injured, restrained or threatened during the attack.

Only 10% of staff-on-youth sexual violence involved coercion or physical force. The largest staff-on-youth infraction was harassment (14%) followed by inappropriate touching (5%) and indecent exposure (2%). Fully two-thirds (66%) of the substantiated sexual encounters were described as “a romantic relationship.”

In the youth-on-youth category the most common perpetrators tended to be male (78%), over 15 (57%), and black (49%). Whites accounted for 40% of the remaining perpetrators with Hispanics following at 9%.

Of staff perpetrators 54% were males under thirty 63% with a racial breakdown of 44% black, 37% white and 19% Hispanic. Of female staff-on-youth sexual infractions 69% held supervisory positions.

The study showed that 12% of all the victims sustained some type of physical injury; 52% were given medical exams; 10% required a rape kit test and 65% were given counseling.

In an opening disclaimer the study states that it is in no way meant to be a ranking of best and worse juvenile pris-

ons. However, in virtually every category substantiated, reported infractions seemed to be more favorably handled at privately run facilities than state facilities. And while the study proclaims 95% accuracy in its statistical analysis *PLN* points out that anomalies do exist.

Specifically, the report indicates that Texas's Coke County Juvenile Justice Center which was run by Geo Group had no substantiated incidents of staff-on-youth sexual misconduct or harassment in 2006. The study also reports that of the 208 boys at the Coke prison no youth-on-youth sexual violence was even reported in 2005.

Yet the Geo-run Coke facility was shut down in early 2008 when inspectors discovered that the children were living in draconian conditions which included having so much feces on the floor that inspectors had to go outside and wipe off their shoes. All the while the unit was receiving glowing reports from Texas Youth Commission inspectors who were formerly employees of Geo.

Reports have also shown that Texas fails to collect much of the basic data on both its private and state-run prisons. So while the DOJ report makes a claim of 95% accuracy it should be remembered that the figure is only as accurate as the data collected. ■

Source: “Sexual Violence Reported by Juvenile Correctional Authorities, 2005-06” Bureau of Justice Report, July 2008

BOP Amends Policy On Shackling Of Pregnant Prisoners

The Bureau of Prisons (BOP) has decided to bar the shackling of pregnant federal prisoners except in extreme situations. The policy change comes just six months after the Second Chance Act of 2007 was signed into law. The Second Chance Act included a provision that requires the BOP to submit detailed annual reports to Congress on its use of restraints on pregnant prisoners.

The BOP's policy change represents a significant victory for thousands of women across the nation in federal prison. The shackling of pregnant women has long been recognized by human rights organizations as dangerous and inhumane. The

Rebecca Project for Human Rights and other organizations have been advocating for the change for years.

The BOP joins California, Illinois, and Vermont in restricting the use of restraints on pregnant prisoners. Forty-seven other states have no such laws and are not subject to the new policy. In addition, U.S. Immigration and Customs Enforcement (ICE), which frequently detains pregnant immigrants never convicted of a crime, has refused to end or restrict its practice of shackling pregnant detainees. ■

Source: ACLU

Thousands Sought Pardons or Commutations from Bush, but Few Were Fortunate

by Brandon Sample

It is not unusual to see an increase in requests for pardons in the waning days of a presidential administration. President Clinton, for example, received 1,827 petitions during his final year in office. However, with harsh mandatory minimums, tough sentencing guidelines and the abolition of parole for federal prisoners, former President Bush received over 2,300 clemency requests in fiscal year 2008, an all-time high.

Among the individuals seeking pardons were Michael Milken, the former junk bond king turned philanthropist, who was convicted of securities fraud in 1990. Other notables included Randy Cunningham, a former Congressman from California; Edwin Edwards, a former Democratic governor of Louisiana; John Walker Lindh, the so-called American Taliban; and Marion Jones, a former Olympic sprinter. Each was seeking a pardon or commutation of their prison sentence.

The influx of petitions in Bush's final days added to a substantial backlog of more than 2,000 pending petitions, most of which were from "ordinary people who committed garden-variety crimes," stated Margaret Colgate Love, a clemency lawyer.

Ms. Love, who served as the U.S. Pardon Attorney from 1990 to 1997, said the backlog was overwhelming the vetting process.

"I have cases that date from the Clinton administration," she remarked. "I have cases that I filed in the last two or three years and have not even gotten any word about the first step of the investigation being authorized. It's unbelievable."

The Department of Justice's Office of the Pardon Attorney is responsible for reviewing, investigating and making recommendations to the president regarding requests for clemency. The office is staffed with about a half-dozen people, and experienced a recent upheaval after former U.S.

Pardon Attorney Randy Adams was reassigned early last year following a scandal that involved claims of racism and retaliation. [See: *PLN*, Nov. 2008, p.31].

Two of Bush's last-minute pardons, on the eve of President Barack Obama's inauguration, included commuting the prison terms of U.S. Border Patrol agents Ignacio Ramos and Jose Compean, who had received 11- and 12-year sentences, respectively, for shooting and wounding a fleeing suspect and trying to cover-up the incident.

Another of Bush's pardons, granted to real estate developer Isaac Toussie, was withdrawn after it generated extensive criticism. Toussie, who was convicted of mail fraud and making false statements in 2001, is a defendant in a pending lawsuit alleging racism, racketeering and fraud related to his real estate dealings. His father had made substantial donations to leading Republican lawmakers.

On January 19, 2009, White House officials indicated that no more pardons would be forthcoming – meaning that Milken, Cunningham, Lindh and other notables were out of luck. Even Lewis "Scooter" Libby was passed over. Libby was widely expected to receive a pardon after taking a bullet for the Bush administration; he had been sentenced to 30 months on perjury charges related to an investigation into the leaked identity of CIA operative Valerie Plame, though Bush had previously commuted his sentence.

Bush granted 200 requests for pardons and commutations during his eight years in office, compared with 406 by former President Reagan and 457 by former President Clinton. ❏

Sources: *New York Times*; *Los Angeles Times*, *sfgate.com*, *CNN*

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Indiana Law Requiring Former Prisoners to Consent to Search and Monitoring of Their Computers Held Unconstitutional

by *Brandon Sample*

On June 24, 2008, U.S. District Court Judge David Hamilton struck down Section 8(b) of Indiana Public Law 119, which required sex offenders and violent offenders who had completed their sentences and were no longer on parole, probation or any other form of correctional supervision to “consent” to the search of their computers or other devices with Internet capabilities. The law also required the installation on the same devices, at the offender’s expense, of hardware or software to monitor their Internet use. Failure to provide such consent was punishable as a felony.

With the assistance of the ACLU of Indiana, ex-offenders John Doe and Steve Morris filed a pre-enforcement challenge to Section 8(b) against all Indiana prosecutors on behalf of a class of “all persons, current and future, who are required to register as sex or violent offenders pursuant to Indiana law and who are not currently on parole or probation or court supervision.”

Doe and Morris argued that the law violated the Fourth Amendment’s prohibition on unreasonable searches and the requirement that probable cause exists before a warrant is issued. They sought a declaratory judgment that the consent-to-search requirement under Section 8(b) was unconstitutional.

Calling Section 8(b) the “broad[est] intrusion on personal privacy and security, without a warrant, probable cause, or even reasonable suspicion, for persons not in prison or subject to parole, probation, or other court supervision,” Judge Hamilton had little difficulty in concluding the law was unconstitutional.

The right of individuals to retreat into their homes without worry of unreasonable intrusion by the government strikes at the “very core” of the protections of the Fourth Amendment, Judge Hamilton wrote. By requiring members of the plaintiff class to consent to the search of their personal computers or Internet capable devices “at any time,” the state crossed this “fundamental boundary” and dispensed with the warrant requirement.

While valid consent can waive the protections of the Fourth Amendment, such consent must be freely and volun-

tarily given and not based on duress or coercion. Section 8(b), however, was not premised on valid consent, Judge Hamilton found. If a person subject to Section 8(b) refused to “consent” to the search and monitoring of their Internet capable devices, they were subject to prosecution for a felony. Having to choose between going to jail or allowing the search was “no choice at all.”

Further, the district court rejected the state’s assertion that Section 8(b) was a “logical extension of felons’ loss of certain freedoms.” While offenders may lose certain rights as a result of their criminal convictions, the Fourth Amendment’s protections are “fundamental,” Judge Hamilton held. “A person’s status as a felon who is no longer under any form of punitive supervision therefore does not permit the government to search his home and belongings without a warrant.”

Finally, the district court dismissed the state’s argument that Section 8(b) was supported by the so-called “special needs” doctrine. The state argued that it had a “special need” to conduct suspicionless searches of ex-offenders’ computers and Internet capable devices at any time in order to protect the public. The special needs exception, however, “cannot be based on the ordinary and important law enforcement purpose of reducing crime,” Judge Hamilton wrote. To hold otherwise would allow the exception “to replace the Fourth Amendment itself.”

Accordingly, the court issued a declaratory judgment that Section 8(b) was unconstitutional as applied to offenders who have completed their sentences and are no longer under any form of parole, probation or other correctional supervision. See: *Doe v. Prosecutor, Marion County*, 566 F.Supp.2d 862 (S.D. Ind. 2008). ■

\$7.5 Million Fine Recommended in Florida Jail Phone Overcharges

by *David M. Reutter*

Florida’s Public Service Commission has recommended that TCG Public Communications, Inc. (TCG) pay \$7.5 million for the improper disconnection of jail prisoners’ telephone calls. The recommendation was made in a September 8, 2008 memorandum following an investigation into complaints made by family and friends of prisoners at the Miami-Dade Pretrial Detention Center (MDPDC).

The Commission began investigating after receiving a complaint on March 18, 2004 that alleged the phone system at MDPDC was malfunctioning, causing prisoners’ calls to disconnect prematurely. As a result, the complainant incurred \$900 in additional phone charges between May 2003 and January 2004.

TCG was a wholly owned subsidiary of AT&T Communications of the Southern States, Inc. All prisoner calls from MCPDC were “collect only,” resulting in a surcharge of \$2.25 for 30-minute local calls and \$1.75 for interstate toll calls plus an additional per-minute charge.

When a call would disconnect prematurely the prisoner would have to dial the party again, resulting in assessment of another surcharge. The disconnects were caused by a serious problem with TCG’s “third-party call detection” software, which resulted in approximately \$6.3 million in improper charges. The Commission’s investigation revealed that TCG was aware of the problem but failed to correct it, instead profiting from the unjustified surcharges for over six years.

Commission staff tested MDPDC’s prisoner telephone system on September 22, 2004. All of the test calls were improperly disconnected, with all but one resulting in a recorded voice announcement that stated “custom calling features are not allowed on this phone.” There were no custom calling features on the phone used during the test.

When AT&T was notified of the results, the company requested a retest with TCG officials. The results were similar. On November 18, 2004, AT&T informed the Commission that the premature discon-

nections resulted from “sensitivity settings so high that it was interpreting regular background noises, such as the inmate or called party breathing, as three-way call attempts.” AT&T said it regretted the customers’ experience, but it had no control over the level of the sensitivity setting.

According to AT&T, MDPDC officials were responsible for the setting. MDPDC, however, claimed it had no contractual agreement concerning the sensitivity setting for the jail’s phone system, and that AT&T had “requested to raise the sensitivity settings for security purposes” in October 2003.

When the Commission staff retested MDPDC’s prisoner phone system on July 17 and 18, 2007, a new software program had been installed and was operating properly. “It is clear that TCG was fully aware of the software’s propensity for error” prior to installing the new system, the Commission found. Therefore, it was recommended that the company pay refunds up to the maximum amount of \$6,290,450 plus interest.

The Commission also found that TCG should be assessed a penalty for “willful violation” and “refusal to comply” with Rule 25-24.515(21) of the Florida Administrative Code, which prohibits terminating prisoner calls “until after a minimum elapsed time of ten minutes.” Commission staff determined that TCG “had the ability to and did not change the three-way detection software’s sensitivity levels at its discretion.”

In addition, Florida law prohibits charging a customer for telecommunication services not provided, and requires access to communication records that are reasonably necessary for the disposition of matters within the Commission’s jurisdiction. TCG had significantly delayed producing phone call detail records.

Thus, it was recommended that TCG show cause why it should not pay \$1,000 per day for 1,266 days of its knowing and willful violations, or \$1,266,000. The refund and penalty, totaling over \$7.5 million, was to be deposited in Florida’s General Revenue Fund. Evidently, because it would be too difficult to locate each customer defrauded by the disconnected phone calls and determine the individual amount owed, it was deemed simpler to let the state keep the ill-gotten gains rather than TCG.

A final issue was which company should pay the \$7.5 million. TCG was

bought by correctional phone service provider Global Tel*Link in June 2005. The Commission said TCG must be held responsible, and Global Tel*Link and AT&T could resolve the dispute in court.

Note that the recommendations made by Commission staff are not final, and the case remains pending on the Public Service Commission’s docket. The Commission’s September 8, 2008 memorandum is available on *PLN*’s website. ■

Source: *Florida Public Service Commission, Docket No. 060614*

California: Restitution Fine Unlawful for Accessory to Murder

The California Court of Appeal (1st District) reversed a trial court’s imposition of a \$12,083 restitution fine in an accessory-to-murder conviction because the criminal act – accessory after the fact – did not cause economic loss to the victim.

Kendricks Woods disposed of a gun that used was in a 2006 murder in Richmond, California, and was subsequently convicted of being an accessory after the fact. He was fined over \$12,000, the sum paid by the Victim Compensation Fund to the family of the murder victim, even though he did not commit the murder.

On appeal, Woods claimed that such fines, by operation of Penal

Code § 1202.4 and Cal. Const., Art. I, § 28, only attached to the perpetrator who actually caused injury to the victim. Since his post-murder actions caused no such injury, he argued the fine was illegal. The appellate court agreed and reversed the lower court’s imposition of the fine. See: *People v. Woods*, 161 Cal. App. 4th 1045 (Cal. App. 1st Dist. 2008). ■

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Pennsylvania Contractor Prohibited from Using State and Federal Funds for Religious Purposes

by Bob Williams

Citizens in Bradford County, Pennsylvania filed a federal lawsuit against the County and state and federal officials after government funds allegedly were used for religious proselytizing of jail prisoners. A consent order was entered that required monitoring of the government funds and a prohibition against using such funds for religious purposes.

The Firm Foundation of America, d/b/a the Firm Foundation of Bradford County (Firm), provides vocational training for prisoners at the Bradford County Jail. The Firm receives federal, state and local government grants and other funding for this purpose, which reportedly total more than 90 percent of its income.

The Firm began receiving federal funds in 2002, which continued in 2003 through the Pennsylvania Commission on Crime and Delinquency (PCCD). The PCCD awarded the Firm funding through a Workforce Investment Act grant received from the U.S. Department of Labor under the "Faith-Based and Community Initiative." Additional funding was provided by the PCCD through the U.S. Department of Justice's Drug Control and System Improvement program, and from the County's general fund, the Temporary Assistance for Needy Families fund, and various other government programs. The majority of the funds was reportedly paid to Firm employees for wages and benefits.

The Firm identifies itself as a "prison ministry" and "faith based, non-profit organization," and requires its employees to be "believers in Christ and Christian Life" who will "share these ideals when opportunity arises." The Firm did not separate its government and private funds for secular and non-secular purposes, or attempt to provide documentation distinguishing how such funds were used.

Bradford County taxpayers Clark and Jane Moeller, Jeffrey Gonzalez, Laura Blain, Chris Schwenke and former prisoner Tim Thurston (plaintiffs) filed suit against the County, PCCD director Michael Kane and acting director Carol Lavery, U.S. Attorney General (AG) Alberto Gonzales, and the Firm (defendants). They alleged that the defendants' participation in the award or receipt of

government funds used for religious purposes violated the Establishment Clause of the U.S. Constitution and the Pennsylvania Constitution's Declaration of Rights § 3 and Article III § 29.

The plaintiffs argued that the Firm's Christian-only hiring policy was discriminatory, that the Firm forced jail prisoners to participate in religious activities to obtain vocational training (as in Thurston's case), and that a substantial amount of the "training" involved prayer and worship lectures. The plaintiffs claimed that the County, PCCD and AG had violated the Establishment Clause by failing to adequately monitor the government funds provided to the Firm. They also stated that as taxpayers they objected to and were offended by the government's funding and support of the Firm's blatant religious programming, and sought injunctive and declaratory relief as well as nominal damages, recoupment, and attorney fees and costs.

The U.S. District Court for the Middle District of Pennsylvania approved a consent agreement that dismissed with prejudice the claims against Kane, the Firm, the County and AG Gonzales, as well as the claims brought by Thurston. The agreement stipulated that no government funds would be used to support religious programs, or would be given to entities with religious employment requirements or that discriminate for religious reasons. The consent agreement provides that religious-based entities must keep their religious activities separate from publicly-funded operations and must maintain separate accounts for government funding, and that government funds be monitored for compliance. In the event the terms of the agreement are violated, the plaintiffs are entitled to receive attorney fees and costs. See: *Moeller v. Bradford County*, U.S.D.C. (MD Pa.), Case No. 05-00334; 2007 U.S. Dist. LEXIS 7965 (Feb. 5, 2007). ■

Elected Judges More Punitive Just Before Elections

by Gary Hunter

Research compiled by Gregory A. Hubner of Yale University and Sanford C. Gordon of New York University revealed that trial judges hand out more prison and jail time to defendants just before they come up for reelection.

A total of 645 trial and appellate judges in ten states with retention elections were surveyed. Observations were restricted to only the most punitive felonies. Measures were taken to control for factors that could skew the results such as age, experience of elected judges, political party affiliations and the nonrandom assignment of cases. All total 22,095 cases of discretionary sentences were studied for punishment imposed between 1990 and 1999. The legal guidelines applied to these sentences were established in 1988, 1994 and 1997.

Once the numbers were crunched results revealed that just before election time judges sentenced defendants from

12 to 16 months longer. No judge included in the study handed down more lenient sentences. Pennsylvania judges close to reelection sentenced defendants to "more than two thousand years of additional incarceration" during that 9-year period.

In spite of the tremendous power wielded by trial court judges the study showed that "voters are almost entirely uninformed about judge behavior." The Hubner-Gordon study hypothesized that because voters tend only to evaluate a judge's performance just prior to election most judges ignore constituent preferences while in office then try to portray a "tough on crime" stance just prior to the election.

This right-leaning position is exacerbated by what the study refers to as "fire alarm oversight by activist groups ready to publicize any perceived underpunishment by judges.

Reports on recidivism are usually accompanied by commentaries that refer to

a repeat offender who previously served a “seemingly” brief stay in prison. Conversely, overpunishment of wrongfully convicted prisoners is usually publicized only years after the conviction, if at all.

Fire-alarm oversight tends to only publicize a judge’s overly lenient response to specific cases rather than his or her overall performance throughout their tenure. This creates what Hubner and Gordon refer to as unidirectional convergence in a judge’s behavior causing them to be more punitive and less representative as elections near.

A prime example of the fire-alarm principle is seen in the April 2008 election of Wisconsin state Supreme Court judge Michael J. Gableman. At the time, Gableman, who is white, was challenging incumbent Supreme Court judge Louis P. Butler, who is black.

In an extremely caustic and race-baited campaign Gableman ran a TV advertisement with side-by-side photos of Butler, in his robes, and convicted child rapist Ruben Lee Mitchell. The ad said, “Butler found a loophole. Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?”

The ad was making reference to Butler’s stint as a defense lawyer, 20 years earlier, when he represented Mitchell at trial. At the time Butler convinced two appeals courts that Mitchell’s trial should be reversed for error. However, the State Supreme Court ruled that the error was harmless. Mitchell served his entire sentence and only afterwards went on to reoffend.

Gableman defeated Butler in the election and replaced him on the Supreme Court even though Butler had nothing to do with Mitchell’s release.

Some critics claim that elected judges are often more responsive to private interests than public opinion. Before he was elected to the state Supreme Court, Gableman had only been a county Judge since 2002 when he was appointed to fill a vacancy. Gov. Scott McCallum, a Republican, chose Gableman over two other candidates and Gableman contributed \$2,500 to the governor’s campaign.

The United States is one of very few countries that has elected judges. Easily 87 percent of all state court judges face elections at some point in their tenure.

“No other nation in the world [elects judges],” said former U.S. Supreme Court Justice Sandra Day O’Conner, “because

they realize you’re not going to get fair and impartial judges that way.”

Most other countries require a high degree of technical skill and experience before a judge is appointed to office. Certain judgeships in France, for example, require applicants to take a four-day written test and a 27-month training program.

“It gives you nightmares for years afterwards,” Judge Jean-Marc Baissus said of his qualification exam. Baissus sits on the Tribunal de Grand Instance. “You come out of this completely shattered.” There have been instances where only 5 percent of the applicants survived the process.

Law Professor Mitchel Lasser is author of *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Lasser succinctly explains the advantages of trained judges over

elected judges saying, “You have people who actually know what the hell they’re doing. They’ve spent years in school taking practical and theoretical courses on how to be a judge. These are professionals.”

Unfortunately, knowledge and expertise play second fiddle to partisan politics in the U.S. In 1998, state trial court judges sentenced nearly one million U.S. residents to over two million years behind bars. In 39 states these trial court judges are elected. The “near consensus among legal scholars” says in one study is that the process of electing judges is “...insidious in its potential for compromising judicial independence.” ■

Sources: *New York Times*, “Accountability and Coercion: Is Justice Blind When It Runs For Office?”

\$100,000 Settlement In Death of Diabetic California Prisoner

The California Department of Corrections and Rehabilitation (CDCR) settled for \$100,000 the wrongful death suit brought by the surviving son of a CDCR prisoner who died from undertreated diabetes after a 2½ year period.

Jeffrey Gautier was transferred in 2003 to Folsom State Prison. He had a medical history of type one diabetes, Addison’s disease and hypothyroidism. After he arrived at Folsom, he suffered multiple hypoglycemic (low blood sugar) seizures that were so severe as to bring him in and out of consciousness. His mental and emotional states deteriorated, and Folsom doctors recommended he be transferred to a medical facility to get the level of care he needed. However, this was never done. After 2½ years of such diabetic seizures, he died at Folsom in February 2006.

Gautier’s son sued in U.S. District Court alleging violations of Jeffrey’s Eighth and Fourteenth Amendment rights, as well as negligence. The parties settled in September 2008. Gautier was represented by Orin-

da attorney Richard Seltzer. See: *Estate of Jeffrey Gautier v. Hickman*, U.S.D.C. (E.D. Cal.) Case No. 07-390 GGH. ■

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Missouri Prisoner Wins \$25,000 in Police Excessive Force Case; Attorney Fees Limited to \$37,500 by PLRA

The U.S. District Court for the Eastern District of Missouri, following the Prison Litigation Reform Act (PLRA), limited the attorney fees awarded in a prisoner's 42 U.S.C. § 1983 lawsuit to 150% of the damage award. The court further limited the offset of "up to 25% of the damage award" applied to the defendants' payment of attorney fees to only 1%.

Craig Boesing suffered injuries from excessive force by police officers prior to entering state prison. After a foot chase, he claimed police then handcuffed him face down on the ground, pepper sprayed him and beat him with a baton. He sued and won a jury award of \$5,000 in compensatory damages plus \$20,000 in punitive damages. His appointed attorney, Robert Rosenthal, applied for attorney fees since his client was the prevailing party. The court followed 42 U.S.C. § 1997e(d)(2) in limiting Rosenthal's fee request to 150% of the \$25,000 damage award, or \$37,500 – less than half the requested attorney fees.

The court first reduced Rosenthal's billing rate from \$250 per hour to the PLRA limit of \$135 per hour, which decreased the fees to \$56,781. However, that still exceeded the PLRA cap, so the court further reduced the fee award to the cap of \$37,500 – which it found "reasonable" for the results achieved. Significantly, the court invoked the PLRA because Boesing was incarcerated. Had he already been released, the PLRA would not have applied and the fees would not have been capped.

The district court then addressed a punitive provision of the PLRA that requires a successful prisoner plaintiff to pay "up to 25% of the damage award" to offset attorney fees awarded against the defendants who unlawfully injured him. Varying courts have interpreted this to mean from as little as \$1 to as much as the full 25% (which in this case would have been \$6,250). The court followed precedent in *Lawrence v. Bowersox*, U.S.D.C. (E.D. Mo.), Case No. 97-cv-1135 CEJ (2002), and exercised its discretion to award only 1% (\$250) to offset the attorney fee award. See: *Boesing v. Hunter*, 2007 U.S. Dist. LEXIS 36549.

Accordingly, Rosenthal received \$37,500 in attorney fees and Boesing received \$24,750 of his damage award. The

district court's ruling was upheld by the Eighth Circuit on appeal. The court held that the PLRA applied even though the defendants were not jail or prison employees

and the suit was not related to incarceration because the suit was filed while Boesing was in prison. See: *Boesing v. Hunter*, 540 F.3d 886 (8th Cir. 2008). ■

Felony Disenfranchisement Reforms Restore Voting Rights to 760,000

by Mark Wilson

Since 1997, 19 states have eased felony disenfranchisement laws and policies, resulting in the restoration of voting rights to at least 760,000 people, according to The Sentencing Project (TSP).

TSP "is a national non-profit organization engaged in research and advocacy on criminal justice policy issues." In 1998, TSP and Human Rights Watch published *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, detailing the nation's far-reaching laws restricting voting rights for people with felony convictions.

In September 2008, TSP Analyst Ryan S. King authored a new report, entitled *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2008*. He found that since 1997, and largely in response to the voter disenfranchisement issues exposed during the 2000 Presidential election, felony disenfranchisement issues have received significant media and high-level policy-maker attention.

According to the report, "as the public has become increasingly aware of these restrictive policies, there has been a groundswell of support for change. Public opinion surveys report that 8 in 10 Americans support voting rights for persons who have completed their sentence and nearly two-thirds support voting rights for persons on probation or parole."

As a result, "since 1997, 19 states have amended felony disenfranchisement policies in an effort to reduce their restrictiveness and expand voter eligibility," TSP found. Nine states either repealed or amended lifetime disenfranchisement laws; two states expanded voting rights to persons under community supervision (probation or parole); five states eased the restoration process for persons seeking to have their voting rights restored after completing their sentence; and three states improved data and information sharing.

Overall, these reforms have restored the voting rights of at least 760,000 people, according to the report.

In Iowa, for example, before 2005, anyone convicted of an "infamous crime" suffered a lifetime voting ban. A gubernatorial pardon was the exclusive mechanism for restoring voting rights. In 2005, however, Governor Tom Vilsack issued Executive Order 42, immediately restoring voting rights to all persons who had completed their sentences. "Since the order was issued, the number of disenfranchised people has been reduced by 81%, or an estimated 100,000 people," wrote King.

Interestingly, "Texas has been incrementally reforming its felony disenfranchisement laws since 1983," the report found. The state repealed its lifetime ban in 1983. Then, "in 1997, under Governor George W. Bush, Texas eliminated the two year waiting period and adopted the policy of automatically restoring voting rights at the completion of the sentence," wrote King. This change "restored the right to vote to 317,000 individuals."

Despite these reforms, the report estimated that 5 million people would still be ineligible to vote in the 2008 Presidential election, "nearly 4 million of whom reside in the 35 states that still prohibit some combination of persons on probation, parole and/or people who have completed their sentenced from voting," observed King. In Tennessee, for example, reforms have been made to one of "the nation's most complex and confusing disenfranchisement laws." Yet, under current law, restoration of voting rights is contingent upon payment of all outstanding financial obligations, including child support, according to the report. "The American Civil Liberties Union filed suit in February 2008 to challenge the law on the basis that it is tantamount to a poll tax," in violation of the Equal Protection Clause

of the Fourteenth Amendment. We've reported on similar litigation in Washington State. Both suits have failed.

The TSP report observes that "the racial disparities in the criminal justice system translate into higher rates of disenfranchisement in communities of color, resulting in one of every eight adult black

males being ineligible to vote." This fact is starkly illustrated by 2004 disenfranchisement statistics. In Iowa, Kentucky, Nebraska and Wyoming, for example, total disenfranchisement rates were 5.39%, 5.97%, 4.77% and 5.31%, respectively, while the percentage of disenfranchised black voters in those states was 33.98%,

23.70%, 22.7% and 20.03%, respectively. Clearly, many more reforms are necessary, but the significant and important reforms described in the report cannot be dismissed. The report, and others, are available at: The Sentencing Project, 514 Tenth Street, NW, Suite 100, Washington D.C. 20004; www.sentencingproject.org. ■

Texas, New Jersey Prison Staff Prosecuted for Cell Phone Smuggling

On October 20, 2008, the entire Texas prison system was locked down and searched for cell phones and other contraband. The search resulted in the discovery of hundreds of cell phones, chargers, SIM cards, tobacco stashes and weapons. [See: *PLN*, March 2009, p.29]. While the search was in progress, the first Texas prison guard charged with cell phone smuggling was sentenced.

Former Mark Stiles Unit guard Davisha Maxine Martin, 26, pleaded guilty to providing a prisoner with a cell phone and received a four-year sentence on October 27, 2008. The Stiles Unit, located in Jefferson County, is the Texas facility where the most cell phones have been discovered in the past year. Two hundred cell phones have been found at the prison, including 60 hidden in an air compressor delivered to the facility.

Also on October 27, 2008, two New Jersey prison workers were indicted on charges related to cell phone smuggling. State prison guard Lisa Whittaker, 32, was indicted for hindering apprehension and two counts of official misconduct. The hindering apprehension charge stems from Whittaker giving investigators false information about New Jersey state prison

nurse Darlene R. Sexton, 44.

Sexton, an employee of Correctional Medical Services, was indicted on two counts of unlawful use of a cell phone in a correctional facility and four counts of official misconduct. Although the New Jersey Department of Corrections has fired prison guards for smuggling cell phones in the past, and prisoners have been indicted for possessing cell phones, these are the first prison employees indicted for phone smuggling.

The indictments alleged that Sexton smuggled cell phones to prisoners Craig Reed and Arlington King. Prison officials claim she provided several other prisoners with contraband and had an "unduly familiar relationship with King." Whittaker was similarly alleged to have had an "unduly familiar relationship" with prisoner Angelo Burgos.

Sexton's attorney noted that Sexton, who is free on \$35,000 bail and faces up to ten years in prison, maintains her innocence and was never a public official, so she cannot be charged with official misconduct. The grand jury also indicted prisoners King, Reed, Burgos, Allen Essner and Richard Siaca with possession of

a cell phone in a correctional facility.

Meanwhile, another Texas prison guard was caught smuggling cell phones, as well as marijuana and tobacco, into the Stiles Unit in February 2009. Eric J. Talmore, 24, attempted to bring the contraband into the facility in a container of rice; he was arrested and taken to the Jefferson County Jail. ■

Sources: *Beaumont Enterprise*, www.nj.com, *ABC News*, *Associated Press*, *KBMT News*

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North Carolina Audit Finds Deficiencies in State-Funded Youth Programs

by Derek S. Limburg

On July 29, 2008, North Carolina's State Auditor issued a report on the state's oversight of juvenile delinquency prevention programs. The audit focused on three areas, all related to Juvenile Crime Prevention Councils (JCPCs).

Each of the 100 counties in North Carolina has a JCPC. The councils share a \$23 million annual budget and use that money to fund and maintain local treatment and counseling programs for at-risk youth. The JCPCs are under the management of the Department of Juvenile Justice and Delinquency Prevention (DJJDP).

The first area of concern in the audit was to determine if the local JCPCs had financial or program evaluation conflicts of interest. JCPC members not only allocate funds, but also evaluate the effectiveness of the funded programs.

Some JCPC members operate programs they are responsible for funding and evaluating; although the audit found no actual abuses, the members' conflicting duties created "the potential for abuse and inequity."

According to the audit, 14 of the councils had local program employees operating as JCPC board members. In the 2006-2007 fiscal year (FY), those members accounted for 17 of the 499 programs that received JCPC funding. Six of those 17 received more than 50% of the total funds disbursed in the counties where they were located.

For example, the StillWaters counseling program received \$59,261, or 88%, of the \$67,497 in funding allocated by the Pamlico County JCPC.

The audit's second area of concern had to do with inadequate monitoring of grant-funded programs. Neither DJJDP nor JCPC had performed required monitoring visits, according to the audit.

For JCPC-funded programs, DJJDP policy requires area consultants to perform on-site visits and complete the proper paperwork after a program has been operating for one year. JCPCs are also required to establish monitoring committees that make annual visits.

The visits are to ensure adherence to program standards, state and federal

laws, and contract terms; they are also to detect any dangers to juveniles and staff. Inadequate monitoring increases the possibility that the DJJDP will not timely identify risks to juveniles served by the programs.

As part of the audit, 30 JCPC-funded programs in operation for over a year were selected at random. Monitoring documentation was then examined. Only one of the 30 programs had been properly visited and documented by DJJDP area consultants. Only seven of the 30 programs that were reviewed had been properly visited and documented by a JCPC monitoring committee.

The audit's third area of concern was a lack of training for the Client Tracking System (CTS). Program management admitted they did not have the training required to operate the computerized CTS.

For FY 2006-2007, the audit randomly selected 26 programs and compared the actual numbers of juveniles served to

the numbers reported in a state database. About 85% of the database's figures were found to be inaccurate.

The database indicated a total of 2,089 youths had participated in the reviewed programs. However, the actual number was 1,690 – an overstatement of 24%. One program had overstated the number of youth participants by 188%, indicating 95 were served when the real number was 33.

The DJJDP concurred with all of the State Auditor's recommendations for improvements, including barring program directors and managers from serving on JCPCs in the county where the programs are located. The North Carolina State Auditor's July 2008 report, titled *Oversight of Juvenile Crime Prevention Council-Funded Programs*, is available on PLN's website. ■

Additional source: www.charlotte.com

Oregon Prison Chief's Pay Raise Revoked; He Must Survive on Only \$14,500 a Month

by Brandon Sample

Crime pays well in Oregon. Just ask Oregon Department of Corrections (ODOC) Director Max Williams, who earned a whopping \$174,000 last year – \$14,500 a month – which was \$80,400 more than his boss, Governor Ted Kulongoski.

Kulongoski gave the state's top administrators very generous raises in 2007. Most realized a 22 percent pay increase, while Williams saw his salary jump 30%, moving him from among the top 20 highest-paid prison directors to third in the nation, behind only California and Texas according to a national survey.

To put the increase in perspective, California incarcerates nearly 12 times as many prisoners (170,000) as Oregon (14,300), but California's Secretary of Corrections earns just 1.3 times more (\$225,000) than Williams. Arizona confines nearly three times as many prisoners (38,000) as Oregon, but its prison director earns \$30,000 less than Williams. Washington state also confines more prisoners

(18,600) but pays its prison chief \$27,000 less than Williams. Nationally, the average salary for top state corrections administrators falls between \$100,000 and \$125,000, according to Audrey Wall, who collected data for the national survey.

It is unclear what qualifies Williams for his hefty salary, particularly in these bleak economic times. Unlike most prison directors who have years of experience, having worked themselves up through the ranks of the prison system, Williams did not. In 2003, Gov. Kulongoski – a lawyer, former legislator and lifelong fixture in Oregon politics – convinced Williams, also a lawyer, to leave the state senate to serve as ODOC's director, despite his never having worked in corrections in Oregon or anywhere else.

But then, merit does not seem to be the determining factor for Williams' substantial pay raise, as evidenced by the fact that Kulongoski also gave across-the-board raises of 13 to 16 percent to rank-and-file state employees, including

prison guards, at about the same time. Meanwhile, Oregon's non-governmental workers saw an average salary increase of just four percent in 2006-2007, and few in the private sector receive pensions and health benefits comparable to those afforded to state employees.

Naturally, agency directors declined to comment on their salaries, but Kulongoski and state officials defended the pay increases, claiming that state government must keep pace with the private sector. "Nobody wants to pay department directors more than what is appropriate," said Lonn Hoklin, spokesman for the Oregon Dept. of Administrative Services. "But you want to pay them and keep them in the job."

As average Oregon workers struggle to put food on the table and gas in their vehicles, the front page of *The Oregonian* newspaper announced "Taxpayers' Wall Street Bailout Tab: \$700 Billion," right next to another article reporting that Williams' salary would jump another 3% to \$180,000 – \$15,000 a month – by June 2009.

State worker Catherine Stearns sees nothing wrong with the increase so long as there are similar raises for frontline workers. "If this methodology is good enough for the directors, we're going to ask for that, too," she said. "We'd be crazy not to."

But both the amount and steep rate of increase of salaries for state employees are "appalling" to Oregon House Minority leader Bruce Hanna, who saw lawmakers harshly criticized just a week earlier for their own proposed pay hikes. "It slaps in the face of working Oregonians," he said. "People will be out there asking, 'What in the world are you thinking?'"

One of those people is 61-year-old Susan Antone. "I'm sorry they can't live on \$10,000 a month," she said. "What do they think, this state is made out of money?"

Apparently Gov. Kulongoski was listening. Just three days after the story ran in *The Oregonian* he rescinded the most recent director pay increases, citing "recent economic events." The governor's spokeswoman, Anna Richter Taylor, said "the governor recognizes families are tightening their belts and state government needs to as well." She estimated that repealing the director salary increases should save Oregon \$25,000 a month. Even so, the Governor did not cancel a November 1, 2008 cost-of-living raise for state workers, who will still realize their

13 to 16 percent raises.

Lawmakers applauded the revocation of the director pay increases. "I would say that it's clear evidence the governor's beginning to realize how serious the downturn has become," said Senate Mi-

nority Leader Ted Ferrioli. So for now, Williams will have to find a way to live on his existing salary of a mere \$14,500 per month. ■

Source: *The Oregonian*

Taliban Break 870 Prisoners Out of Afghan Prison

On June 13, 2008, the Taliban staged a prison break in Kandahar, Afghanistan, releasing 870 of Sarpasa Prison's 1,000 prisoners, 390 of whom were members of the Taliban. The escape started with a cell phone call from a Taliban prisoner to his local Taliban subcommander complaining of poor conditions in the prison in which up to 20 men were crammed into one tiny cell. A week later, the subcommander celled back and promised that the prisoners would soon be freed. Within a few weeks, they began an attack on the prison using a suicide tanker truck bomber to destroy the front gate while a second suicide bomber blew a hole in the prison's back wall. Dozens of motorcycle-riding Taliban fighters followed up with rocket-propelled grenades and assault rifles, storming the prison, suppressing the guards and freeing the prisoners. Seven guards and several prisoners died in the assault.

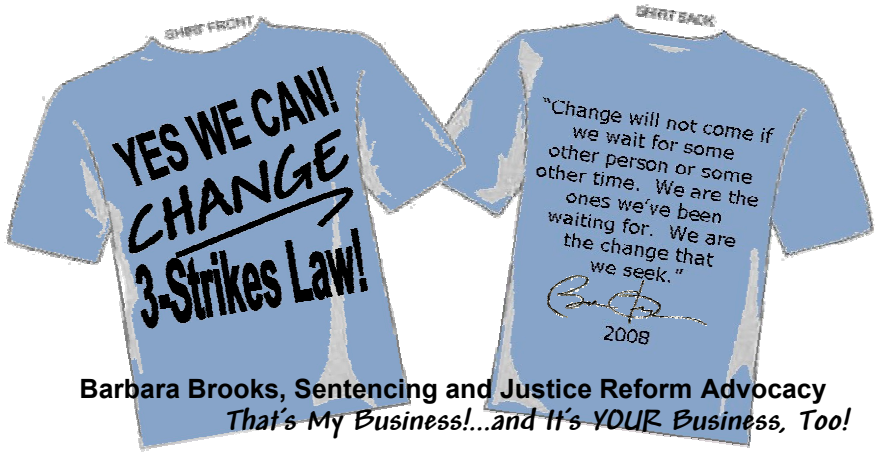
The Taliban allegedly had minibuses waiting outside the prison to transport some of the prisoners. Within a week,

NATO and Afghan forces recaptured 20 prisoners and killed 15 insurgents while searching for escaped prisoners. The Afghan government fired Kandahar police chief General Sayed Aqa Saeqeb ten days after the escape. He was accused of neglecting his duties. Reportedly, several other officials will also be fired. The chiefs of criminal investigations and the intelligence agency were suspended pending investigation by the attorney general's office.

Mohammad Qasim Hashimzai, an Afghan Justice Ministry deputy minister, admitted that the prison did not meet international standards for prisons. He blamed the substandard conditions on it not being purpose-built as a prison, but rather modified into one. ■

Sources: *www.thestar.com*, *Associated Press*, *Reuters*

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Conditions on Federal Death Row “Horrendous,” ACLU Finds

by *Brandon Sample*

The conditions of confinement on federal death row fall below minimum constitutional standards and jeopardize the lives and safety of condemned prisoners, according to an investigation by the American Civil Liberties Union (ACLU).

The results of the ACLU’s investigation were summarized in an October 15, 2008 letter sent to Harley Lappin, Director of the Federal Bureau of Prisons (BOP). The letter detailed the plight of some 50 prisoners on federal death row, known as the Special Confinement Unit (SCU) at the U.S. Penitentiary in Terre Haute, Indiana.

According to the letter, prisoners at the SCU are denied basic medical treatment, adequate mental health services and timely dental care, and are subjected to constant noise that causes sleep deprivation and psychological and physiological stress.

“Our findings should be a clear wake-up call for federal prison officials and should prompt them to do whatever is necessary to ensure that they are fulfilling their constitutional obligations to provide adequate levels of care,” said Gabriel B. Eber, who sent the 30-page letter to Lappin after investigating conditions at the SCU for one year. “The Constitution prohibits deliberate indifference to the serious medical needs of prisoners, including those sentenced to die,” wrote Eber.

One of the ACLU’s most alarming findings involved a situation where a prisoner was forced to wait three hours before being transported to a hospital after suffering a heart attack. The delay was caused by a Terre Haute policy requiring all SCU prisoners to be examined by the institution physician before being sent to an outside hospital. The prison’s doctor lives an hour and a half away from the facility. “BOP’s policy of requiring physician approval of emergency room visits when the on-call physician is located an hour and a half away speaks of a reckless disregard for the medical needs of the prisoners in its care,” Eber stated.

Other prisoners have been forced to endure significant delays in receiving medical treatment by a specialist. One prisoner, for example, waited five years before receiving eye surgery – a delay that the U.S. Court of Appeals for the Seventh Circuit found unacceptable. See:

Ortiz v. Bezy, 281 Fed. Appx. 594 (7th Cir. 2008).

The ACLU also reported problems with the management of SCU prisoners’ diabetes. One prisoner was denied a diabetic diet. Another, who suffers from Type-2 diabetes, had his blood glucose checked less than 50 times over a two-year period.

Dental care fares no better; prisoners are often forced to wait 13 months or more before seeing a dentist. Some SCU prisoners have elected to have all their teeth pulled rather than endure constant pain from untreated dental problems.

Prisoners are also subjected to “drive-by” mental health evaluations, the ACLU claimed. A psychologist stops at each cell and, through the cell door, asks the prisoner if he is doing okay. “Minute-long

cell-front consultations do not satisfy the Bureau’s legal duty to provide mental health care to prisoners,” Eber noted.

One prisoner, who was denied mental health treatment, volunteered for execution. “The fact that prisoners are asking to be executed as a means of escaping the horrendous conditions they are forced to contend with on a daily basis is a testament to just how urgently changes are needed,” said Eber. “That kind of reality is unworthy of a society that cherishes justice and fairness.”

There is no indication that the BOP has made improvements in response to the ACLU’s concerns regarding conditions and medical care for SCU prisoners. ■

Sources: *ACLU letter dated October 15, 2008; USA Today*

Imprisoned Connecticut Politician Gets Special Privileges

by *Matt Clarke*

In October 2008, the *Hartford Courant* reported that former Connecticut State Representative Jesse G. Stratton had received special privileges from Department of Corrections officials. Stratton, a 61-year-old widow with three grown children, was serving a four-month prison sentence at the York Correctional Institution. She had been arrested for her third DWI offense on September 21, 2007, and pleaded guilty and was sentenced on August 21, 2008.

According to York officials, the maximum number of names allowed to appear on a prisoner’s approved visitation list is seven. DOC regulations say it is ten. Stratton’s list had fifteen.

DOC regulations limit prisoners to three visits a week. However, seven of the people on Stratton’s list had a notation that their visits didn’t count toward the three-visit limit. The names on Stratton’s visitation list included state Environmental Protection Commissioner Gina McCarthy, State Comptroller Nancy Wyman, State Representative Cameron Staples, State Senator Eileen Daily, former State Representative Peter Smith (who is now a lobbyist), and “Pam Church,” who apparently is Pamela Churchill, a friend of

Stratton who is a professional fundraiser for nonprofits and schools.

The state officials did not have to go through the usual process to be placed on Stratton’s visitation list. Normally a prisoner submits a prospective visitor’s name for approval, then the prospective visitor submits a written request to visit the prisoner. A criminal background check is performed and several weeks later the visitor is approved. The legislators and other state officials sidestepped this procedure and were approved for “special visits.”

“As a courtesy to a number of elected officials who requested to visit inmate Stratton ... upon her incarceration at the end of August, a number of special visits were approved,” stated Andrius Banevicius, a DOC public information officer, who explained that special visits circumvent normal visitation restrictions and “are frequently provided to other offenders before the formal visiting list process can be completed.”

Banevicius refused to divulge information regarding who approved the visits, how frequently such visits are granted, and whether other prisoners had received such special visits. He did say the DOC believed “that all the rules and regulations were

adhered to.” However, DOC regulations indicate “special visits” are for potential visitors “awaiting approval or under unusual circumstances” or who have “traveled from out of state for a one (1) time visit,” or who “may assist the inmate in release planning or provide counseling.”

The lawmakers said they visited Stratton as friends and not for any other purpose. Wyman and McCarthy stated no one ever told them about an application process. Staples said he thought anyone could visit if they presented valid identification to prison officials.

Eight of Wyman’s visits were during daytime working hours instead of evening visitation hours. She used a \$63,000-per-year aide as a driver when visiting Stratton at the York facility, and did not list the mileage as personal miles subject to state income tax on her monthly reports. She is seeking legal advice on the mileage issue.

Shortly after arriving at York, Stratton was enrolled in the Marilyn Baker residential treatment unit for substance abusers, a highly-esteemed six-month program with a lengthy waiting list, even though she was only serving a four-month sentence. Banevicius declined to say whether Stratton had been given special consideration in her

admission to the program.

Due to Banevicius’ reticence, the governor’s top lawyer got involved. “Our chief legal counsel, Anna Ficeto, has asked [DOC] Commissioner Lantz about the questions raised in [the *Courant*] article,” said Chris Cooper, a spokesman for the governor’s office.

Of course the honest answer to such questions is simple: Incarcerated lawmakers are afforded special privileges due to their influence and political standing, and do not have to abide by the rules that apply to all other less-important prisoners. ■

Source: *Hartford Courant*

Cornell Defrauded of \$13 Million in Prison Construction Scam

On August 26, 2008, indictments were filed against three men accused of defrauding private prison operator Cornell Corrections of California, Inc. out of \$13 million in a prison construction scam.

A federal grand jury handed down indictments that included 20 counts of wire fraud and one count of conspiracy against Edgar J. Beaudreault, Jr., 60, of Alpharetta, Georgia; Howard A. Sperling, 44, of San Diego, California; and Robert B. Surles, 62, of Canon City, Colorado. The indictments allege the men contracted with Cornell in June 2003 to build a private prison in Canon City. Cornell placed \$13 million in an escrow account to be held until construction was complete.

In August 2003 the trio convinced Cornell to transfer the funds to an Atlanta account, which they claimed was a bank escrow account but was actually controlled by Beaudreault. They then moved the money to their own accounts and withdrew it. Some of the cash was spent at casinos, and one of the defendants bought a \$60,000 Mercedes Benz.

Beaudreault and Sperling entered guilty pleas on December 17, 2008 and February 2, 2009, respectively, each to one count of conspiracy. They have not yet been sentenced; the charges against Surles are still pending. ■

Sources: *Atlanta Journal Constitution*, www.bizjournals.com

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Arizona DOC Deporting Prisoners to Save Money

by Gary Hunter

The Arizona Department of Corrections (AZDOC) has transferred almost 1,500 illegal aliens from state lock-ups to the U.S. Immigration and Customs Enforcement agency (ICE) since 2005. AZDOC director Dora Schriro said the newly-implemented policy has saved the state \$18.6 million since its inception.

According to Julie Myers, Assistant Secretary of Homeland Security, the program only involves low-level offenders. Most of those deported are charged with non-violent crimes such as drunken driving and drug offenses.

"People who are eligible for this program do not have significant criminal histories in Mexico or any other country," she stated.

Under the current guidelines only about 4 percent of the illegal aliens incarcerated in Arizona's prisons are eligible for the Rapid Repatriation program. Guidelines stipulate that eligible prisoners must serve half of their sentence, agree not to fight extradition, and not have a violent offense. Those caught reentering the U.S. would be required to serve the remainder of their original sentence plus up to an additional 20 years in prison.

Statistics show that, on average, immigrant prisoners who have been deported under the program received about 210 days off the full sentence they would have served.

Schriro estimates that nearly 1,000 prisoners would be deported in 2008 and about 250 more in 2009. ICE has offered the Rapid Repatriation program to all 50 states; thus far only Arizona is participating, but other states appear ready to join.

Florida state Sen. Mike Bennett has already made plans to introduce a Repatriation Bill. "These people are going to be deported when they get done anyhow. Why not speed the process and get them out of here?"

Nationwide over 300,000 immigrant prisoners are eligible for deportation. Over the next several years Myers predicts that number could go as high as 455,000, which would cost taxpayers over \$2 billion annually.

U.S. Rep. David Price, however, feels that the Rapid Repatriation program is being handled irresponsibly. He said the \$200 million appropriated for the program

did "not meet the legal requirements" set forth in the original agreement.

Still, most lawmakers agree that illegal immigrant prisoners should be deported as quickly as possible, and are working to streamline the process. One problem is the lack of a shared database between state and federal agencies. ICE hopes to push the use of new technology and to educate state law enforcement officers on which prisoners are deportable.

David Leopold of the American Immigration Lawyers Association fears that such an effort may be counterproductive. "Immigration law is confusing and convoluted and not user friendly," he warned. "To turn that over to local law enforcement without training is asking for trouble."

At least one Arizona lawman also opposes the program, but for a different reason. "Why are we giving these guys breaks?" asked Maricopa County Sheriff Joe Arpaio. "Why don't they do the full time, just like a U.S. citizen? If they are worried about money, if they don't have

room, I have a tent city. I'll take as many of them as you want."

Arpaio has a reputation for abusive behavior towards prisoners; he has also targeted illegal (and sometimes legal) immigrants, conducting widely-condemned "sweeps" based on racial profiling. On February 4, 2009, raising xenophobia to a new level, Arpaio marched about 200 chained illegal immigrants from the Durango Jail in Phoenix to his infamous Tent City, where they will be housed in a segregated section enclosed by an electric fence.

AZDOC director Dora Schriro announced her resignation on January 27, 2009; she is headed to Washington to accompany former Arizona Governor Janet Napolitano, who will serve as director of the U.S. Dept. of Homeland Security. Based upon Arizona's experience with the Rapid Repatriation program, similar efforts may be implemented in other states. ■

Sources: *Arizona Republic*, *Phoenix New Times*, www.ktar.com

Suit Filed Over Minnesota Jail's Secret Recording of Privileged Phone Calls

by Matt Clarke

On October 15, 2008, a Minneapolis law firm filed a civil rights suit in federal district court alleging that attorney-client phone calls from the Becker County Jail in Detroit Lakes, Minnesota were secretly recorded and sent to law enforcement officials.

Kenneth E. Andersen was arrested for murder and incarcerated at the jail from June 2007 to June 2008. He was given an orientation handbook when he arrived at the facility that stated phone calls were recorded and monitored except for attorney-client calls, which were not recorded or monitored. No further information on procedures for securing privileged phone calls was provided to Andersen or his attorneys.

Andersen's initial attorney was based 200 miles from the jail. She and her investigator used phone calls to question Andersen about the case, inform him of the progress of their investigation and plan trial strategy. After four months of

privileged phone discussions, they began to suspect that their phone calls were being recorded and provided to law enforcement personnel.

On multiple occasions, law enforcement officials interviewed witnesses a few hours before they arrived at planned witnesses interviews that had been discussed in phone calls with Andersen. Andersen also discovered that it was an open secret among prisoners at the jail that privileged calls were recorded and the recordings given to law enforcement personnel.

Andersen's attorneys learned that the jail had an unwritten policy of only excluding phone numbers from monitored calls that were submitted by attorneys and verified by the phone service provider and jail staff. Neither attorneys nor prisoners were routinely informed of this unwritten policy. Andersen's attorneys submitted six numbers and confirmed that they had been added to the "Do Not Record" list. However, a few days later, three of

the numbers were removed from the list without notification. This was allegedly due to another unwritten jail policy that disallowed cell phone numbers.

The attorneys set up a sting, leaking false information via a phone call to Andersen. Law enforcement personnel reacted to the leaked information. The attorneys then filed motions raising violations of attorney-client privilege in Andersen's criminal trial.

At an April 14, 2008 hearing in the criminal case, jail officials admitted they automatically recorded all prisoner phone calls except calls to numbers on the approved attorney list, and that they shared the recordings with law enforcement officers. They also admitted taking the attorneys' cell phone numbers off the list without informing them, and said it was yet another unwritten policy not to allow attorney investigators' phone numbers to be included on the list.

One Bureau of Criminal Apprehension special agent admitted that he monitored all of Andersen's recorded phone calls, but said he stopped listening if they appeared to be with attorneys. He said he routinely provided recordings of the non-privileged phone calls to prosecutors. The way he determined whether a call was from an attorney was by listening to it. The judge was outraged, and ordered the jail to stop recording privileged attorney-client phone calls.

Andersen and St. Louis Park attorney William K. Bulmer II, who assisted in Andersen's defense, filed a civil rights suit in federal district court under 42 U.S.C. §

1983 and various state statutes. They alleged violations of 1st, 5th, 6th and 14th Amendment rights and state law by the secret recording of attorney-client phone calls. The lawsuit seeks class-action status and requested a temporary restraining order and preliminary injunction enjoining Becker County from recording privileged phone calls, and ordering jail officials to inform prisoners and attorneys of the unwritten policies. The suit also requests unspecified monetary damages, attorney fees and costs.

Andersen and Bulmer are represented by Minneapolis attorneys Jeffery A.

Abrahamson, Mara R. Thompson and Dan Bryden, and attorney Steven M. Sprenger of Washington, D.C. The motion for a temporary restraining order was denied; the case is scheduled to go to trial in October 2009. See: *Andersen v. Becker County*, U.S.D.C. (D. Minn.), Case No. 0:08-cv-05687.

PLN has previously reported the improper recording of attorney-client calls by jail officials in California, Florida and Texas [See: *PLN*, Aug. 2008, p.32].

Additional sources: *Sprenger & Leng* press release dated 10-15-08, *DL-online*

North Carolina DOC Pays \$750,000 for Sex Between Guard and Female Prisoner

A North Carolina Department of Corrections (NCDOC) female prisoner won a jury award of \$750,000 for three acts of sexual intercourse perpetrated by a male prison guard.

Former prisoner Tawanda Johnson, 25, reported the three incidents to NCDOC authorities because she feared she might have contracted a sexually transmitted disease. Although she tested negative, the report led to the guard being charged with and pleading guilty to three counts of felonious sexual activity under G.S. § 145-27.7 (Custodial Sexual Misconduct). Under the statute, consent is not a defense.

Johnson claimed bruising of her upper thigh and vaginal soreness from the

rough sex. The guard denied liability on grounds that he was not acting within the scope of his employment at the time. However, this lame defense flew in the face of the statute, which criminalizes sexual intercourse if it involves a person having custody of a victim when the custodial person is an agent or employee of an institution.

Johnson, who was represented by Goldsboro attorney Gene Riddle and Durham attorney Thomas Loflin III, rejected the NCDOC's \$50,000 settlement offer. A superior court jury returned verdicts of \$250,000 for each of the three admitted sex acts. The state has since appealed. See: *Johnson v. North Carolina DOC*, Raleigh Superior Court, Case No. TA-18461.

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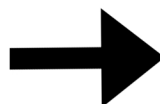
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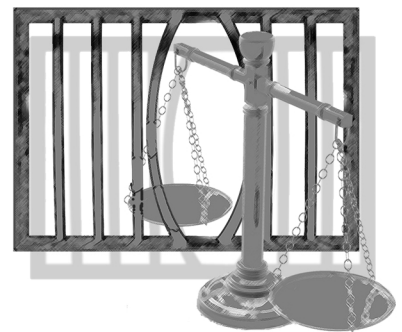
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News in Brief:

California: On March 19, 2009, a rebellion by 38 prisoners at the Kern Valley State Prison left prisoner Oscar Cruz dead and 16 injured. One prisoner was stabbed to death by other prisoners, four prisoners were shot by guards, two were stabbed and the remainder were wounded by “blunt projectiles” fired by guards. The cause of the uprising is “under investigation” by prison officials.

California: On March 5, 2009, David Paradiso, 29, a criminal defendant on trial for stabbing his girlfriend to death, was shot and killed by police when he attacked Judge Cinda Fox with a homemade shank. Paradiso was being cross-examined by a prosecutor who asked why he had killed his girlfriend, and he responded “Because she deserved to die.” This resulted in a commotion in the court and when Judge Fox ordered a recess, Paradiso attacked her. Police detective Eric Bradley shot Paradiso three times; he was pronounced dead at the scene.

China: The National People’s Congress (legislature) has pledged to conduct more frequent inspections of the nation’s prisons and jails to halt the abuse and torture of prisoners by staff and fellow prisoners. A national scandal erupted after the February 12, 2009 beating death of prisoner Li Qiaoming at a jail in Jinning County in Yunnan province. Police initially claimed that Li was “accidentally injured when he ran blindfolded into a wall while playing hide and seek with other inmates.” A subsequent investigation disclosed he had, in fact, been beaten to death by other prisoners. Several jail officials were fired and criminally charged for dereliction of duty and neglect in Li’s death. At least five other detainee deaths have contributed to public scrutiny of the jail and prison systems in China. Government officials have vowed to end the abuse of prisoners; one suggestion was to place the operation of local jails in the hands of another agency because the police forces that currently run them sometimes torture prisoners to induce confessions.

Colorado: For the past several months the Weld County jail has enforced a policy of criminally charging prisoners who fight with felony charges of rioting in a detention facility. Any time more than two prisoners fight, or are present when a fight occurs, they are charged with rioting. Weld County leads the state in such charges, with 19 cases filed since 2006. The

effects of the policy remain to be seen as fights continue to occur.

Florida: On March 4, 2009, Shaun Oppe, 29, and two other guards at the Charlotte Correctional Institution were charged with beating a prisoner and then filing a false report to cover up the attack.

Georgia: On February 23, 2009, five guards and a lieutenant at the state prison in Trion were fired, and deputy warden Dale Herndon was suspended, after prisoners Michael Tweedel and Johnny Mack Brown escaped through a hole in the fence and then took a woman hostage and stole her vehicle.

Georgia: On March 20, 2009, Curtis Browne, Jr., 41, a guard at the Fulton County jail in Atlanta, was charged with beating two prisoners, one of whom later died. The civil rights charges were filed in federal district court. He was also charged with making false statements and obstructing a federal investigation.

Guatemala: On March 6, 2009, prisoners at the juvenile Etapa II Reformatory in San Jose Pinula, Guatemala took three teachers and two guards hostage to protest the transfer of 12 prisoners to another facility and a shakedown that led to the confiscation of cell phones and electronic devices. Handicraft instructor Ginter Vidaurre, 28, was among those taken hostage; the prisoners beat him to death, disemboweled him and removed his heart. Riot police and guards then stormed the prison and rescued the remaining hostages.

Illinois: On September 11, 2008, David Nelson was sentenced to nine years in prison for manufacturing methamphetamine. When he had reported to the Shelbyville jail to serve a weekend sentence for a minor traffic offense, he tested positive for methamphetamine; he then promptly confessed to having a meth lab in his home and gave police permission to search the residence.

Massachusetts: On March 12, 2009, prisoners at the Souza Baranowski prison in Shirley rebelled and rioted throughout a cell block, throwing things and destroying a door terminal. The prisoners were protesting plans to double-cell and overcrowd the facility. Guards regained control of the cellblock using tear gas. Prison officials claimed that only seven prisoners were involved, but Steve Kenneway, president of the guard’s union, said dozens of prisoners participated in the uprising and officials were downplaying the incident.

Mexico: On March 5, 2009, a fight between rival drug gangs at the state prison in Ciudad Juarez left 20 prisoners dead and three critically injured. The fight involved members of the Aztecas and Mexicles gangs. Police and army troops regained control of the prison within four hours after storming the facility and using tear gas and batons.

New Jersey: On March 2, 2009, Lon Sainato, 52, a guard at the Morris County jail, was charged with forcing oral sex on a 30-year-old male prisoner he was supervising at a community service program at the Cedar Knolls Fire House. Sainato was charged with sexual assault and official misconduct.

New Jersey: On March 6, 2009, Hudson County family court judge Lawrence DeBello was charged by the Advisory Committee on Judicial Conduct with violating various ethics rules stemming from his torrid romance with one of his law clerks, which included discussing “personal matters” in “offensive language.” He used his judicial e-mail account to carry on the romance even after being told not to do so by the court’s assignment judge. He also tried to get his unidentified paramour a job with the public defender’s office.

New York: On March 4, 2009, Edinson Rosales, 29, a guard at the Rikers Island jail, was charged with agreeing to accept \$15,000 from an undercover DEA agent to transport 15 kilos of cocaine to Detroit and another \$5,000 to return with \$400,000 in drug proceeds.

North Carolina: On March 3, 2009, Tameka Mebane, a guard at the Bertie Correctional Facility, was charged with having a sexual relationship with an unidentified male prisoner and becoming pregnant with the prisoner’s child. Mebane denied the prisoner was the father; when asked who the father might be, she responded “God.” The relationship was discovered when guards found a cell phone on the prisoner and calls were traced to Mebane. The prisoner also had nude and semi-nude photos of Mebane in his cell, which aroused investigators’ suspicions. Mebane said she was not the only guard to have sex with a prisoner at the facility. Windsor police agreed, but said she was the first guard charged because this was the first time they had enough evidence to prosecute someone.

Ohio: On March 6, 2009, an unidentified employee of Correctional Medical

Services at the Corrections Center of Northwest Ohio in Stryker, identified as a psychiatrist, had his jail license revoked after he admitted giving money and letters to a female prisoner at the facility. Such conduct violates the jail's ethics and fraternization policies.

Oklahoma: On March 5, 2009, Tulsa County District Court Judge Jesse Harris was arraigned on indecent exposure charges. Harris has denied the charges, which allege that he exposed his penis to two women outside a hotel in Tulsa. He continues to carry out his judicial duties while the charges are pending.

Philippines: On August 26, 2008, Emilion Culang, Jr., warden of the Manila City Jail, was fired after a riot the preceding weekend left one prisoner dead and another injured. Prior reports had indicated that lax security at the jail was a problem likely to lead to riots or escapes.

Tennessee: On March 15, 2009, Tammy Graves, 42, a juvenile court detention clerk, was charged with statutory rape for sexually assaulting a 17-year-old prisoner by taking him to her home after his release from a juvenile facility, plying him with vodka, and having sex with him. Graves was charged with aggravated statutory rape and contributing to the delinquency of a minor.

Tennessee: On March 19, 2009, Daniel Whalen, 32, a prisoner at the Turney Center prison in Only, was found stabbed to death near a prison cell.

Tennessee: On March 21, 2009, George Hyatte, 37, pleaded guilty to first degree murder and was sentenced to life without parole, eliminating the possibility of a death sentence. In 2005, Hyatte escaped from the Kingston County courthouse when his wife, Jennifer, a former prison nurse, used a pistol to shoot prison guard Wayne "Cotton" Morgan and wound guard Larry "Porky" Harris. George and Jennifer fled and were captured 36 hours later. Jennifer pleaded guilty to murder charges in 2007 and was also sentenced to life without parole. A trial date has not yet been set for prison guard Randall Ride-nour, who is charged with letting George use a cell phone to call Jennifer to set up the escape. George was a prisoner at the Brushy Mountain State Penitentiary, and had been taken to the courthouse for a hearing when the escape occurred.

Texas: On August 27, 2008, Harris County jail guard Duane Peterson resigned after his brutal and unprovoked beating of jail prisoner Joseph Torres was

captured on video and submitted to the Office of the Inspector General.

Washington: Monroe city officials claim to be incensed that the Monroe

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\$1.5 Million Settlement for CA Jail Prisoner's Broken Leg

Ventura County, California officials have settled an excessive-force lawsuit brought by a prisoner whose leg was severely broken while he was being restrained by jail deputies. The \$1.5 million award, while admittedly high, avoided both the high costs of attorney fees in the civil rights suit and an even larger potential damage award for 40 years of future pain, suffering and medical costs.

Michael Andrews, 43, a 5'9" 150-pound pre-trial detainee held on suspicion of public intoxication and vandalism, struggled with three deputies at the Ventura County jail while two other deputies "supervised." Also

observing the incident was the jail's overhead video camera.

The video footage recorded the five deputies surrounding Andrews, who was handcuffed, and ordering him to get down. The deputies proceeded to kick his feet out from under him and sit on his legs. They then left him in a holding tank for three hours while he was crying for help because his leg had been fractured. Andrews' attorney, Michael Alder, said the broken bone cut off circulation in Andrews' lower leg.

Doctors found that Andrews' leg was broken below the knee and performed two operations. Nonetheless, the knee had only a 90-degree range of movement and

may eventually need to be replaced, and Andrews suffered continuous pain.

Due to his disability, Andrews could not return to his prior work as a security guard. Charles Pode, Ventura County's risk manager, said the jail deputies were "doing the best they [could] under the circumstances," referring to Andrews' inebriation. But the videotaped footage of the incident, and the \$1.5 million payout by the county, suggested they could have done far better. See: *Andrews v. County of Ventura*, U.S.D.C. (C.D. Cal.), Case No. 2:06-cv-06540-VBF-FFM. ■

Additional source: *Ventura County Star*

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

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May 2009

Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic

by Gary Hunter

Sexual assault, rape, indecency, deviance. These terms represent reprehensible behavior in our society. They also represent recurring themes in our nation's prisons – not only by prisoners, but also by guards and other staff members.

PLN's August 2006 cover story, *Guards Rape of Prisoners Rampant, No Solution in Sight*, profiled examples of sexual abuse by prison guards and other employees in 26 states. Since that time the National Prison Rape Elimination Commission has issued proposed standards to reduce sexual abuse behind bars, and the Bureau of Justice Statistics has released reports on sexual victimization in our

nation's prisons and jails. The latter reports found that over 60% of allegations of sexual abuse involved staff members rather than other prisoners.

What has not changed in the past several years is the continued rape and sexual exploitation of prisoners by prison and jail employees who are supposed to ensure their safety. All 50 states have enacted laws criminalizing sex between prisoners and prison staff; thus, employees who engage in sexual misconduct can no longer claim consent as a defense.

Due to the nature of prisons as "total institutions," it is impossible for prisoners to voluntarily consent to sexual advances by staff members who exert complete control over their lives – and in some cases over their release from prison.

Past issues of *PLN* have pushed this significant problem to the forefront. We would like to report that exposure of this issue has eased the problem. It hasn't. We would like to say our continued coverage on this subject has deterred sexual abuse by prison staff. It didn't.

Prison and jail employees are more out of control than ever. From state to state, north to south, east to west, sexual misconduct by guards and other staff members continues to weave its way through the fabric of our nation's prisons. A common thread of rape, debauchery and even sexual torture is present in detention facilities nationwide.

This time we bring you recent reports from 39 states, which constitute only a fraction of the tragic truth about rape and sexual abuse by prison and jail workers. Indeed, it would easily be possible to publish a monthly magazine consisting

of nothing but substantiated reports of the sexual assault of prisoners by their captors. It also illustrates the shortcomings of the PREA which contains no real enforcement mechanism to stop or deter sexual assaults, merely the collection of data self reported by the agencies holding the prisoners. But one result is we may now have slightly better data than we did before in a central location.

Arizona

Former prison guard Elsa Gutierrez, 33, was booked into the Yuma County Jail on October 1, 2008 after being charged with unlawful sexual conduct with a male prisoner. She had been employed at the Arizona State Prison Complex.

On November 7, 2008, Steve Edward Hiser was arrested and charged with six counts of sex crimes involving female prisoners. He was a maintenance worker at the Eddie Warrior Correctional Center when the incidents occurred; the charges include sexual battery, indecent exposure, forcible oral sodomy, sexual battery and rape by instrumentation. Hiser posted a \$15,000 bond; his case is still pending.

Arkansas

Former Arkansas DOC psychologist Anna Clark, 57, was convicted of third-degree sexual assault after being caught in the act of sexual intercourse with prisoner Dan Burns. In a taped confession Clark admitted that she had sex several times with Burns, who was diagnosed as depressed and suicidal. She was sentenced in August 2007 to three years in prison and her conviction was upheld by the state Supreme Court on Sept. 25, 2008 [See: *Clark*

Inside

California Parole Law Passes	12
Maryland Prison Problems Persist	14
Kids Jailed by Bribed Judges	20
Texas Youth Prisons Grow	24
Phoenix Jail Still Unconstitutional	28
Hawaii Trust Fund Ruling	29
Prisoners Get Out the Vote	34
Prison Television Switchover	37
Missouri Abortion Ban Illegal	40
<i>Bivens</i> Suits Barred Against CCA	46
Unicor Wins Copyright Suit	48
News in Brief	50
BOP Guards Sentenced in Beating	52

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Article submissions should be sent to - **The Editor** - at the above address. We cannot return submissions without a SASE. Check our website or send a SASE for writers guidelines.

PLN is indexed by the *Alternative Press Index*, *Criminal Justice Periodicals Index* and the *Department of Justice Index*.

Prison Sexual Abuse (cont.)

v. State, 374 Ark. 292 (Ark. 2008)].

On January 16, 2009, Pulaski County sheriff's deputy Willie Lee Owens was arrested for raping a female prisoner in a basement holding cell at the county courthouse. While Owens went to get a napkin so his victim could clean up, she wiped some of his semen on the inside of her bra and later gave it to investigators.

"The crime lab confirmed with scientific certainty that the swabs submitted by Dep. Owens and the samples taken from the bra were the same," the arrest warrant stated.

California

In May 2008, Mark Susoeff, 45, was sentenced to 120 days in jail and three years probation for having oral sex with a female prisoner. Susoeff was a guard at the Leo Chesney Community Correctional Facility (LCCC) when the incident occurred. LCCC is a minimum-security prison run by Cornell Corrections.

Former San Luis Obispo County jail guard Steven Edward Irysh was sentenced to 45 days in jail and three years probation on October 31, 2007 for performing a sex act in front of a female prisoner. He had also been charged with indecent exposure, but that charge was dropped as part of a plea agreement. On January 11, 2008, the court allowed Irysh to begin serving his sentence in late February to accommodate his work schedule. He was also allowed to serve his jail time on weekends.

In September 2007, former Imperial County jail guard James Ray Morris pleaded no contest to having sex with female prisoners. One of his victims stated that Morris threatened to restrict her recreation time if she didn't have sex, and that she contracted a sexually transmitted disease from him. Morris was sentenced on October 19, 2007 to 90 days in jail and three years probation.

Two prisoners have filed lawsuits against Imperial County claiming that jail guards, including Morris, pressured them into having sex. One guard, Corbin Dillon, allegedly coerced oral sex from a prisoner who was in an observation cell following a suicide attempt. [See: *Fernandez v. Morris*, U.S.D.C. (SD Cal.), Case No. 3:2008-cv-00601-H-CAB and *Flores-Nunez v. Dillon*, U.S.D.C. (SD Cal.), Case No. 3:08-cv-01881-W-CAB].

Colorado

Two female prisoners from Hawai'i, Christina Riley and Jacqueline Overturf, were being held at the Brush Correctional Facility, a private prison operated by GRW Corp., when they were sexually assaulted by prison guard Russell E. Rollison. They filed a lawsuit that was settled in January 2008; their attorney, Myles Breiner, described the confidential settlement as a "significant amount of money." [See: *Riley v. Rollison*, U.S.D.C. (D. Colo.), Case No. 1:06-cv-01347-WYD-BNB].

The prisoners claimed they had been coerced by Rollison to perform a sex act, and alleged he had threatened them with disciplinary write-ups if they did not cooperate. One of the women saved Rollison's semen and turned it over to DOC authorities.

Despite having evidence in the form of the guard's semen, state officials called the incident a ploy by the women to get back to their home state of Hawai'i. Since the settlement, all Hawai'i prisoners at the Brush facility have been moved to the Otter Creek Correctional Center in Kentucky – where incidents of sexual abuse have continued (see below).

Rollison resigned and was charged with two counts of having felony sexual contact with a prisoner. The charges were later reduced when he pleaded guilty to menacing with a real or simulated weapon – a non-sex offense – and received probation.

Former prison Sgt. Leshawn Terrell, employed at the Denver Women's Correctional Facility, was charged with having sexual relations with prisoner Amanda Hall. According to a subsequent lawsuit, Hall claimed that Terrell made her a "virtual sex slave" and coerced her continuously to have sex over a five-month period. Terrell sexually abused her to the point that she sustained a torn rectum that required surgery.

"She's been assaulted in ways that are so inhumane and so offensive we can't talk about them on TV," stated Hall's attorney, Mari Newman. "What I've learned after the [lawsuit] filing, I've got many e-mails about other similar cases, and this is a problem systemwide in the Colorado Department of Corrections," Newman said.

Hall's federal lawsuit settled in December 2008 for \$250,000 in damages and attorney fees; additionally, the DOC agreed to install more security cam-

Prison Sexual Abuse (cont.)

eras in the area where the sexual assaults took place. [See: *Hall v. Colorado DOC*, U.S.D.C. (D. Colo.), Case No. 1:08-cv-00999-DME-MEH].

On Oct. 28, 2008, Terrell pleaded guilty to a misdemeanor charge of unlawful sexual conduct. The judge found that he had preyed on female prisoners who were in a "unique and vulnerable position," and imposed a sentence of 60 days in jail and five years probation, plus sex offender treatment and placement on the state's sex offender registry.

A former secretary at the Federal Prison Camp in Florence (which houses the federal supermax) was sentenced to six months in prison and five years supervised release on January 29, 2009. Janine Sligar, who had worked for the Bureau of Prisons for 14 years, had a sexual relationship with prisoner Eric McClain that included oral sex and intercourse.

Connecticut

On August 22, 2008, former federal prison guard Michael Rudkin pleaded guilty to charges of having sex with a female prisoner and plotting with her to kill his wife.

According to prosecutors, Rudkin provided his incarcerated lover with a detailed layout of his home and agreed to pay \$5,000 for the murder. He also asked her to wait until he could have a life insurance policy taken out on his wife.

The plot was discovered before his wife was harmed. Rudkin was sentenced to 15 years in prison on January 15, 2009; he had been employed at FCI Dansbury.

Florida

Former prison guard William A.

Blanton was sentenced on May 22, 2008 to three years probation and eight months home detention after being convicted of engaging in a sexual act with a female prisoner.

Blanton and eight other employees at the Federal Correctional Complex in Coleman had been arrested on suspicion of smuggling and misconduct following a two-year investigation; he was the only guard charged with a sex-related offense.

On April 3, 2008, Wilfredo Vazquez pleaded guilty to sexual battery and "placing a woman in fear" during a forced sexual encounter. Vazquez, an Immigration and Customs Enforcement (ICE) employee, drove a detainee to his home and forced her to have sex with him.

The victim was being held on charges of making a false claim about her U.S. citizenship and was slated to be deported. Vazquez was responsible for transporting her from the Krome Detention Center in West Miami Dade to the Broward Transitional Center in Pompano Beach. The woman reported the incident upon her arrival at Broward, and an investigation ensued.

Vazquez accepted a plea deal to avoid being charged with aggravated sexual assault. He was sentenced in August 2008 to seven years in prison and five years supervised release.

Shaun McFadden worked for TransCor, a private transportation company, when he was arrested at a motel for having sex with two prisoners. On March 21, 2008, McFadden and a co-worker transported two female prisoners from the Bradford County Jail to another facility. After dropping off his co-worker, McFadden returned and convinced jail officials that the prisoners needed to be taken to a local hospital for a physical examination.

McFadden then drove the women to a motel where the threesome had sex. But while he was in the shower, one of the prisoners went to a pay phone and called the police. McFadden was arrested on charges of two counts of sexual misconduct.

The women said they had agreed to have sex with McFadden in exchange for alcohol and cigarettes. A TransCor official stated this was an isolated incident, and the company did not plan to change the way it operates. There have been at least 5 other incidents of rape and sexual abuse involving TransCor guards [See: *PLN*, Sept. 2006, p.1].

On November 8, 2008, prison guard

Geno Lewis Hawkins was arrested on charges of sexual battery involving a female prisoner. Hawkins was employed at the CCA-run Gadsden Correctional Facility; he was held without bond.

Georgia

Dewayne Wood, an 18-year veteran of the Warren County Sheriff's Department, was charged with sexual assault of a person in custody, violation of oath by a public official, and violation of the Georgia Controlled Substances Act.

The charges stem from accusations made by a female prisoner Wood had transported on August 10, 2006. A search of Wood's patrol vehicle yielded pornographic pictures, condoms, Viagra pills and diet pills.

Wood remained free on \$10,000 bond until he pleaded guilty in October 2008. He was sentenced to two years incarceration plus 8 years probation.

Former prison guard Tashala C. Johnson-Ashley received 180 days in jail and 5 years probation after being convicted of sexual assault against a person in custody and violation of an oath by a public officer.

By her own admission, Johnson-Ashley met with a prisoner working as a trusty at the Bull Creek Golf Course on April 5, 2008 and had sex with him in her car.

On December 31, 2008, Twiggs County deputies Richard Merideth and James Kristopher Baker were arrested after they acknowledged they both had sex with jail prisoner Jennifer Lyles. Lyles reported them after one of the deputies failed to bring her some cigarettes.

Hawai'i

In October 2008, Markell Milsap pleaded guilty to sexually assaulting a female prisoner at the Federal Detention Center in Hawai'i. Milsap worked as an electrician at the prison; he reportedly pushed the woman against a wall, pulled down her pants and had sex with her.

The prisoner, identified only as Jane Doe, filed a lawsuit against Milsap and the federal government, which is pending. [See: *Doe v. United States*, U.S.D.C. (D. Hawaii), Case No. 1:08-cv-00517-SOM-BMK].

Milsap received a 10-month prison sentence on March 10, 2009, and the federal judge over his case described the sexual encounter, even if consensual, as "horribly wrong." Milsap will be required

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to register as a sex offender; his victim refused to testify against him.

Idaho

Tim Gilligan, a guard at a medium security men's facility in Boise, was arrested on March 19, 2009 on a felony charge of having sexual contact with a female prisoner. While female prisoners are allowed to work at the men's facility in administrative and cleaning positions, they do not have contact with male prisoners – presumably because they might be sexually assaulted. Apparently the same holds true for prison staff.

Illinois

In August 2007, former Jefferson County Justice Center guard Gary Lynch was arrested on charges of sexual assault and custodial misconduct. He was accused of forcing a female prisoner to have sexual intercourse and oral sex with him.

Lynch pleaded guilty to one charge of official misconduct in June 2008 in exchange for a sentence of 30 months probation and \$1,500 in costs. He was also required to serve 90 days in jail and pay incarceration fees. Under the agreement, Lynch will spend the first 45 days of his probated sentence in jail and the last 45 days in jail. However, the last 45 days will be suspended if he stays out of trouble – which presumably means if he doesn't sexually assault anyone else.

A Dwight Correctional Center prisoner referred to by the *Chicago Tribune* as Jane Doe was repeatedly forced to have sex with prison guards even though she had diminished lung capacity and was hooked up to an oxygen machine.

Doe filed a lawsuit on March 3, 2008, alleging that guards would come to her cell in the middle of the night and force her to have sex in the guards' bathroom. Doe, who is afflicted with obstructive pulmonary lung disease, became pregnant from the rapes. She was an ex-beauty pageant winner, and apparently attractive enough that the guards did not care that she had to tote her oxygen tank with her to the bathroom where they would rape her.

"You can't fight them because they grip you from behind the neck," she said. "You don't know if they're going to kill you."

Doe tried to report the attacks on numerous occasions. But instead of help, a prison administrator threatened to have a year added to her sentence. She was placed in segregation and her letters to her

attorney and the media were intercepted or blocked. She was sexually assaulted 29 times, both before and after she was put in segregation.

In January 2007, after she was released, Doe gave birth to a baby boy. Her lawsuit names the warden, assistant warden, two lieutenants and eight prison guards who allegedly participated in a "rape squad." [See: *Doe v. Denning*, U.S.D.C. (ND. Ill.), Case No. 1:08-cv-01265].

Joseph R. Cabell, a guard with the Peoria County Sheriff's Dept., was arrested on February 3, 2009 on charges of official misconduct and custodial sexual misconduct. Cabell was assigned to monitor a suicidal female prisoner who had been taken to a hospital; instead, he offered to help her make bail if she would give him oral sex. Although she performed the sex act, Cabell was unsuccessful in obtaining her release. The prisoner then reported him.

Indiana

John Kelly, a civilian employee of the Bartholomew County Sheriff's Department, was fired and arrested in August 2008 after it was learned he had an affair with a female prisoner. The charges against Kelly include sexual misconduct and official misconduct.

In January 2009, a manager at the Marion County Juvenile Detention Center was charged with felony counts of sexual misconduct and child seduction. Michael A. Jackson is accused of forcing a 16-year-old prisoner to perform oral sex on him; the incident occurred on Christmas Eve of last year.

Iowa

On January 18, 2008, former Dallas County jail administrator Deke Gliem was sentenced to eight years in prison for having sex with a prisoner, touching and kissing other prisoners, and watching them shower. He reportedly gave the prisoners telephone cards in exchange for sexual favors. Gliem's misconduct was discovered during an investigation

into \$6,000 in missing telephone cards and \$2,300 in missing cash at the jail.

Kansas

Eric A. Taylor was fired from his job as a guard at the Saline County Jail on July 14, 2008, and arrested on charges of inappropriately touching three female prisoners. He posted bond immediately. Taylor was found guilty on March 12, 2009 of three felony counts of unlawful sexual relations, and will be sentenced in late April.

Jennifer Stambaugh was a case manager with the Bureau of Prisons when she had an affair with a prisoner at the federal penitentiary at Leavenworth. Stambaugh

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Prison Sexual Abuse (cont.)

lied to a federal investigator about the affair, claiming the two had never had a sexual relationship. She also denied that they had been in touch after his release from prison.

When the truth came out, Stambaugh came clean. In April 2008 she pleaded guilty to making a false statement to a Department of Justice investigator; she was sentenced on July 14, 2008 to six months house arrest, six months probation and a \$3,000 fine.

Kentucky

An unnamed guard was fired and charged with a misdemeanor for forcibly demanding sex from a female prisoner at the CCA-operated Otter Creek Correctional Center, according to an October 2, 2008 news report. The woman saved evidence from the sexual assault.

The victim, a prisoner from Hawai'i, was subsequently placed in segregation for 50 days; prison officials claimed she was segregated due to an altercation with another prisoner, but that allegation was later dismissed. CCA changed its policy at the facility to require, "whenever possible," a female guard to accompany male guards in the housing areas.

Louisiana

On February 19, 2009, Gary Dewayne Midkiff, a social worker at the Louisiana State Penitentiary, was arrested on one count of aggravated rape. Midkiff was accused of using threats of violence to perform oral sex on a male prisoner; his victim said Midkiff threatened to make false accusations against him, which

would result in a beating by prison guards. The prisoner provided DNA evidence and investigators found that four other prisoners had accused Midkiff of sexual misconduct. Midkiff refused to provide a DNA sample for comparison purposes.

Maine

Glen Works was indicted in July 2008, accused of failure to report a sexual assault by another guard. He was employed at the Maine Correctional Center (MCC). Works resigned his position a week before the charges were filed; he subsequently pleaded guilty to a misdemeanor charge and was fined.

Bradford Howard was the MCC guard that Works covered for; he was also indicted in July 2008, on charges involving sex with two prisoners. Howard, a military veteran, was later sentenced to three years with all but four months suspended.

Massachusetts

Former prison guard Stanford Norman, 35, was sentenced on January 3, 2008 to two to three years for having sex with a female prisoner. Norman had sex with the woman while he was employed at the Hampden County Correctional Center.

Another former Hampden County guard, Brian Murphy, received two years probation; he was charged with luring the prisoner to the facility's medical unit so Norman could have sex with her.

Michigan

On August 21, 2008, former Livingston County Deputy Sheriff Randy Boos pleaded guilty to three counts of second-degree criminal sexual conduct. Boos was accused of "touching the breasts

and genital areas" of three prisoners while transporting them from the county jail; he will serve between 43 months and 15 years in prison.

PLN has previously reported on the systemic sexual abuse of female prisoners by guards in the Michigan DOC, and the resultant multi-million dollar verdicts in lawsuits brought by the victimized prisoners. [See: *PLN*, Jan. 2006, p.12; Oct. 2008, p.42].

Mississippi

On January 25, 2008, U.S. Marshals arrested former Mississippi prison guard Jennifer Danielle Readus, who had fled to Texas after she was charged with having sex with a prisoner. Readus was employed at the Central Mississippi Corr. Facility when she allegedly had a sexual relationship with prisoner Zachariah Combs.

Montana

Four female employees of the Montana State Prison were placed on paid suspension in September 2008 after they were accused of having sex with prisoners. All four later resigned, and a fifth male employee was placed under investigation. The County Attorney determined there was insufficient evidence to warrant criminal charges.

According to prisoner Michael Murphy, one of the prison employees – a mental health worker – had sex with him over 30 times. The Montana DOC took the *Associated Press* to court after the AP requested records related to the sexual misconduct investigation; state officials said they needed a judge to weigh privacy interests versus the public's right to know.

"Corrections officers and officials whose work involves interacting with inmates at the Montana State Prison hold positions of high public trust involving the safety and well-being of the public, and therefore have a reduced expectation of privacy when accused of wrongdoing involving their interaction with inmates," stated David K.W. Wilson, Jr., who represents the *Associated Press*. The public records suit is still pending. [See: *Montana DOC v. Associated Press*, 1st Judicial District Court (MT), Cause No. CDV-2008-1091].

Nebraska

Former prison guards Becky Willison and Keri Ann Brandt were charged with delivering contraband into a correctional

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facility, felony criminal conspiracy-escape, and giving false information to a law enforcement officer after it was discovered they had sneaked saw blades into the North Central Correctional and Rehabilitation Center. Willison was also charged with felony sexual assault and tampering with physical evidence.

Officials believe the two women were part of a foiled escape attempt hatched after Willison began having a sexual relationship with one of the three prisoners involved.

Willison pleaded guilty and was sentenced on Feb. 19, 2008 to five years in prison on state charges. In June 2008 she received a consecutive four-year sentence on related federal charges; Brandt received the same state and federal sentences as part of a plea bargain.

Former jail guard Jason Keller avoided trial on March 3, 2008 when he pleaded no contest to sexually abusing a female prisoner at the Hall County Jail. As part of the plea agreement, the County Attorney's office recommended probation and opined that Keller would not have to register as a sex offender.

Gary Fowler was a teacher at the Omaha Correctional Facility when he engaged in an illegal sexual encounter with a 47-year-old prisoner. He was sentenced on October 14, 2008 to two years probation.

Nevada

Nye County Deputy Sheriff Daryal Taylor was arrested on March 26, 2008 after a female prisoner accused him of sexual assault while he was transporting her. Investigators obtained information that corroborated the victim's allegations, and determined that Taylor had used his position to obtain sex from the woman.

New Hampshire

Former prison chaplain Ralph Flodin, 70, was indicted in June 2007 on nine counts of aggravated felonious sexual assault against a 24-year-old female prisoner. Flodin had been the chaplain at the Strafford County House of Corrections for over ten years. He was convicted following a jury trial in May 2008, based largely on a videotaped confession in which he admitted to touching and kissing the victim.

He was sentenced to 2 to 10 years in prison plus a 12-month suspended sentence on Sept. 5, 2008. "Sadly, what we have here is another instance when some-

one within the jail community has used his or her authority to coerce sexual favors," said County Attorney Tom Velardi.

On November 18, 2008, Douglas Tower, 63, pleaded guilty to raping three women living at a halfway house. Tower was supervisor of the Shea Farm halfway house in Concord; he told the women he would return them to prison or deny visits from their children unless they submitted to his sexual demands.

As part of the plea bargain, charges involving 8 more victims were dropped. At the time of his guilty plea Tower was already serving 21 to 40 years for sexually assaulting two other residents at the halfway house. He received additional sentences of 10-20 years in the plea deal, which were suspended. Thirty female prisoners and one prison employee sued the state due to sexual abuse or harassment by Tower; the suits were settled in March 2008 for \$1.9 million.

New Jersey

Cape May County jail guard Thomas Koochembere was convicted on February 28, 2008 of official misconduct and criminal sexual contact for having sex with two prisoners. Evidence presented at trial included one of the prisoner's underwear, which contained Koochembere's DNA.

One of his victims testified that she did not scream for help because the guard had power over her. "That man holds my freedom in his hands," she stated. Koochembere contended that the women had in fact raped him, and that his DNA was obtained by force when they threatened him with a pair of scissors – an alleged incident he did not report at the time.

"Why did he do it?" asked Assistant Prosecutor Matthew D. Weintraub. "He did it because he could."

Koochembere received sentences of 3 and 5 years on May 8, 2008. A federal lawsuit was filed against the county by one of the prisoners, Demetria Marshall. [See: *Marshall v. Koochembere*, U.S.D.C. (D. NJ), Case No. 1:07-cv-03191].

On February 22, 2009, Morris County guard Lon Sainato allegedly pressured a male prisoner performing community service work into a sex act. Sainato was charged with sexual assault and official misconduct.

New Mexico

Cibola County Detention Center guard Deandra McNeill, 20, was fired on March 4, 2009 after jail officials deter-

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Prison Sexual Abuse (cont.)

mined she had a sexual relationship with a prisoner. She was arrested by the State Police later that month and charged with criminal sexual penetration.

In a 2008 report, the Bureau of Justice Statistics found that the Torrance County Detention Facility in Estancia, New Mexico had the highest rate of sexual victimization by staff members in a survey of over 280 jails nationwide. The facility is operated by CCA, and on Sept. 30, 2008, county and CCA officials appeared before the Review Panel on Prison Rape to discuss the jail's excessively high rate of sexual abuse.

Interestingly, CCA's general counsel, Gus Puryear, is a commissioner on the National Prison Rape Elimination Commission – but has missed half of the Commission's eight public hearings. [See: *PLN*, March 2009, p.6]. Apparently CCA places little importance on the prevention of sexual abuse in the company's for-profit facilities.

New York

In December 2006, Raymond "Mickey" Dunham, Jr., a major with the Berkshire County Sheriff's Department, was indicted on four counts of having sexual relations with a prisoner. Dunham was one of two unit managers at the Berkshire County House of Corrections.

Dunham initially insisted he was innocent, but pleaded guilty to having sex with two prisoners; he was sentenced in May 2008 to a maximum of one year and one day in prison.

Three civilian jail workers were arrested in November and December 2008, and charged with multiple counts of having sex with prisoners at the Gouverneur Correctional Facility. The employees, all women, were Laura E. Douglass, Lisa A. Vaughn and Rachel S. Patterson.

Over the course of two years Vaughn allegedly had sex with four male prisoners. She was charged with 16 counts of third-degree rape, third-degree sexual assault and official misconduct. Douglass was charged with 11 counts of third-degree rape, one count of criminal sexual act and one count of promoting prison contraband. One of the women would reportedly stand lookout while the other had sex.

Patterson was charged with three counts of third-degree criminal sexual act and official misconduct, two counts

of second-degree sexual abuse and one count of petit larceny.

North Carolina

It will be hard for former Bertie Correctional Facility guard Tameka Mebane to deny she had sex with a prisoner at the maximum-security prison, as one allegedly got her pregnant. She was criminally charged in February 2009. "According to her, she was pregnant from the inmate. That's what she told me," stated Windsor Police Sgt. Rick Morris. "I'm only human," Mebane remarked. "Everyone makes mistakes."

Ohio

A dark cell turned into a dark day at trial for former Richland County jail guard James N. Campaign. A former female prisoner testified that Campaign turned out the lights in her cell and fondled her breasts, after which she sexually gratified him.

"He unzipped his pants, and I did what I did," she stated. Campaign later gave her cigarettes.

Campaign's misconduct was exposed when another female prisoner filed a grievance against him. She testified that while she worked in the kitchen Campaign would rub up against her and ask to see her breasts. Campaign was a 13-year veteran at the jail; he was charged with three counts of sexual battery, one count of gross sexual imposition and ten counts of dereliction of duty.

He was found guilty at trial in January 2008, sentenced to a total of nine years, and classified as a Tier III sex offender.

Oklahoma

Custer County Sheriff Mike Burgess resigned on April 16, 2008 after being accused of using female prisoners as sex slaves. Burgess, who had been sheriff since 1994, was charged with 35 felony counts including rape, forcible oral sodomy and bribery by a public official.

The allegations were brought by 12 former prisoners who testified they were coerced into participating in a variety of sexual activities for the jail's employees, including wet T-shirt contests.

Several women testified that Burgess, who was a member of a drug court panel, threatened to send them to prison if they didn't have sex with him. Members of the panel decide who attends the rehab program and who is incarcerated.

Burgess was convicted of 13 felony

charges in January 2009, and received a 79-year sentence in March. The jury had recommended 94 years. A lawsuit has been filed against the county by Burgess' victims. [See: *McGowan v. Burgess*, U.S.D.C. (WD Okla.), Case No. 5:07-cv-01168-HE].

Joi Ilene Starr, a former secretary at the Joseph Harp Correctional Center, was charged with first-degree rape on June 26, 2008. Starr admitted to a prison investigator that she had sex with a male prisoner the previous year. In July 2008, Katrina Lavern Hinds (aka Katrina Black), an employee at the Lexington Assessment and Reception Center, was charged with first-degree rape for engaging in sex with a prisoner. Although both Hinds and Starr's sexual encounters were consensual, they still face up to life in prison if convicted.

In April 2009, former Jackie Brannon Correctional Center guard Stacy Marie Smith was charged with sexual battery and rape by instrumentation, involving a male prisoner. She was released on \$10,000 bond.

Oregon

Cindy L. Roberts was a contract nurse at the Cowlitz County Jail when she allegedly had sex with a 27-year-old prisoner. She was arrested on May 31, 2008 and charged with introducing contraband into a jail and attempted custodial sexual misconduct.

Paul Golden, a landscaper at the Coffee Creek Correctional Facility, a women's prison, was jailed in January 2009 on charges of sexual abuse, sexual misconduct and providing contraband to prisoners.

Pennsylvania

Sex and contraband charges resulted in guilty verdicts in a wide-ranging investigation involving staff at the Monroe County Correctional Facility. Six former guards and a kitchen worker were charged. Ex-guard Mark Gutshall pleaded guilty to institutional sexual assault on Dec. 17, 2007 and received a 3-23 month prison sentence; he has since been paroled. The other jail employees, who were charged with contraband-related offenses, received probation. [See: *PLN*, Dec. 2007, p.1].

On July 11, 2008, former prison worker Gregory A. Williams was found guilty of four counts of institutional sexual assault and one count of official oppression; he was acquitted of four other charges. Williams was a food service manager at the Cambridge Springs Correctional Institution when he engaged in

oral sex with prisoners Melissa Torres and Helen McCandless-Weiss. He was sentenced to a minimum of four months in jail on October 8, 2008.

Northumberland County Prison guard Brandon Fraim resigned on December 10, 2008 after he was caught in an amorous embrace with a female prisoner. Fraim admitted the incident happened but said, "I just got caught up with flirting with young girls. They make it sound like there was sex, but it was just kissing."

However, videos revealed that Fraim had been sneaking into the women prisoners' quarters since last spring. Prison guard Gregg Cupp also resigned; both he and Fraim were charged in January 2009 with having sexual contact with prisoners. Deputy Warden John Conrad had shrugged off initial reports of the guards' misconduct as "silly talk."

On November 13, 2008, former prison guard Michael Waters received a 23-month sentence for having sexual encounters with a female prisoner at the Delaware County Prison. He began serving his sentence, at his former workplace, later that same month.

South Carolina

On April 3, 2008, former prison guard Lori Clawson Johnson was arrested on charges of sexual misconduct with a prisoner following an investigation by the State Law Enforcement Division and the Dept. of Corrections. Johnson was employed at the Tyger River Correctional Institution when the incidents occurred.

Tennessee

Jackson County Sheriff Kenneth Bean initially refused to step down after being charged with numerous counts of sexual contact involving at least 10 female jail prisoners. A six-month inves-

tigation revealed that Bean had coerced prisoners to have sex by threatening to plant evidence against them. He was also charged with failure to secure and maintain evidence.

"[Bean] offered and gave illegal drugs and favorable treatment to inmates in exchange for sexual favors," said special prosecutor Alan Poindexter.

In September 2008, as part of a plea bargain, Sheriff Bean resigned and pleaded guilty to a charge of simple assault. Under the plea agreement he cannot run for sheriff again for six years. Additionally, three Jackson County deputies were convicted on charges involving sex with female prisoners.

On June 13, 2008, Kevin D. Vance, a former employee of the Montgomery County Sheriff's Office, was arrested and charged with having sexual contact with a female prisoner. Vance had worked at the jail for over three years.

Montgomery County jail employee Santiago Alcantara had been fired for the same offense a month earlier. Both Vance and Alcantara pleaded guilty in October 2008, and each received two years pre-trial diversion and probation.

Thomas Baccus was a guard at the Henderson County Jail when he was suspended in March 2008, then fired for having a sexual relationship with a female prisoner. He was arrested last June and charged with felony sexual contact and official misconduct. Baccus had previously been terminated from the Turney Center Industrial Prison, a

state facility, for having white supremacy propaganda on his MySpace webpage.

Former Shelby County jail guard Antonious Totten was charged with sexual contact with a female prisoner in March 2007. Totten was supervising several women on a work detail when he decided to hook up with one of them. The two reportedly had sex in a van in full view of the other prisoners, who remained silent because they did not want to lose their jobs. After one prisoner eventually came forward they all were called as witnesses.

Totten's attorney, Blake Ballin, called the witnesses against his client "a parade of liars, thieves, cheats and forgers." Nevertheless, Totten was convicted and sentenced to one year in jail. The sentence was suspended except for time he had to serve on weekends.

On November 18, 2008, Angel Harris appeared in court on felony charges of having sexual contact with a prisoner. Harris was employed at the CCA-run Silverdale Detention Center in Chattanooga at the time the incident took place.

Texas

On July 2, 2008, three female guards at the Liberty County Jail, Angelia Per-

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Prison Sexual Abuse (cont.)

ales, Techa Fowler and Tynisha Pierre, were arrested for having sex with prisoners. The women were employees of Civigenics, a private company that runs the jail; they were charged with violation of the civil rights of a person in custody, a felony.

"This type of offense is taken very seriously. Not only is it a violation of law, policies and procedures, it puts the safety of all people in the correctional facility at risk. If they are at risk, then the public is subsequently at risk," said Sheriff Greg Arthur.

Guards at the South Texas Detention Complex, an immigration detention facility, have been accused of rampant sexual abuse involving detainees. Former guards at the prison went on record with local news reporters, saying that sexual abuse of female prisoners had been going on for years. According to investigators, guards threatened detainees with deportation and lied by telling them they could help them stay in the country if they had sex with them. The facility is operated by the GEO Group (formerly Wackenhut Corrections).

One guard, Joseph Canales, was fired after he reportedly got a prisoner pregnant. But whistleblowers – several of whom were fired after reporting the sexual abuse – insisted that was only one of many pregnancies that resulted from rapist guards run amok at the detention facility. The allegations have been referred to the Office of the Inspector General (OIG).

David W. Morris was sentenced on June 2, 2008 to five years probation for having consensual sex with two female prisoners. He was caught on video sneaking into the women's cells at the Jefferson County Jail. One of the prisoners was a former sheriff's employee who had worked with Morris before she was incarcerated.

Lindsey Ann Russell lost her job as a Coryell County jail guard after she was arrested in September 2008 for improper sexual conduct with a prisoner. The following month another guard at the jail, Richard Samuel Linn, resigned after he was indicted on similar charges.

Last year's sexual abuse scandal involving the Texas Youth Commission (TYC) has claimed yet another casualty. On August 11, 2008, former TYC guard Janice Marie Simpson was sentenced to four years deferred adjudication, probation, and a \$500 fine for having sex with

an 18-year-old prisoner at the Al Price Juvenile Correctional Facility.

A number of other TYC officials, including administrators Ray E. Brookins and John Paul Hernandez, were indicted on charges of sexually abusing juvenile offenders. [See: *PLN*, Feb. 2008, p.1]. Brookins' trial has been delayed due to the arrest of his attorney, Scott M. Dolin, on undisclosed charges.

On February 27, 2009, six female guards at the Montague County Jail were indicted on charges of having sex with prisoners and bringing contraband into the facility. One of the guards, Shawna Marie Herr (aka Shawna Marie McCrary), pleaded guilty on March 23, 2009 and received five years probation and a \$4,000 fine.

The former sheriff for Montague County, Bill Keating, faces a state charge involving sexual misconduct with a prisoner; he has already pleaded guilty to a federal charge of coercing a woman into having sex with him to avoid being jailed. Keating will be sentenced on May 1, 2009.

Utah

Carbon County drug court supervisor Melanie Madill pleaded guilty to one count of custodial sexual relations and three counts of evidence tampering on March 24, 2009. Madill was a jail guard over the county's drug court when she had a sexual relationship with a prisoner and helped him and other prisoners pass drug tests. She has not yet been sentenced.

Virginia

Patrick Owen Gee was head of security at the Fluvanna Correctional Center for Women. He's now serving time himself. Gee was convicted of four counts of carnal knowledge with a prisoner following a jury trial in October 2008. He entered Alford pleas to two other charges, and was sentenced on January 8, 2009 to 10 years in prison with five years suspended, plus two years of supervised probation.

Washington

In July 2007, current and former female prisoners joined together in a lawsuit against the Washington Dept. of Corrections. They accused prison officials of failing to protect them from sexual abuse by guards at the Washington Corrections Center for Women (WCCW).

The DOC promised major reforms in response to the class action suit; some of

the changes include hiring more female guards, installing more surveillance cameras and having the State Patrol conduct an independent investigation. Seven male prison employees have been suspended.

The current and former WCCW prisoners are represented by Columbia Legal Services and the Public Interest Law Group; their lawsuit is still pending. [See: *Doe v. Clarke*, Thurston County Superior Court, Case No. 07-2-01513-0].

On November 14, 2008, Eddie Garbitt was sentenced to 1 year and 7 months after he pleaded guilty to three counts of custodial misconduct. Garbitt, a former WCCW supervisor and 15-year DOC veteran, had coerced three prisoners into having sex with him. He was originally charged with seven counts but four were dropped as part of a plea agreement.

A former mental health counselor at the King County juvenile detention center, Flo-Mari Crisostomo, began serving a six-month sentence on April 6, 2009 following her conviction on first-degree custodial sexual misconduct charges. She had sex with a 17-year-old prisoner and gave him candy and phone privileges. Her counseling license has since been revoked.

West Virginia

A guard at the Southern Regional Jail was arrested on October 21, 2008 for having sex with a prisoner. Stephen Gillespie was discovered by a supervisor, who literally caught him with his pants down; the 16-year veteran was released on \$25,000 bond.

Wisconsin

In June 2008, Becky Bathke, a former Oshkosh Correctional Institution employee, was sentenced to 18 months in prison for having sex with two male prisoners. Bathke worked in the prison's education department when she arranged sexual encounters with prisoners Ryan K. Rowe and Mark Prevatt.

On January 15, 2008, jail guard Nanette Vorath was charged with three counts of engaging in illegal behavior with prisoners. The FBI had recorded 78 phone conversations between Vorath and prisoners at the Waukesha County Jail; she reportedly had a sexual relationship with one prisoner, gave another prescription drugs and supplied a third with smuggled documents.

Vorath was an 11-year veteran. She pleaded guilty to felony misconduct charges and was sentenced to three years

probation on January 8, 2009.

Brian Bohlmann, a doctor at the Stanley Correctional Institution, was charged in August 2008 with six counts of sexual assault for inappropriately touching prisoners during medical examinations. While examining one male prisoner for back problems, Bohlmann allegedly concentrated his attention on the patient's genital and rectal area.

On September 30, 2008, Julie Alt, a sergeant at the Oak Hill Correctional Institution, was charged with second-degree sexual assault and one count of intimidation. Alt reportedly had sex with two prisoners while working at the prison.

Investigators obtained a confession from one prisoner, Darius Wade. That confession led to taped phone calls between Wade and Alt, which provided investigators with even more evidence. "I'm going to lose my job and I'm going to end up in, probably second-degree sexual assault," Alt stated in one recorded conversation.

Paul Vick, Jr., a sergeant at the Milwaukee Secure Detention Facility, was charged on January 28, 2009 with 15 felonies related to sex involving three female prisoners. The charges include four counts of delivering illegal articles to a prisoner, five counts of second-degree sexual assault of a prisoner, one count of second-degree sexual assault by use of threat of force or violence, and five counts of misconduct in public office.

Conclusion

The sheer magnitude of the number of offenses listed in this article leaves little room for commentary – literally. *PLN* is a 56-page publication and could never contain the litany of sex offenses committed by prison and jail employees. The above list generally omits cases and articles previously reported in *PLN*. A December 2007 Bureau of Justice Statistics (BJS) report estimated that 38,600 state and federal prisoners had self-reported sexual abuse or misconduct by prison employees. A second report, released in June 2008, estimated that 15,200 prisoners had self-reported sexual victimization by jail staff.

According to another BJS report from 2006, 25% of sexual abuse allegations involving staff members that were officially reported and investigated were substantiated. While this percentage may seem low, consider that it is very difficult to prove misconduct by prison staff when

the incarcerated victims are often deemed untrustworthy, and when the perpetrator's co-workers are reluctant to break the "code of silence" prevalent in most correctional settings.

A 2005 U.S. Dept. of Justice report noted that "in many cases where there was sufficient evidence to prove that a staff member had sexually abused an inmate, the OIG has found that some prosecutors are reluctant to prosecute prison staff who do not use force or overt threats to obtain sex with inmates, often because the penalty is only a misdemeanor."

Even when caught, many prison and jail workers who sexually abuse prisoners are not prosecuted. The BJS reported that in 2006, 77% of staff members involved in substantiated incidents of sexual abuse had resigned or were fired, while only 56% were referred for prosecution. Those who do face charges are often released on low bonds, plead to lesser charges that may not involve sex crimes, and receive short sentences or probation. Thus rape is perfectly acceptable as long as the victims are prisoners and the predators are government employees. In that case the norm is one of lackluster prosecution, sweetheart deals, suspended and probationary sentences.

Further, it is worth noting that few offenders are caught the first time; thus, it is safe to assume that many cases of sexual abuse by prison staff have gone undetected and unreported. According to a statement from Just Detention International (formerly Stop Prisoner Rape), "We know from speaking daily with prisoner rape survivors that the vast majority will never file a formal report."

Evidence indicates that some prison and jail employees are rapists who have risen through the ranks undetected. More and more, we are witnessing years of sexual abuse come to light after having been concealed behind the striped sleeves and silver bars of correctional staff. *PLN* will continue to expose examples of sexual abuse by prison and jail workers, but, like an iceberg, the vast majority of such incidents remain hidden from sight. ■

Sources: *Sexual Victimization in Local*

Jails Reported by Inmates (BJS 2007), Sexual Violence Reported by Correctional Authorities (BJS 2006), Sexual Victimization in State and Federal Prisons Reported by Inmates (BJS 2007), Arkansas Democrat Gazette, Associated Press, Chicago Sun Times, Chicago Tribune, Corpus Christi Caller-Times, Daily Leader, Daily American, Deseret News, El Paso Times, Greenbay Gazette, Honolulu Advertiser, KMOV-TV, Ledger-Enquirer, Commercial Appeal, Livingston Daily Press & Argus, Miami Herald, Union Leader, News Journal, North Country Gazette, Pittsburgh Tribune Review, Rocky Mountain News, San Luis Obispo Tribune, Seattle Post Intelligencer, Seattle Times, Beaumont Enterprise, Bellingham Herald, Boston Herald, Daily Item, Daily News, Daily Telegraph, Decatur County Chronicle, Grand Island Independent, Journal News, Leaf-Chronicle, Dallas Morning News, News Herald, News Tribune, Norman Transcript, Palm Beach Post, Press Enterprise, Pueblo Chieftan, Times Tribune, Times-Union, Wichita Eagle, Union Tribune, Watertown Daily Times, Waco Tribune-Herald, World-Herald, Tennessean, KENK, et al.

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From the Editor

by Paul Wright

On March 20, 2009, the National Council on Crime and Delinquency gave *Prison Profiteers: Who Makes Money from Mass Incarceration*, the third PLN anthology on mass imprisonment its respected PASS (Prevention for a Safer Society) Award. The purpose of the award is to honor the role of the media in informing the public on the root causes of crime and

methods to protect youth and citizens from involvement in crime. I would like to thank both the NCCD and all the contributors to *Prison Profiteers* for the award. The book is available from *Prison Legal News*.

On the topic of books, the latest edition of *Protecting Your Health and Safety*, published by the Southern Poverty law Center and exclusively distributed

by PLN is also now available. The book is an excellent litigation how to book aimed at helping pro se prisoners successfully litigate medical, excessive force and failure to protect claims.

This editorial will be brief because we have a lot of news to report this month. Enjoy this issue of PLN and encourage others to subscribe. ■

Billionaire-Funded California Voter Initiative Triples Lifer Parole Denial Intervals, Imposes Restrictions on Parole Violators

In the November 2008 elections, California voters narrowly passed Proposition 9 by a 53 to 47% margin. Prop. 9 was a state Initiative Act that 1) tripled the statutory intervals permitted by the Board of Parole Hearings (BPH) when denying parole to life-sentenced prisoners, and 2) countered a recent U.S. District Court ruling that guaranteed legal representation and prompt revocation hearings for parole violators.

Seductively labeled on the ballot as a "victim's rights" act, Prop. 9 was bankrolled almost entirely by billionaire Henry T. Nicholas III, whose 21-year-old sister, Marsy Leach, was murdered in 1983 by a former boyfriend. Notwithstanding that Marsy's killer died in prison years ago, Prop. 9 was in reality a posthumous blanket decree designed to punish all of California's 120,000 parolees and 30,000 life-sentenced prisoners.

But in what can only be characterized as poetic justice, Nicholas was himself recently indicted on 21 federal charges that include stock fraud, conspiracy, pimping, perjury, drugging friends' and prostitutes' cocktails, and having a warehouse of drugs. He faces up to 340 years in prison and is scheduled to go to trial in late 2009.

The Tentacles of Prop. 9 Are Legion

Proposition 9 applies to all lifers, including murderers, kidnappers, 3-strikers and habitual sex offenders, and contains a number of provisions that will lead to an increase in California's already overburdened prison population, including:

Increases lifer parole denial intervals to a presumptive 15 years, unless the prisoner proves by clear and convincing

evidence that s/he should get a shorter denial.

Increases the minimum lifer parole denial interval from one year to three years.

Permits "professional victims" (i.e., persons unrelated to the offense or victims) to be designated to attend and speak at any lifer's parole hearing.

Permits "any person harmed by the offender" to appear and speak at the offender's parole hearing.

Requires restitution to be ordered to all victims of "criminal activity," regardless of sentence or disposition (i.e., incarceration, probation, suspended sentence, release on recognizance, home detention, etc.).

When both court fines and restitution have been ordered at sentencing, restitution must now be paid first. This may leave court fines unpaid, which prevents released prisoners from leaving the state.

Permits reintroduction into a current hearing of the testimony of any victim (or representative) who appeared either in person or by letter at an earlier hearing, including the prior testimony of persons who have since died.

Extends, for all parole violators, the time period to the first probable cause hearing to 15 days, and the time period to a revocation hearing to 45 days. Attorneys will now be provided only if the violator is indigent and the BPH determines that s/he is incapable of representing himself.

Requires the BPH to report to the Governor, rather than to the CDCR.

Bars reduction of prison overcrowding through early releases, regardless of the type of crime or commitment.

Provides that each parole hearing is conducted de novo, meaning that decisions in prior hearings (including prior grants of parole that were reversed by the Governor) do not bind the current parole panel.

Provides that if the BPH or the Governor reverses a panel's grant of parole, the decision becomes a denial with the next hearing to be held between 3 and 15 years later.

Provides that notice to victims of a lifer's pending parole hearing shall be sent at least 90 days in advance. Victims/survivors to be notified include those involved in the crime resulting in a life sentence, as well as any and all other victims of non-life felony crimes for which the prisoner was convicted or previously paroled.

Cites its need to curb the "excessive parole process for murderers" as justification for applying its terms to all parole violators and life prisoners, whether they were convicted of murder or not.

Becomes effective immediately and applies to all parole board hearings held after its enactment date

Prop. 9 further includes, for the announced purpose of punishment, a state constitutional provision limiting prisoners' rights to those "required by the U.S. Constitution." While no interpretation yet exists for this language, it has been suggested to mean limiting prisoners' existing rights and privileges such as visitation, education, recreation and personal property.

Prop. 9 Challenged

As an Initiative Act, Prop. 9 amends both state statutory and constitutional provisions. This, in turn, requires amendment of existing BPH regulations, a lengthy process requiring public notice and interaction. To obtain immediate implementation

of Prop. 9, the BPH issued Administrative Directive 08/01 on December 8, 2008, which modified affected regulations by fiat pending formal amendment.

Several legal challenges to Prop. 9 have been raised. One attacks the restrictions on parole violators' hearing rights – restrictions that conflict with a prior federal court injunction. See: *Valdivia v. Schwarzenegger*, U.S.D.C. (E.D. Cal.) No. CIV. S-94-0671 LKK/GGH. [*PLN*, Jan. 2006, p.9; April 2004, p.24].

Attorneys representing the plaintiffs in the *Valdivia* class action suit filed a motion stating that Prop. 9 "purports to eliminate nearly all due process rights of parolees and directly conflicts with the protections put in place by the injunction and established constitutional law."

On December 9, 2008, U.S. District Court Judge Lawrence K. Karlton issued a temporary injunction against implementing the parole hearing-related provisions of Prop. 9. Following a hearing, Judge Karlton ruled on March 26, 2009 that the court had continuing jurisdiction to enforce the *Valdivia* injunction. He denied the state's motion to modify the injunction to conform to the parole hearing restrictions imposed by Prop. 9, citing the supremacy clause of the U.S. Constitution. See: *Valdivia v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 25777 (E.D. Cal. 2009).

In an unrelated challenge, it has been argued that Prop. 9, in its broad brush, violates the single-subject rule of the California Constitution's Initiative Act (Cal. Const. Art. II, § 8(b)). Los Angeles District Attorney Steve Cooley has

expressed concern that Prop. 9 contains many ex post facto provisions; he further objects to lay victims taking part in deciding what charges should be brought in a criminal prosecution.

Prisoners' rights attorneys have suggested that requiring a presumptive 15-year parole denial interval for lifers amounts to unconstitutional excessive punishment (e.g., doubling a 15-life prisoner's minimum term to 30 years, solely by BPH administrative action).

Prop. 9 Election Was "Bought"

Opponents had lamented the huge taxpayer costs that would ensue should Prop. 9 be enacted. If tens of thousands of lifers were denied parole for minimum three-years intervals, at an approximate cost of \$75,000 each per year (reflecting the aging lifer population), already-bankrupt California would be saddled with hundreds of millions of dollars in additional annual incarceration costs. While Prop. 9's supporters had countered that fewer parole hearings would save "millions," no one suggested firing any of the BPH Commissioners as a result of such alleged cost savings.

Funding in support of Prop. 9 came almost exclusively from Nicholas (\$5 million) and Crime Victims United (\$100,000). The latter organization is a vocal murder-victims group that receives six-figure annual cash contributions as well as office space from the politically powerful California prison guards union (CCPOA). Prop. 9 opponents raised approximately \$550,000 to fight the measure.

This vast imbalance caused the opposition to cry foul. Their concern was that Nicholas' reported \$2 billion net worth came almost entirely from his Broadcom, Inc. stock options, which allegedly had been fraudulently backdated (Broadcom recorded a \$2 billion accounting loss for this). The contention was that California voters were "bought" by extensive media advertising procured with ill-gotten money, and that the election process was therefore unlawfully tainted. Using this criteria however, it would be difficult to find a "clean" election in US history.

Henry's Law

Prop. 9 was nicknamed "Marsy's Law" by Nicholas, after his slain sister. While Marsy's tragic demise is worthy of compassion, one can only wonder how her memory is served by exhuming her good name to become the public moniker for punishing 150,000 California parolees and lifers who had nothing to do with her death.

It would seem more fitting to instead label Proposition 9 after the signature on the \$5 million check that procured its passage: "Henry's Law." ■

Sources: *Sacramento Bee*; *San Francisco Daily Journal*; *San Francisco Chronicle*; *Los Angeles Times*; *CDCR News Release dated Dec. 16, 2008*; *2008 CA Official Voter Information Guide*; *McGeorge School of Law*; *California Initiative Review (2008)*; *Prison Law Office, Information Regarding Prop. 9 (November 17, 2008)*; *CA Board of Parole Hearings Administrative Directive 08/01 (December 2008)*

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Prisoner's Death, Abusive and Incompetent Guards Give Black Eye to Maryland Prisons & Jails

by Gary Hunter

On June 27, 2008, Ronnie L. White, 19, was arrested for the death of Maryland State Police Cpl. Richard S. Findley after hitting him with a truck. Police reports claim that White "intentionally accelerated toward Corporal Findley and ran him over."

The following day White was taken to court and charged with first-degree murder. He was then placed in a solitary confinement cell at the Prince George's County jail, which would prove to be a death sentence. White was found dead in his cell on June 29; an autopsy ruled his death a homicide.

The circumstances surrounding White's murder were unclear, but guards at the jail were implicated. NAACP chapter president June White Dillard complained that the guards involved in White's death were not being disciplined. "There are nine individuals identified and all are still employed and still on duty. We feel it is imperative that they be placed on administrative leave until a complete and thorough investigation has been completed into the homicide of Ronnie White."

Clothilda Harvey, attorney for the guards' union, said the autopsy ruling was premature and that White's death could eventually be declared a suicide because a sheet was found in the vicinity of White's cell.

However, the attorney representing White's family, Bobby Henry, disagreed. "The medical examiner's office has already given the cause of death, and that is not going to change ... [White's] neck was broken, and he was strangled to death. There's nothing that can change that, nothing...."

At least two medical examiners concurred. Vincent DiMaio, retired chief medical examiner of San Antonio, Texas and Dimitri L. Contostavlos, retired medical examiner for Delaware County, Pennsylvania, noted that petechiae found on White's body – splotch marks left by burst blood vessels in the face and eyes – seldom occur in suicide by hanging and were indicative of strangulation.

Further complicating the investigation into White's death was the discovery that his solitary confinement cell was accessible to many more people than

first believed, because two doors allowed anonymous entry into his cell block.

Dillard insisted that the FBI should be leading the investigation. "There is no doubt that some actions of correctional officers or others are the direct cause of [White's] death, and that has to be immediately investigated and acted upon," she said.

Two guards, Anthony McIntosh and Ramon Davis, were eventually placed on leave after jail authorities determined they were "the focus of the investigation," according to county spokesman John Erzen. They have not been charged, and the investigation is ongoing.

Brutality is not uncommon in Maryland lockups. In April 2008, 25 guards were fired from two state correctional facilities after evidence of brutality was discovered. Seventeen guards were fired from the Roxbury Correctional Institution near Hagerstown and eight were fired at the North Branch Correctional Institution near Cumberland. [See: *PLN*, July 2008, p.38]

"These mass firings, this conduct by the state, is not justified," said Joe Lawrence, a spokesman for the American Federation of State, County and Municipal Employees, the union that represents the guards. He did not say whether the guards' brutality was justified.

In August 2008, Maryland State Police investigators presented prosecutors with a report of the guards' misdeeds that was over 9 inches thick. Regardless, prosecutors Charles P. Strong of Washington County and Michael O. Twigg of Allegany County decided to proceed with caution. "I don't have a timeline for these matters but certainly, in the best interests of all concerned, it would be appropriate to expedite this matter," said Strong.

Guards at the Roxbury prison allegedly beat seven members of the Dead Man Inc. gang on March 6, 2008, breaking one prisoner's jaw. The remaining prisoners were sent to the North Branch facility, where they were again assaulted by guards.

On March 8 and 9, 2008, another prisoner was beaten by a guard during a security check. Because that prisoner had been accused of attacking the guard, he

was assaulted by staff on the following shift, too, and had to be hospitalized.

Maryland Public Safety and Correctional Services Secretary Gary D. Maynard was urged by state lawmakers to reinstate the fired guards, but declined to do so until the investigation was complete. He said the grounds for their dismissal were "very compelling." Two of the Roxbury guards who had been fired were later reinstated after prison officials said they had evidence that cleared them of wrongdoing.

In February 2009, nine of the former Roxbury guards were each charged with one count of second-degree assault, and six former North Branch guards were charged with second-degree assault and conspiracy. All were released without bail following a hearing on March 5. Trials are scheduled for June 2009; some of the prison guards are reportedly cooperating with the DA's office. Eight fired guards will not face charges due to insufficient evidence.

Beyond brutality by prison staff, a series of escapes has also proved problematic for corrections officials. After two prisoners escaped from custody at Maryland's Laurel Regional Hospital, prison administrators imposed a policy barring non-emergency hospital treatment for state prisoners.

On April 30, 2008, Kelvin D. Poke, a prisoner at the Jessup Correctional Institution, was taken to the Laurel Hospital after he complained of chest pains. While he was being treated he managed to elude the single prison guard who was watching him, overpowered two armed guards, and carjacked a vehicle outside the hospital. After evading police for seven hours he was finally killed in a shootout at Prince George's County cemetery.

Poke's unsuccessful escape occurred mere months after prisoner Kamera Mohamed's November 2007 getaway from the same hospital. Mohamed grabbed a gun from a state trooper while making his escape.

There have been calls to construct a wing at Laurel Hospital solely for the treatment of prisoners. Other hospitals have implemented their own protocols. Howard County General Hospital al-

lows only one prisoner per floor, requires prisoners to be handcuffed and shackled, allows no more than three prisoners in the hospital at a time, does not allow prisoners access to phones or visitors, and requires a guard to be within arm's length of the prisoner at all times.

The escape of prisoner Marcus Anderson on July 22, 2008, although not as dramatic, was still a cause for concern for prison officials. Deborah Barron, a 19-year veteran of the corrections department, picked up the 6'3" 220-pound Anderson in the lobby of a pre-release unit in Jessup. Barron then transported him to the Brockbridge Correctional Facility, where another transport was supposed to take him to trial. But when she arrived at Brockbridge she learned Anderson's transport had already left. Barron reported the problem to a supervisor, who failed to advise her on how to proceed.

All the supervisor said was "Oh Lord. OK," and hung up, Barron said.

On her own initiative Barron placed Anderson in the front seat of the van, unhandcuffed, and proceeded to drive him to the courthouse. When the van stopped at a red light Anderson "leaped out" and ran away. Because Barron didn't have a radio or cell phone, she had no choice but to continue to the courthouse and report the escape.

"Did you give him bus tokens, too?" Judge Charles G. Bernstein asked her sarcastically.

In her defense, Barron stated, "...they didn't tell me to bring him back. I assumed they wanted me to take him downtown."

She was not disciplined.

The misconduct by and general ineptness of Maryland's prison and jail guards prompted an investigation by the *Washington Post*. The *Post*'s investigators found that over a dozen guards at the Prince George's County jail had been arrested on a variety of charges. No less than six jail guards were suspended in 2008 alone.

Former guard Reynardo Humphrey was incarcerated in late July after being convicted of armed robbery. In 2001, ex-guard Kenneth Paul St. Clair was convicted of second-degree child abuse. He had fractured the ribs and skull of an 11-month-old baby; the child also suffered a bite mark to his shoulder and bruises to his chest, face and forehead.

Another jail guard was charged in May 2008 with sexually assaulting his wife. The charges were later dropped after his wife refused to cooperate. Nine of the guards who had been arrested were still employed at the jail as of December 2007, one with multiple convictions for brutality against women.

In June 2008, the corrections director for Prince George's County, Alfred J. McMurray, Sr., was fired after four handguns went missing from the jail's armory. The guns have not been found. Three months earlier, three guards were suspended during an investigation into whether they had conspired to smuggle cell phones to prisoners. One of those guards was reportedly a member of the Bloods gang.

When asked about the *Post*'s findings, jail officials refused to comment on any of the guards in question, citing concerns

about the ongoing investigation into the murder of Ronnie White. "Due to the critical nature of the ongoing investigation, it is not in the public's best interest to discuss those issues until the investigation is concluded," said Public Safety Director Vernon Herron.

In December 2008, a Prince George's County grand jury investigating White's death completed its term without issuing an indictment. Maryland State Attorney Glenn F. Ivey said the case was still ongoing, and a new grand jury would hear evidence. Investigations by the FBI and Maryland State Police remain pending.

Although ten months have passed since Ronnie White's death in a segregation cell, questions remain. Jail officials, however, are apparently disinclined to provide answers. ■

Sources: *Associated Press*, *Baltimore Sun*, *Washington Post*, www.news8.net

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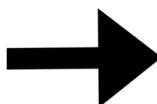
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Unlock the Box: Documenting the Struggle to Shut Down Prison Control Units, Reel Soldier Productions / MIM **(www.abolishcontrolunits.org) 2008, 2:00 hours**

Reviewed by David Preston (DP_Editor@comcast.net)

The new documentary *Unlock the Box* is the upshot of two public conferences: “Unlock the Box,” held in 2005, in San Francisco, and “Stop-Max,” held in 2008, in Philadelphia. The conferences, sponsored by the Unlock the Box Coalition and the American Friends Service Committee respectively, were organized to focus attention on the increasing trend toward use of Special Housing Units (SHUs) in the American prison system, and to put pressure on government to stop and reverse this trend. At the conferences, testimony was presented by former prisoners and their families; legal and psychological experts; and general supporters of human rights. The film presents additional historical material and testimony from current prisoners, prison officials, and others. If you can get past the low budget feel and overtly political tone of *Unlock the Box*, you are guaranteed to have your eyes opened about the nature of modern American prisons.

Like most bureaucratic inventions, the Special Housing Unit (aka Prison Control Unit, Segregation Unit) is a mild-sounding euphemism for something unpleasant. In this case, very unpleasant. The Special Housing Unit is actually nothing more than a recycled version of old-fashioned solitary confinement, which itself is just another name for torture. According to the Unlock the Box Coalition, today, out of a US prison population of 2 million, at least 90,000 prisoners are locked up in a SHU at any one time, confined to windowless boxes as small as six by nine feet for up to 23 hours a day, barred from all human activity or contact except for an hour of exercise (maybe) and the occasional taunt or threat from a guard. Sometimes the prisoner has control over the lights; sometimes not. Sometimes the prisoner is left in total and constant darkness. Other times the lights are on 24/7.

Think about that for a moment: ninety thousand human beings locked up all day with no one to talk to and nothing to do, in a space about the size of a small walk-in closet.

That’s a lot of torture.

Solitary confinement for prisoners was first advocated in the early 19th century. By the Quakers, oddly enough – a religious group known for its compassion and progressive politics. Extrapolating from their own model of silent worship services, the Quakers believed that prisoners isolated from the distractions of human contact would have a better chance to reflect on their crimes and be penitent (hence the name, penitentiary). However, when this theory was put to the test it quickly failed – prisoners subjected to forced isolation, rather than waxing meditative and remorseful, simply went insane – and there followed a return to the “congregational” system of allowing prisoners to get out of their cages and socialize with each other during the day. From the mid-1800s onward the congregational model was followed, with a few exceptions, until the late 1960s, when isolation units began making a comeback as a means for the government to exert control over an increasingly restive black underclass that had begun pushing for change both from inside and outside the system.

In trying to give historical context to the rise of the SHU, *Unlock the Box* takes some interesting, if distracting, detours, examining the rise of the Black Panther Party, for example, and discussing the Attica prison takeover, among other episodes. Much of the material in the film is not particularly well organized or presented; however, taken as a whole, the evidence is still convincing that the shift back to solitary confinement was no accident and has little to do with the ostensible goals of segregating the most dangerous prisoners or improving prisoner behavior. In fact, it has much more to do with perpetuating the racial and economic injustices of American society as a whole. Clearly, institutional racism in the prison system is as alive today as it was when George Jackson was killed in the San Quentin prison yard in 1971, and SHUs only magnify it, with the vast majority of SHU prisoners (90%+ according to the film’s sources) being blacks and Latinos. Forget what you’ve seen on those prime-

time prison documentaries, the ones where prison officials profess to be up in arms about all the race-based prison gangs; as *Unlock the Box* demonstrates, prison staff do not hesitate to use these gangs as a wedge to divide prisoners from one another and keep the hatred flowing. In some cases prison guards have even staged gladiator-style fights between rival gang members in SHU units.

SHUs are also about profit. One section of the film examines the special economic relationship between prisons and the people who make money off them, from the corporations that build and outfit them, to the nearby towns that supply them, to the prison guards who work in them. While the prisons-for-profit case is not the most compelling one *Unlock the Box* makes against the SHU system, it does explain why that system is expanding, even as the crime rate goes down. Following the prison building boom of the 1980s and 90s, prisoners are ending up in SHUs for increasingly unjustifiable reasons, including minor behavioral problems and administrative infractions such as possessing “unauthorized” literature, forming or belonging to an unauthorized group. The SHU’s stated purpose is to isolate dangerous inmates from the general prison population, so where is the logical connection between a prisoner being caught with a political pamphlet and that prisoner doing time in an isolation unit? Again, it comes down to economics. One prisoner sums it up tersely when he says: “Once they’ve built that control unit, they’re gonna find a way to use it.”

Although most SHU stays last a few weeks or less, occasionally prisoners may be confined in these holes for months, years or even decades at a time. As the testimony from prisoners and a psychiatrist interviewed for the film point up, however, even a few weeks in an isolation unit is too long. Human physiology hasn’t changed since the days of the failed Quaker experiment, so it’s no surprise that this kind of isolation still causes permanent damage to a human being. Anxiety, depression, sleeping dis-

orders, psychotic breaks: every symptom one might reasonably expect a victim of torture to manifest. Note: While it's technically illegal to confine a prisoner with an existing mental illness in an SHU, this is small comfort to the thousands of prisoners who have *become* mentally ill as a result of being put into an SHU.

On the theme of torture again, the film draws a powerful connection between torture at home and abroad. In 2005, Army reserve specialist Charles Graner was court marshaled and convicted of maltreatment and cruelty towards Iraqi prisoners at Abu Ghraib. In the late 1990s, when Graner was a guard at the maximum SCI-Greene prison in Pennsylvania – a facility where 98% of the prisoners are black and 95% of the guards are white – he was accused of using methods strikingly similar to the ones he later used at Abu Ghraib. Clearly maximum security institutions like SCI-Greene, while doing nothing to reduce recidivism, do serve as effective training academies for sadists like Graner. One wonders: If the producers of prison reality TV want to do a piece on prisons as schools for crime, why don't they do a series on Graner and the SHU-Abu Ghraib connection?

Listen to the prisoner testimony in *Unlock the Box* and you can't help but be moved to pity for anyone (even the hardest, meanest prisoner) who is subjected to the torments of an SHU. Yet, beyond the cruelty is the sheer waste and futility. Prison control units don't reform prisoners or make society safer; in fact, they do the opposite.

One ex-prisoner sums it more eloquently than all the reams of statistics: "Put a dog in a cage and then come by and kick the cage or poke that dog with a stick every day. What happens when the dog comes out that cage?"

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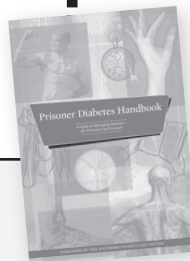
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Washington's Top Prison Doctor Resigns Over Executions; Entire Execution Team Later Quits Following *PLN* Records Request

by Mark Wilson

Washington State death row prisoner Darold Ray Stenson was scheduled for execution in December 2008. He got an unlikely stay, however, when the top physician for the Washington Department of Corrections (WDOC) resigned to avoid involvement in Stenson's death sentence.

Dr. Marc Stern supervised about 700 medical staff in WDOC facilities statewide. He was troubled that some of the people he supervised were participating in preparations for lethal injections, and voiced concerns to his supervisors. According to Stern, no solution was forthcoming.

He noted that it was unethical for doctors to take any part in executions, and that both the American Medical Association and Society of Correctional Physicians oppose physician participation in carrying out death sentences. Resigning was the only way he could remove himself from being involved with Stenson's execution, Stern stated.

WDOC Assistant Secretary Scott Blonien characterized Stern's objection as more personal than professional. "It's clear to us that Marc had a personal, ethical conflict and we respect that," said Blonien. "There's nothing we would want to do in the department to cause someone to commit a violation of their personal ethics." All WDOC employees who participate in executions do so voluntarily, Blonien added.

Given that Dr. Stern resigned because some WDOC medical employees had agreed to assist with lethal injections, *PLN* wanted to know who those employees were. Therefore, on January 28, 2009, *PLN* editor Paul Wright submitted a public records request to the WDOC seeking "all documents disclosing the identity of medical employees who have agreed to participate in executions of prisoners" from 2002 to the date of the request.

Attorneys for three Washington death row prisoners who are challenging the state's lethal injection protocol had also requested information about the execution team, but those requests related to the team's qualifications and experience, not their identities.

On March 31, 2009, all four members

of the WDOC's execution team resigned, indicating they were concerned their names might be disclosed. "The history of state murder is there's never a shortage of executioners. But if we are going to have the death penalty the public should know who its killers are," Wright stated.

PLN's public records request remains

pending; if any WDOC medical employees have agreed to participate in executions, they will be reported to the appropriate licensing boards for ethical violations. Plus *PLN* will publish their names. ■

Sources: *Associated Press*, *kuow.org*, *Seattle Weekly*

State Auditor: Texas Prisoners Face Retaliation for Airing Grievances

by Matt Clarke

In September 2008, the Texas State Auditor released a report on the investigation and resolution of complaints in the Texas Department of Criminal Justice (TDCJ). The report found that while grievance administrators filled out investigation forms properly and resolved grievances on time, many prisoners and employees had suffered retaliation for filing complaints.

By the end of FY 2007, 139,577 prisoners were incarcerated in 101 state prisons and 20 privately-operated facilities. At that time, TDCJ had 39,030 full-time equivalent employees. The audit covered FY 2007 and the first six months of FY 2008. Over that time period there were 376,421 non-medical prisoner grievances; 46,492 medical prisoner grievances; 12,364 Patient Liaison Program complaints; 34,436 Safe Prison Program prisoner protection complaints; 1,492 employee grievances; and 1,120 Equal Employment Opportunity Complaints (EEOCs).

Surveys of 1,641 prisoners at 7 prisons regarding the TDCJ grievance system revealed that many prisoners did not know about the grievance system, most believed they would be subjected to retaliation if they filed a grievance, and almost all questioned the objectivity and independence of grievance staff. Similar surveys of 673 employees at seven prisons as well as parole and TDCJ offices indicated a similar fear of retaliation, but a better understanding of the grievance procedure.

The audit report focused on whether documents were properly completed and timelines were followed. For the most part they were. However, that should not be

an indication of the quality of grievance investigations. Experience by prisoners has demonstrated that grievance staff typically send an unredacted copy of a grievance to the complained-of employee for a response, and there is no interview of the prisoner's witnesses. This violates grievance regulations, breaches confidentiality and invites retaliation.

The grievance is then resolved in the employee's favor because the grievance investigator "fails" to find evidence supporting the prisoner's complaint. Indeed, the audit found that some grievance files contained nothing more than the prisoner's statement, the staff member's statement and a notation that there was insufficient evidence to sustain the grievance, with no indication of what had been done to investigate the complaint. This sham grievance procedure cannot be adequately evaluated by an audit that fails to take into account the investigator's lack of investigation.

The audit revealed that 83% of grievances that identified the employee who processed the form showed an "alternative grievance investigator"; that is, an employee who assisted the regular grievance staff. Training of grievance personnel was also a problem, with officials at all TDCJ prisons believing that existing grievance staff was responsible for training new grievance employees, when TDCJ regulations place that responsibility on the regional grievance supervisors.

According to the audit, 62% of surveyed prisoners reported having previously faced retaliation for filing one or more grievances, and 35% said they were afraid to file a grievance due to fear of retaliation. 55% reported that no TDCJ

employee ever told them a grievance process existed, while 78% said they did not trust the grievance investigators. Only 5% of grievances filed by prisoners were resolved through the grievance process with some action taken; another 8% were resolved by informal action outside the formal grievance procedure.

Between 21% and 50% of prisoners' grievances claiming life endangerment of various types did not have documentation showing that appropriate staff had been notified of the allegations. Likewise, 30% of grievances that were not resolved within required deadlines failed to show documentation requesting an extension of time. Although it could be easily done, grievances were not tracked to show how often an employee was the subject of complaints.

Thirteen of the 187 audited medical-related grievances did not have proper supporting documentation showing an investigation, and 4 could not be found at all. Three others were not signed by proper medical personnel. Interestingly, 2% of the grievances had case-closed dates that predated their filing dates.

The Office of Inspector General (OIG) investigated 7,186 cases during the audit period. Criminal prosecutions were undertaken in 1,153 OIG cases. However, only 34% of surveyed TDCJ prisoners said they knew how to access the OIG.

There were 94,436 Offender Protection Investigations (OPIs) by TDCJ under the Safe Prisons Plan, 32% of which were not properly documented. The Safe Prisons Program Office conducted 3,820 OPIs and activated the Extortion Investigation Team 6,628 times, confirming 836 allegations of sexual assault – 321 of which required further investigation and possible prosecution by the OIG. Larger prisons

had the highest rates of reported sexual assaults. Private prisons and state jails had the lowest reported rates, while 20 prisons had no reports of sexual assaults.

The Ombudsman Program, which received 31,071 complaints from elected officials and the public, was untimely in processing up to ten percent of its responses.

Employee grievances and EEOCs were appropriately screened. However, 60% of the EEOCs were not reviewed and

forwarded within established deadlines, and 20% of the investigations were not completed in a timely manner. See: *Audit Report on the Dept. of Criminal Justice's Complaint Resolution and Investigation Functions*, Texas State Auditor's Office, Report No. 09-004 (September 2008), available on PLN's website. ■

Additional source: www.gritsforbreakfast.blogspot.com

New York Prisoner Receives \$3,732 for Medical Neglect/Lost Property Claim

A New York Court of Claims awarded a prisoner \$3,500 for medical neglect by prison medical officials' failure to treat the prisoner's deviated septum for 20 months. The prisoner also received a \$232.68 settlement for lost property.

Before the Court was the claim of prisoner Stephen Grand, who brought claims that arose from an assault upon him on July 10, 1996. On that day, Grant was attacked by members of a prison gang known as the "five percenters."

Prison officials refused to diagnose Grant's injuries until nine days after the assault. The subsequent x-rays revealed he had a deviated septum, which needed surgical repair. It was not performed until February 27, 1998. Prison officials contended the delay was the result of expired contracts for non-emergent care.

After a bench trial, the Court found Grant was due to recover damages for medical neglect in the amount of \$3,500 plus interest. The Court dismissed state and federal constitutional violations because such claims have alternative remedies than being brought in a claims

court. It also held prison officials were not liable for the assault, for it was a spontaneous event that there was no notice of to prevent.

The defendants agreed to pay Grant \$232.68 for property he lost following the assault. Grant proceeded pro se to receive the settlement and March 23, 2006 verdict. See: *Grant v. New York*, N.Y. Court of Claims, #2006-031-515, claim no: 98192. ■

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Caging Kids for Cash: Two Pennsylvania Judges Guilty of Selling Out Juvenile Justice System

by Matt Clarke

Judges are supposed to be the protectors of our constitutional rights. They are expected to be fair and impartial, and to safeguard vulnerable members of society who are unable to protect themselves. Admitting to a shocking breach of this sacred trust, in January 2009 two Luzerne County, Pennsylvania judges entered guilty pleas to federal charges related to their acceptance of \$2.6 million in kickbacks.

The payments were for their help in arranging the construction of private juvenile facilities, eliminating a county-owned and operated juvenile prison, obtaining a favorable contract for the private facilities, and incarcerating juvenile offenders accused of minor crimes in the private, for-profit prisons.

On January 21, 2009, Luzerne County President Judge Mark A. Ciavarella, Jr., 58, and Senior Judge Michael T. Conahan, 56, entered conditional guilty pleas to the charges contained in a 22-page criminal information. The plea agreement requires them to resign from their positions, pay an undisclosed amount of restitution, and serve 87 months in prison. Both remain free on \$1,000,000 unsecured bonds pending formal guilty pleas and sentencing. See: *United States v. Ciavarella and Conahan*, U.S.D.C. (MD Penn.), Case No. 3:09-cr-00028.

The offenses charged in the criminal information sound fairly innocuous: wire fraud and tax evasion. However, the details tell a chilling story of egregious judicial misconduct and exploitation of juvenile offenders for profit.

According to court filings, in around June 2000, Ciavarella met with an unnamed attorney who was interested in building a private juvenile facility in Luzerne County. Ciavarella introduced the lawyer to a construction company owner, who then built the facility for a firm called PA Child Care, LLC. Local media identified the attorney as Robert J. Powell, who was a co-owner, along with Gregory Zappala, of PA Child Care.

Zappala is a Pittsburgh-area investment banker whose father, Stephen Zappala, is a former Pennsylvania Supreme Court Justice. In June 2008, amid news reports of a joint FBI/IRS investiga-

tion into judicial corruption in Luzerne County, Zappala bought out Powell and became sole owner of PA Child Care. He also owned Mid-Atlantic Youth Services, a company that provided employees to staff the private juvenile facility.

The construction company owner was identified as Robert S. Mericle, president of Mericle Construction, Inc. He was a long-standing friend of Ciavarella.

On January 29, 2002, Conahan, who was President Judge of Luzerne County at the time, signed an agreement that gave PA Child Care guaranteed annual payments of \$1,314,000 to hold juvenile offenders in the company's private facility. To create demand for the for-profit prison, Conahan, in his official capacity, removed funding from the county-owned Luzerne County Juvenile Detention Facility in December 2002, resulting in its closure.

For their roles in making possible the construction of the PA Child Care prison, the judges received a payment of \$997,600. But that was just the start; now they needed to fill the facility. Ciavarella thus began incarcerating juveniles for minor offenses.

Kurt Kruger, 17, was sent to a boot camp program for five months for being a lookout for a friend who tried to steal DVDs from Wal-Mart. It was his first offense. Thirteen-year-old DayQuawn Johnson was incarcerated for several days in 2006 after he failed to appear at a hearing as a witness to a fight he was not involved in. Jamie Quinn, 14, served nine months for slapping a friend whom she claimed had slapped her first. Shane Bly, 13, was accused of trespassing in a vacant building; he was sent to a boot camp for two weekends.

"I couldn't believe what was happening," one unidentified parent stated. "They told us the hearing was not a big deal, a minor offense. 'Just sign here and we'll get this over with,' they said. Next thing I knew, they were handcuffing my daughter and taking her to a juvenile residential treatment center. I fainted right there in the courtroom."

Fourteen-year-old Hillary Transue had created a fake MySpace page that poked fun at the vice-principal of her school. She was charged with harassment,

found delinquent by Judge Ciavarella, and sentenced to three months in a juvenile facility. It was that case that led to a complaint filed by Hillary's mother, a child services worker, which eventually resulted in the federal investigation.

When a cigarette and pipe were found in a backpack that Jessica Van Reeth, 16, was holding for a friend at school, she was sentenced to three months. According to her father, Jack Van Reeth, upon hearing of the judges' guilty pleas Jessica was "extremely happy. She said this is better than Christmas."

"We feel that it's a great day for the young people and the youth of this area to see the system really does work; the system really isn't rigged against them," he added. "It's just wonderful to see that the scheme of jailing for dollars has come to an end."

Then again, until Ciavarella and Conahan were caught, the system was in fact rigged against juvenile defendants. An estimated 5,000 cases may have been tainted due to their corruption. Further, the end was a long time coming. From 2002 through 2007, the judges tore apart families and traumatized children in pursuit of profit. Ciavarella even adopted special procedures, turning his courtroom into a "specialty court" that "created the potential for an increased number of juvenile offenders to be sent to juvenile detention centers."

In 2004, the two judges used their influence to persuade Luzerne County commissioners to lease the PA Child Care facility for 20 years at a cost of \$58 million. The lease came under criticism from state auditors, and the commissioners were eventually able to renegotiate a month-to-month lease.

The for-profit prison scam was so successful that Mericle built another juvenile facility for Powell and Zappala's spinoff company, Western PA Child Care, LLC. Upon completion of the second prison in July 2005, Ciavarella and Conahan received a payment of \$1 million. Even this capacity wasn't enough, though, so an expansion of the first facility was undertaken. The judges were paid \$150,000 upon completion of the expansion in February 2006.

In addition to those payments and the earlier kickback following construction of the PA Child Care prison, Ciavarella and Conahan received hundreds of thousands of dollars during the incarceration-for-profit scam. From January 2003 through April 2007, the two judges raked in approximately \$2.6 million. They bought a Florida condo in 2004 and claimed their illicit kickback income as rent payments. Powell kept a 56-foot yacht docked at the condo. It was named "Reel Justice."

The criminal information filed in federal court detailed how Powell, Mericle, Ciavarella and Conahan falsified tax and business documents and transferred money between various accounts – including business accounts under the control of Mericle and the judges, and attorney trust accounts controlled by Powell.

The juvenile jailing scheme in Luzerne County really took off following the October 1, 2005 adoption of new state Rules of Juvenile Court Procedure, which included rules governing waivers for children who did not have legal representation. Judges were the ones who approved such waivers, of course.

From 2003 through the end of 2007, Ciavarella incarcerated up to 26% of the children who appeared before him – more than double the statewide average of 10%. Up to half of the juvenile defendants in Luzerne County Juvenile Court did not have legal representation, compared with 4% statewide. Ciavarella even influenced juvenile probation officers to change their recommendations from community supervision to incarceration, and overruled those who didn't. Hearings lasted

an average of two minutes.

Why wasn't all of this brought to the attention of state officials? It was. In April 2008, the Juvenile Law Center (JLC), a national public interest law firm and advocacy group, filed a petition with the Pennsylvania Supreme Court seeking review of more than 250 questionable cases involving the incarceration of children in Luzerne County.

The Supreme Court's reaction was to deny the petition in a one-line order dated January 8, 2009, which contained no explanation for the denial. The Luzerne County District Attorney's office had opposed JLC's petition, saying it "was not a matter of immediate public importance."

After Ciavarella and Conahan pleaded guilty and the scandal generated public outrage, the Supreme Court, on a motion for reconsideration, issued another one-line order on February 2, 2009 that vacated its previous order pending further action by the court.

"We see this as a very positive sign that the court is going to take a fresh look at our application for relief," said JLC Executive Director Robert Schwartz. "Beyond that, it's hard to read into this. It's pretty clear that they want to go deeper. There's no reason to do this if they're not going to grant relief down the line or at least figure out a way to provide relief to the kids of Luzerne County."

The state Supreme Court did want to go deeper. Much deeper. On February 11, 2009 the court issued an order granting JLC's petition, and exercised plenary jurisdiction over the case. The court ap-

pointed Senior Judge Arthur E. Grim as a Special Master to review all cases in which Ciavarella had sent juvenile offenders to the PA Child Care or Western PA Child Care facilities, and all cases where juveniles who appeared in his court were denied their right to counsel.

The Court of Common Pleas of Luzerne County was directed to give the Special Master "unlimited access and cooperation"; the Supreme Court stated its goal was "to determine whether the alleged travesty of juvenile justice in Luzerne County occurred, and if it did, to identify the affected juveniles and rectify the situation as fairly and swiftly as possible." See: *In re: J.V.R.*, Supreme Court of Pennsylvania, Middle District, Case No. 81 MM 2008.

On February 26, 2009, JLC and the law firm of Hangley, Aronchick, Segal and Pudlin filed a federal class-action civil rights and RICO suit against Ciavarella, Conahan and other defendants. The lawsuit alleges that the judges conspired

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Pennsylvanian Corruption (cont.)

with others in a corrupt scheme to accept kickbacks for their assistance in the construction of private juvenile prisons, then wrongly sent juvenile offenders to those prisons. See: *H.T. v. Ciavarella*, U.S.D.C. (MD Penn.), Case No. 3:09-cv-00357.

“Judge Ciavarella’s placement of so many children in juvenile facilities without regard for their underlying charges suggests a procrustean scheme that violated one of the core principles of the juvenile justice system – the right to individualized treatment and rehabilitation,” remarked JLC Associate Director Lourdes Rosado. “He shredded the constitutional rights and statutory rights of these children; and now, he has been properly stripped of any right to serve as a judge or practice law ever again. Through this lawsuit, we also seek to hold him civilly liable for money damages.”

Although Ciavarella pleaded guilty to the federal criminal charges, and admitted in a letter that “My actions have destroyed everything I worked to accomplish and I have only myself to blame,” he strongly denied that he had incarcerated children in exchange for kickbacks. “Cash for kids? It never happened,” he said.

In March 2009, Ciavarella filed a motion to dismiss that included a defense of judicial immunity, which provides wide-ranging protection to judges for judicial acts performed in their official capacities. Still, the lawsuit is probably the only chance the exploited children and their families have for getting any real justice. Asked about the improper incarcerations that occurred in Ciavarella’s court, Luzerne County District Attorney Jackie Musto Carroll was unenthusiastic.

“Those who have already gone through the system, who are no longer in the system and who are no longer in placement, obviously we can’t give them back the time they spent there. And many of them probably should have been in placement,” she said.

Many? Less than half of the juvenile offenders Ciavarella sent to prison deserved to be there, based upon a comparison between the 26% incarceration rate in Luzerne County and the 10% average statewide rate.

On March 12, 2009, the Special Master appointed by the Pennsylvania Supreme Court issued his First Interim Report and Recommendations. Grim

found “that a very substantial number of juveniles who appeared without counsel before Judge Ciavarella for delinquency or related proceedings did not knowingly and intelligently waive their right to counsel. My investigation has also uncovered evidence that there was routine deprivation of children’s constitutional rights to appear before an impartial tribunal and to have an opportunity to be heard.”

He therefore recommended that convictions of low-level offenses for certain juvenile offenders “be declared void *ab initio*, and/or vacated, and/or expunged.” The Special Master noted that this action would “be at least one step towards righting the wrongs which were visited upon these juveniles and will help restore confidence in the justice system.”

The Supreme Court agreed. In a March 26, 2009 order the court largely approved and adopted Grim’s recommendations, while acknowledging that the Special Master’s review of other juvenile offender cases in Luzerne County would be forthcoming. Hundreds of convictions will be expunged as a result of the court’s order.

“I’ve never encountered, and I don’t think that we will in our lifetimes, a case where literally thousands of kids’ lives were just tossed aside in order for a couple of judges to make some money,” said JLC attorney Marsha Levick.

The joint FBI/IRS investigation into judicial malfeasance in Luzerne County started almost two years ago. Besides Ciavarella and Conahan, other county officials were implicated. Luzerne County Court Administrator William T. Sharkey, 57, was named in a two-count indictment for embezzling over \$70,000 in forfeited gambling proceeds; he pleaded guilty on February 1, 2009. Sharkey is Conahan’s first cousin.

On February 20, 2009, Jill Moran, Luzerne County’s Prothonotary (chief court clerk), agreed to resign and cooperate with federal investigators as part of a civil consent judgment. She had unknowingly assisted in fraudulent acts.

Further, Luzerne County Deputy Director of Forensic Programs Sandra M. Brulo, 56, pleaded guilty to one charge of obstruction of justice on March 26, 2009. Brulo was accused of altering a juvenile court file by changing and backdating her original recommendation of incarceration to one for probation, after she was named in a federal civil suit.

Neither Powell nor Mericle have been

charged, though the investigation is still ongoing. “Bob Powell never solicited a nickel from these judges and really was a victim of their demands,” his attorney stated. “These judges made it very plain to Mr. Powell that he was going to be required to pay certain monies.” Apparently he never thought to inform the authorities of this alleged extortion, which went on for years.

Luzerne County officials are now considering seizing the PA Child Care facility through civil forfeiture, in an effort to recover losses incurred through the judges’ kickback scheme.

Arthur Piccone, former president of the Pennsylvania Bar Association, said that prior to the scandal local attorneys had respected Ciavarella and Conahan as good trial judges. “It’s really unfortunate that this happened,” he said.

It’s not just unfortunate, it’s abominable. This was not merely a regrettable case of public malfeasance, although it was that too. It was not just a tragedy for hundreds of children and their families. Rather, this scandal illustrates the quintessential reason why prisons, juvenile or otherwise, should not be privatized.

The convergence of moneyed interests with the construction and operation of for-profit prisons creates a fundamental conflict between the private prison industry and what best serves the public interest. Private prisons have a financial incentive to incarcerate as many prisoners as possible, deserved or not. They operate on the same principle as hotels: More filled beds means more profit.

Conversely, it is in the public interest to redeem and reform prisoners so they stay out of prison. When incarceration results in profit and public officials control the rate of imprisonment, corruption is inevitable. There has never been a case where the warden of a public prison has bribed a judge to incarcerate more prisoners. Why should we, as a society, tolerate the operation of private prison companies that have such an inherent and pernicious profit motive?

Meanwhile, the PA Child Care and Western PA Child Care facilities are still in business – albeit now, hopefully, without the collusion of corrupt judges. ■

Sources: www.law.com, *Associated Press*, www.republicherald.com, *New York Times*, www.citizensvoice.com, *Philadelphia Inquirer*, www.timesleader.com, www.guardian.co.uk, www.cnn.com

Wisconsin Prisoners Sexually Assaulted by 20 Staff Members Over Five Years

by Gary Hunter

According to John Dipko, public information director for the Wisconsin Dept. of Corrections, twenty state prison employees have faced charges of rape or sexual assault involving prisoners since 2003. Several recent cases are detailed below.

Dwight Helsell, Edward H. Wood and Andrew Metzen all worked maintenance at the Taycheedah Correctional Institution (TCI) when they were charged with sexually assaulting two female prisoners. [See: *PLN*, Aug. 2006, p.1].

Helsell received two years probation and 45 days in jail for sexually inappropriate behavior with the two prisoners between February 1 and August 22, 2005.

Wood was a section plant operator at TCI for 13 years when he was charged with 4th degree sexual assault. He was accused of bringing beer into the prison, giving it to one of the prisoners and then touching her inappropriately on two occasions. Wood was ordered to pay \$250 to a non-profit organization for sexual assault victims.

Metzen received a six-month jail sentence and two years probation for having sexual intercourse with one of the prisoners, who was also sexually involved with Helsell. The woman said the sex was consensual and admitted to being "romantically interested" in Metzen.

In October 2005, TCI employee John Patterson, 53, was charged with sexually

assaulting two female prisoners. He was placed on three years probation.

Dustin M. Schultz also worked at TCI before he was arrested and sentenced to 60 days in jail and three years probation in January 2008. Schultz was a guard at the time a 26-year-old female prisoner claimed they engaged in sexual intercourse while another prisoner acted as a lookout. Schultz admitted to having sexual contact but denied engaging in intercourse.

TCI prison guard Jimmie Brown, 36, was charged in April 2008 with 13 counts of sexual assault for having sex with five women at TCI. Another four counts involving a sixth victim were added last July; he is accused of raping one prisoner and having consensual sex with the others. His prosecution is still pending.

Male prisoners aren't safe from sexual abuse, either. In March 2008, Prairie du Chien prison guard James Trentin, 58, was arrested for sexual assault. He was accused of giving male prisoners candy, chewing tobacco, soap and other amenities; in exchange, he allegedly took them to a private telephone room where he performed oral sex. The sexual misconduct took place over an 18-month period, according to prosecutors.

The sexual assault charges were dropped after Trentin entered an *Alford* plea to three felony counts of delivering contraband to prisoners in October 2008; he was ordered to pay over \$2,500 in fines


and fees. However, Trentin was rearrested in November after sending a birthday card and money order to a prisoner despite a no-contact order; he was also charged with three counts of felony bail jumping.

In May 2008, two female guards at the Oakhill Correctional Institution, Christine Roberge and Heather Bartosch, were charged with second-degree sexual assault for having sex with a male prisoner. Both were married at the time, Bartosch to a police detective. The guards claimed they had been seduced, a defense that is unlikely to prevail in court.

Most recently, a female guard at the Columbia Correctional Institution was charged in June 2008 with second-degree sexual assault, delivering contraband and public misconduct. The 45-year-old prison employee, who was not identified, was placed on administrative leave; she is accused of having sex with a male prisoner and giving him snacks and magazines.

Although prison guards include sex offenders among their ranks, the punishment for such crimes – when they are investigated and prosecuted – is generally lax, and often results in fines or probation rather than substantial prison terms that would serve as deterrents for other guards who may be tempted to use prisoners for their sexual gratification. ■

Sources: *Fond du Lac Reporter*, correction-officersgoingwrong.wordpress.com



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\$1 Million Settlement Fund Established in New Mexico Jail Strip Search Settlement

by David M. Reutter

A \$1 million settlement fund has been established in a class action lawsuit alleging an unconstitutional blanket strip search at the Hidalgo County Detention Center (HCDC) in New Mexico violated the rights of the class.

After John Luke Shannon and John Madrid were arrested on minor charges in separate incidents and taken to HCDC, they were strip searched pursuant to HCDC's policy "of conducting strip searched of all incoming prearrest detainees." They obtained counsel after the strip searches were conducted without HCDC officials "having a reasonable belief that the Plaintiffs possessed weapons or contraband, or that there existed facts supporting a reasonable belief that the search would produce contraband or weapons."

The class sought relief to stop the blanket searches without individualized reasonable suspicion. The defendants contended the search policies were "reasonably related to legitimate penological interests in deterring the introduction of weapons, drugs, and other contraband into the detention center." The parties engaged in mediation on November 6, 2008 that resulted in a settlement.

The settlement establishes the class period is from April 7, 2005 to November 6, 2008 but it notes the strip search policy changed on March 19, 2008. The Settlement Class Members are persons arrested on "Non-VDW Offense[s]" on a charge list.

The settlement fund allocates \$50,000 to be split amongst Shannon and Madrid to acknowledge their participation and efforts in the lawsuit. The attorneys for the class will receive \$333,333.33 for attorney fees. Cost to administer the fund, provide notice to the class and to process and administer the fund will also come out of the fund. The settlement class members will receive "a pro-rata share of the funds... pursuant to a plan of allocation approved by the Court."

All Settlement Class Members will be notified by the Administrator by use of information in HCDC's database. They will be required to file a timely claim or they can choose to opt out. Opting out of failure to file a claim will preclude them from the settlement fund.

Class members will receive a pro-rata share of the funds. If they were strip searched more than once, they will receive an "additional payment equal to 25%," but they "shall receive compensation from the fund for more than two strip searches." That payment will be satisfaction for all claims of the class members.

The class was represented by Santa

Fe attorneys Robert R. Rothstein, John C. Bienvenu and Mark Donatelli; Las Lunas attorney Michael R. Greigo; Albuquerque attorney P. Scott Eaton. See: *Torres v. Valencia County Board of Commissioners*, USDC, D. New Mexico, Case No: CIV-07-00328 MCA/WDS. The settlement, complaint and other documents in the case are available on PLN's website. ■

TYC Leaders Straining Public Coffers; Agency Still Problematic

by Gary Hunter

Administrators at the already-troubled Texas Youth Commission (TYC) have succeeded in creating a new scandal. Only 18 months ago, Texas citizens and lawmakers were rocked by revelations that two senior TYC officials, Ray Brookins and John Paul Hernandez, had been molesting young boys at the West Texas Youth Facility in Peyote. [See: *PLN*, Feb. 2008, p.1].

Also, in January 2008, the U.S. Dept. of Justice filed suit in federal court against administrators at TYC's Evins unit, alleging they had "engaged, and continue to engage, in a pattern or practice of failing to ensure that the youth at Evins are adequately protected from harm." The state entered into a settlement agreement to resolve problems at the facility. [See: *PLN*, Oct. 2008, p.50].

Since that time state legislators have supposedly imposed greater oversight, and the TYC's population of juvenile offenders has been cut by more than half. Lawmakers are now shocked by the fact that TYC administrators are doing less work for considerably more money. The salaries for top agency officials have increased almost 25 percent to \$18.7 million annually, while the population in TYC facilities has dropped from 4,500 to about 2,200.

TYC general counsel Stephen Foster, who was hired in 2007, started at a salary of \$104,000 a year. A recent raise bumped his pay to \$111,000. Melinda Hoyle Bozarth, general counsel for the Texas Dept. of Criminal Justice (TDCJ), which has a population of 158,000 prisoners, makes about \$8,000 a year less.

TYC media relations director Jim Hurley earns \$100,000 annually, compared with \$77,000 paid to his TDCJ counterpart, Michelle Lyons. Tim Savoy, TYC's second media spokesman, earns \$75,000 a year – almost \$12,000 more than Jason Clark, who occupies a similar position with the TDCJ.

When TYC facilities held over 4,500 juvenile offenders in 2007, the agency employed 321 administrators. Now, even though TYC's population has dropped to 2,200, the number of top officials has grown to 368.

"It's an agency of high-priced employees in the central office trying to protect salaries and turf," stated Sen. John Whitmire, chairman of the joint committee on prison affairs.

Hurley said the salary comparison was unfair. He cited the fact that the cost of living in Austin, where his office is located, is higher than in Huntsville where Ms. Lyons works.

However, while TYC administrators are protecting their own jobs and paychecks, they don't mind laying off line staff. The agency has had three rounds of staff reductions, most recently in February 2009. Over the past seven months the TYC has cut 720 job positions – although some of those positions were vacant.

"While it is hard to take this action during these difficult economic times, it is imperative that we are good stewards of Texas taxpayers' dollars and continue to build an agency that is effective and efficient," said TYC executive director Cherie Townsend, who earns \$125,000 a year.

Salaries aren't the only concern involving the TYC. A recent report indicated that TYC's educational system is still dysfunctional. The report called the agency's academic programs poorly designed, and the teachers overwhelmed. It also noted that in spite of a considerable investment of time and money, TYC still does not have adequate treatment programs in place.

For example, according to a November 2008 report by the Sunset Advisory Commission, "Despite the documented need for more treatment, in fiscal year 2008, the agency only used 61 percent of its specialized treatment budget. TYC received funding for an average daily population (ADP) of 934 specialized treatment beds, and only served an ADP of 571 youth, leaving 363 treatment beds vacant. While the agency explains this as a result of its reduced population, staffing vacancies, and closed facilities, failure to use these beds meant that youth in need went untreated."

In a joint letter, Senator Whitmire and Rep. Jerry Madden contacted the state auditor's office about the connection between salary increases for TYC officials and the agency's substandard education and treatment programs.

"Instead of spending money retaining and attracting new [juvenile facility staff], TYC has chosen to increase central office personnel. In addition, we have seen evidence that large salary increases are being given to executive staff members. Yet today, our juvenile correctional system sits without a functional classification system or proven treatment and educational programs," the lawmakers wrote.

Former TYC conservator Richard Nedelkoff called the criticism unfair. "Reforms take years and years," he said. In an effort to stave off further complaints, Nedelkoff promised last year to freeze pay increases for senior level management, and expressed an interest in eliminating up to 30 central office positions.

Governor Rick Perry removed the TYC from conservatorship in October 2008; until then, Nedelkoff had received an annual salary of \$160,000.

On the positive side, TYC has added 11,000 surveillance cameras to communal areas in juvenile facilities. An Office of Special Investigations and an ombudsman have been established to protect juvenile offenders. TYC has further increased training for guards, and the agency's guard-to-prisoner ratio has improved.

Yet beyond the salary and education/

treatment program issues, other problems still remain. The first quarterly report for FY 2009 from the TYC's ombudsman's office found that large numbers of mentally ill youths were being incarcerated. The ombudsman estimated that 30 to 40% of TYC offenders have serious mental health problems. In March 2009, a 14-year-old boy hanged himself with his underwear at the Crockett State School, a 265-bed TYC facility.

Earlier this year the state Sunset

Advisory Commission voted to merge the TYC with the Texas Juvenile Probation Commission as a way to cut costs. The proposed merger was later called off, though legislation amended in April 2009 would create a Texas Juvenile Justice Board to oversee operations by the TYC and Juvenile Probation Commission (HB 3689 / SB 1020). ■

Sources: *Houston Chronicle*, *Waco Tribune*, www.kwtx.com

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CA Jail Deputies Allegedly Provoke Murder of Misidentified Child Molester by Other Prisoners; Wrongful Death Suit Settled for \$600,000

A prisoner booked into the Theo Lacy jail in Orange County, California on domestic battery and child pornography charges was falsely labeled a child molester by deputies, and as a result was savagely beaten to death by other prisoners. The victim's parents sued Orange County for \$60 million for failing to protect their son, but settled for \$600,000 before trial.

Computer technician John Derek Chamberlain, 41, was awaiting trial at the Theo Lacy jail on October 5, 2006. At 1 p.m. that day, Chamberlain's attorney, Jerry Steeling, called the jail and advised them that Chamberlain was in fear for his life because he had overheard threats from other prisoners who thought he was a child molester.

Jail officials ignored Steeling's request to have his client moved to protective custody. Sometime between 5:50 p.m. and 6:50 p.m., Chamberlain was dragged to a blind spot in his housing unit. There, approximately twenty prisoners beat him for 20-30 minutes; he was stripped naked, scalded with hot water, and punched, kicked and stomped. Other prisoners spat and urinated on him. Although three jail deputies were nearby, they did not intervene as they were too busy watching TV and sending text messages. Chamberlain was pronounced dead at the scene. [See: *PLN*, Feb. 2009, p.1].

In a lawsuit filed in U.S. District Court, Chamberlain's family alleged that jail guard Kevin Taylor had told prisoner Jared Petrovich, a gang "shot caller," that Chamberlain was a child molester and "needed to be beaten." Taylor further reportedly told Petrovich that the prisoners in the unit would be rewarded for the beating by being allowed to watch a televised Dodgers vs. Mets playoff game.

The suit claimed that Orange County jail officials should have known that child sex offenders were frequently targeted and severely beaten in the jail, and were even targeted by guards. Furthermore, deputies should have noticed the lengthy fatal beating, because they were in the area watching TV and could hear the fight and Chamberlain's cries for help. Finally, the lawsuit alleged that the deputies gave prisoners involved in the beating time to wash off Chamberlain's blood to prevent their being identified.

The parties entered into a settlement agreement in February 2008. The settlement included written recognition that Orange County and its employees denied all legal and factual allegations raised in the complaint. But that position wasn't accepted by others. An Orange County special grand jury report released in February 2008 found wrongdoing by jail staff, and the county Board of Supervisors created an office of independent review to examine complaints at the facility.

There is plenty of blame to go around relative to Chamberlain's murder. Seven prisoners have been charged with homicide. One has fingered jail deputies Taylor and Jason Chapluk, accusing them of instigating the attack by falsely telling other prisoners that Chamberlain was a child molester. Taylor responded that he was watching TV (while on the job), and saw and heard nothing inside the Barracks F West unit during the 20-minute period while Chamberlain was beaten to death. After the murder, Taylor allegedly altered the jail log to reflect his willingness to have moved Chamberlain, which he falsely wrote Chamberlain had "declined."

Details emerged that at around 6:30

p.m. Chamberlain was taken to a partially hidden cubicle where a mob of prisoners doused him with scalding water, beat him with shoes, kicked him in the head and punched him with their fists – all while he lay screaming for help on the floor, curled into a protective ball. One of the assailants hit Chamberlain so hard that he broke his hand. Another, holding onto a bunk for leverage, stomped on his skull.

Orange County deputies apparently have a history of arranging fatal beatings of accused child molesters at the jail. The Chamberlain murder was the second such death at the facility in a month where deputies were accused of instigating such attacks.

Conspiracy to commit murder in California carries a 25-life sentence. But Orange County is a hotbed of wealthy "tough-on-crime" conservatives, and it remains to be seen if any deputies will do a single day in prison for complicity in the murders of jail prisoners. See: *Chamberlain v. Orange County*, U.S.D.C. (C.D. Cal.), Case No. 8:07-cv-01154-DOC-RC. 📄

Additional sources: *Orange County Register*

California County's 2005 Purchase of Private Prison Still Clouded in Conflict of Interest Questions

by Marvin Mentor

Investigative journalism by the *San Bernardino Daily Bulletin* has revealed that the April 2005, \$31.2 million purchase of a private prison by San Bernardino County remains under a conflict-of-interest cloud because the lobbyist who represented both the buyer and seller allegedly did not fully disclose his dual relationship at the time.

The Victor Valley Modified Community Correctional Facility, located in Adelanto, was owned by Maranatha Corrections, LLC. The company's consultant, former state Assemblyman and Board of Prisons Terms member Brett Granlund, also served as a lobbyist for the county. Maranatha founder Terry Moreland reportedly failed to disclose this conflict of interest to county officials at the time of

the private prison sale.

The conflict question was subsequently assigned to independent attorney Leonard Gumport, who found that Granlund's involvement in the sale was "minimal" and he had no influence on the purchase negotiations. Although the parties insist there was no wrongdoing regarding the sale of the prison, Gumport's report has never been made public. [See: *PLN*, Dec. 2007, p.15; Jan. 2006, p. 20].

The private prison had been built on spec by Moreland, who believed a 500-bed facility for state prisoners in San Bernardino County would be in high demand according to his demographic projections.

After leasing the facility to the California Department of Corrections under an \$8.1 million annual contract, Moreland

became embroiled in a 2004 lawsuit over entitlement to \$1.6 million in prisoner phone revenue. [See: *PLN*, Feb. 2005, p.39]. As a result of the suit, he found a new lessee in the form of the county, which was looking at either the Maranatha prison or the Adelanto city jail to expand the county's jail.

San Bernardino County supervisors unanimously approved a lease-purchase for the private prison without a property appraisal. The purchase option was for \$28 million plus \$3.2 million in improvements; when an appraisal was later completed, it came in at precisely \$28 million.

While the Board of Supervisors never approved full disclosure of Gumpert's investigative report, they released a five-page summary that absolved county officials of any wrongdoing. The summary also criticized Granlund for failing to properly disclose his conflict of interest relative to the private prison sale.

County Supervisor Dennis Hansberger stated, "I have thoroughly reviewed the report prepared by Leonard Gumpert regarding the Adelanto jail purchase, and after considering the matter at length, I have come to the conclusion that the summary issued to the public ... is a mischaracterization and does not accurately

represent the information in the report."

Despite the non-disclosure of the full report, the *Daily Bulletin's* examination of other records that were publicly available revealed some salacious facts. Granlund's lobbying firm, Platinum Advisors, had given gifts to Board of Supervisors Chairman Bill Postmus, who in turn pushed for acquiring the Maranatha prison.

Two months after the Board of Supervisors increased Platinum Advisor's monthly lobbying fee from \$9,000 to \$16,000, the firm and one of its clients treated Postmus to three Major League baseball games and dinner at a fashionable San Francisco restaurant.

It was during this time period that Granlund, who had lobbied for Maranatha regarding the company's state prison contract, suggested to Postmus that the county buy the facility, calling it a "golden opportunity." This became the core of the conflict-of-interest issue that has simmered ever since. County officials maintain that Granlund's involvement was only in supplying the "initial tip" regarding the private prison purchase, and not in negotiations.

In the end there was no complaint that the county had overpaid for the

prison; rather, the main concern was how the deal went down. County officials consider the matter closed and plan no further action, including the public release of the full Gumpert report.

But Hansberger stated, "It's the public's business. They have a right to know what the heck we're doing. None of the explanations I've heard for not releasing the report are satisfactory." Yet they are, apparently, satisfactory to someone.

Meanwhile, Moreland's troubles have not subsided in regard to the former Maranatha prison. On January 11, 2008, a state appellate court upheld a ruling against Moreland in a libel and defamation lawsuit he had filed against the California Dept. of Corrections related to his alleged "misappropriation" of prisoner phone revenues. See: *Maranatha Corrections, LLC v. CDCR*, 158 Cal.App.4th 1075 (Cal.App. 3d Dist. 2008).

On April 11, 2008, he was ordered by a Sacramento Superior Court to pay the state's legal costs of \$71,000. Moreland's breach-of-contract claim against the state is still pending. ■

Sources: *Daily Bulletin*, www.bakersfield.com

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Conditions in Maricopa County, Arizona Jails Still Unconstitutional

by Matt Clarke

On October 22, 2008, U.S. District Court Judge Neil V. Wake issued an 83-page order with findings of facts and conclusions of law in a long-running civil rights lawsuit against Maricopa County, Arizona Sheriff Joe Arpaio and other county officials. The order held that conditions of confinement in sections of the Maricopa County jail system, which houses around 10,000 pre-trial detainees, did not pass constitutional muster.

The class-action civil rights suit, brought under 42 U.S.C. § 1983, was originally filed with the assistance of the American Civil Liberties Union (ACLU) in 1977. In 1998 the defendants filed a motion to terminate a previously-entered amended judgment pursuant to the Prison Litigation Reform Act (PLRA); the motion was renewed in 2001. This resulted in an automatic stay of the injunctive relief in the amended judgment.

The intent of the PLRA's automatic stay provision was to ensure that the termination proceedings would be resolved quickly. Such was not the case; rather, the termination motion had the effect of suspending enforcement of the amended judgment for a decade. Unfortunately, Sheriff Arpaio did not use that time to bring the Maricopa County jails into compliance with constitutional standards.

Regardless, the district court's October 22, 2008 order had the effect of reinstating the injunctive relief as modified by the court's newly-issued Second Amended Judgment (SAJ).

The class-action suit addressed issues related to overcrowding, lack of recreation, dayroom access, medical care, dental care, mental health care, fire safety precautions, sanitary facilities, toilets, sinks, cleaning supplies, oversight by guards, and adequate and wholesome food for jail detainees.

The originally-entered amended judgment had 116 paragraphs. The plaintiffs stipulated to the termination of 82 of those paragraphs because they dealt with facilities that had since been closed, involved more than the constitutionally-mandated minimum relief, or dealt with issues that had already been resolved. The court terminated another 13 paragraphs for the same reasons. The remaining 21 paragraphs were rewritten by the district court into the SAJ.

The SAJ forbids housing more than two detainees per cell at the Towers jail if they are confined in their cells for 22 hours or more a day, and prohibits the routine use of portable beds in cells and dayrooms. It also places a cap on the number of detainees in holding cells at the Madison facility and 4th Avenue intake facility of no more than the number of prisoners who can sit without physically touching one another.

The SAJ mandates that the temperature at the jails not be allowed to exceed 85 degrees in housing areas where detainees taking prescribed psychotropic medications are held. The defendants are required to clean and sanitize cells before they are occupied, and must provide cleaning supplies to detainees. They are also required to provide functional and sanitary toilets and sinks, with toilet paper and soap, at the Madison and 4th Avenue facilities.

The defendants are further required to screen incoming detainees for medical and mental health issues, including prescribed medications. They must provide ready access to medical and mental health care, and security staff may not interfere with detainees' access to such care or to prescribed medications.

The SAJ requires the defendants to continuously monitor conditions among the detainees, including those in the intake areas. Intake area detainees must be provided access to a toilet and wash basin. They must be given a blanket and bed or mattress if held in an intake area for 24 continuous hours, and a report must be made available to plaintiffs' counsel regarding the length of time detainees are kept in intake facilities. During the monitoring period, 24% of the detainees were in intake more than 24 hours, 2% stayed in intake over 48 hours and 0.4% were in intake more than 72 hours.

The SAJ requires that detainees housed in the Towers, Durango, Estrella and 4th Avenue facilities must be given a minimum of one hour outdoor or fresh-air recreation, four days per week. Outdoor recreation may be suspended for a week for detainees in disciplinary segregation. The outdoor recreation is in addition to any other out-of-cell non-recreation time.

Judge Wake was highly critical of the jails' food service, stating multiple times that he did not believe the testimony of the sheriff's department's nutritionist. Therefore, the defendants were ordered to provide detainees with food that meets or exceeds the U.S. Dept. of Agriculture's Dietary Guidelines for Americans.

The SAJ also requires visual observation of detainees in the 4th Avenue intake areas and psychiatric unit, all segregation units, and the Madison court holding cells. It further requires the defendants to keep records and statistics of prisoner and officer abuse, injuries, violence, sexual assaults, suicides, deaths, riots and demonstrations. The SAJ requires the defendants to keep records – and provide plaintiffs' attorneys with quarterly summaries – of their compliance with all of the above provisions.

In terminating the automatic stay over Maricopa County's enormous jail system, which books around 125,000 detainees per year, the court noted that the plaintiffs had proven, or the defendants had failed to disprove, current and ongoing violations of detainees' constitutional rights. The district court further found the defendants were in breach of the newly-entered SAJ.

The court determined that the plaintiffs were entitled to attorney fees within the limitations of the PLRA, and a hearing on the award of fees was scheduled for April 2, 2009. Costs in the amount of \$25,161.23 were taxed against the defendants. The plaintiffs were represented by Phoenix attorney Debra Ann Hill and ACLU attorneys Margaret Winters, Hanh Nguyen and Daniel Pochoda.

Maricopa County has had to pay around \$43 million due to prisoner mistreatment, injuries and deaths during Sheriff Arpaio's tenure. [See, e.g.: *PLN*, March 2009, p.34]. Arpaio may or may not be the "toughest sheriff in America," as he bills himself, but he is certainly one of the most expensive to the taxpayers. See: *Graves v. Arpaio*, U.S.D.C. (D. Ariz.), Case No. 2:77-cv-00479-PHX-NVW; 2008 U.S. Dist. LEXIS 85935 (D. Ariz. Oct. 22, 2008).

On March 10, 2009, after years of abuses by Maricopa County jail staff and the deaths of numerous prisoners, the U.S. Dept. of Justice finally announced it

was opening an investigation into Sheriff Arpaio. That investigation, however, has nothing to do with unconstitutional conditions at the county's jails as determined by the U.S. District Court, nor with bru-

tal jail guards. Rather, it concerns racial discrimination and unconstitutional searches and seizures by sheriff's deputies related to Arpaio's ongoing efforts to arrest illegal immigrants. Apparently

they have to start somewhere. ■

Additional sources: *Arizona Republic*, *ACLU Press Release*, *New York Times*, *Phoenix New Times*

Hawai'i Supreme Court Holds Takings Clause Requires Payment of Interest on Prisoner Trust Accounts

by David M. Reutter

The Hawai'i Supreme Court has held that prison officials have no statutory authority to divide a prisoner's trust account into two accounts, one of which was restricted as to withdrawals. More importantly, the Court held that state prisoners have a federal constitutional right to payment of accrued interest on funds in their prison trust accounts.

Hawai'i prisoner Richard Blaisdell, acting pro se, filed a declaratory judgment action against the Department of Public Safety (DPS), challenging the placement of his prison earnings into a restricted trust account. He cited Hawai'i Revised Statutes (HRS) § 353-20, which provides that all sums collected for prisoners "shall be deposited by the department into an individual trust account to the credit of the committed person."

Such funds can only be garnished under four specific provisions of HRS § 353-22.5. Garnishment may occur only for restitution to victims, court-ordered child support, replacement and other expenses associated with damage the prisoner may cause while incarcerated, and reimbursement for copying and postage costs advanced for litigation. None of those factors were applicable to Blaisdell.

The DPS did not dispute that it was splitting the money that Blaisdell earned over \$20 between two trust accounts, or that one account could only be accessed

"upon his release, or for uses such as family emergencies, legal obligations, or program necessities." Nevertheless, the Intermediate Court of Appeals granted summary judgment to the defendant prison officials.

The Hawai'i Supreme Court held this was error, as the plain language of the statute only allows one individual trust account. Also, because the statute includes no guidelines on how DPS may restrict withdrawals from that account "for such purposes as it may deem proper," there can be no restrictions on withdrawals.

The Supreme Court then turned to Blaisdell's claim that the DPS's failure to "pay accrued interest on the inmates' money in their trust account was a violation of the takings clause of the Fifth and Fourteenth amendments of the U.S. Constitution." The Court agreed, citing *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1199-1200 (9th Cir. 1998), which relied "upon the traditional common law rule that interest follows principal" in recognizing a protected property interest in earned interest income under the Takings Clause.

On remand, the appellate court was directed to vacate its summary judgment order, to enter declaratory judgment declaring the "restricted" prisoner account was in violation of HRS § 353-20, and to order payment of interest due but not credited

to Blaisdell's trust account. See: *Blaisdell v. Department of Public Safety*, 119 Haw. 275, 196 P.3d 277 (Hawaii 2008). ■

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Overdetained California Prisoner Wins \$21,800 for False Imprisonment

by John E. Dannenberg

The California Court of Appeal upheld a Superior Court verdict of \$21,800 against state prison officials in a lawsuit filed by a prisoner whose eventually-corrected good time credit earning rate resulted in his being released nine months late. Suing under a theory of false imprisonment, he defeated defenses of failure to exhaust administrative remedies and statutory immunity for government actors.

Jorge Gallegos was convicted of continuing child molestation from July 1993 to July 1994. On September 14, 1995, he was sentenced to 12 years. At that time his crime was eligible for half-time credit earning; however, on September 21, 1994, Penal Code § 2933.1 became effective which reduced his crime category's credit earning status to 15%. The California Department of Corrections and Rehabilitation (CDCR) incorrectly applied the new, lower credit earning rate to Gallegos' prison sentence, projecting his release on September 9, 2005.

In July 2002, Gallegos' attorney pointed out the error in a letter to CDCR, noting that the crimes of conviction had occurred before the statutory credit rate change. The CDCR corrected the release date to December 7, 2001. Gallegos was released to INS custody on August 6, 2002, nine months late, and then deported to Mexico.

One year later Gallegos filed suit against the state for false imprisonment and violations of his civil rights. The state first moved for a directed verdict under Gallegos' Civil Code § 52.1 claim on grounds that the overdetention was not "coerced." The trial court granted the motion. The state then moved for dismissal because Gallegos had never exhausted administrative remedies, and also moved for immunity from liability under Government Code (GC) § 845.8. The trial court denied these motions, and following a jury trial Gallegos was awarded \$1,800 in lost (foreign) wages plus \$20,000 for physical discomfort, inconvenience and loss of time.

On appeal, the Court of Appeal upheld the directed verdict because the requisite ill will of "coercion" was plainly not present in this case. But the appellate court also upheld the denial of the state's motions related to administrative exhaustion and immunity.

As to the former, the state had relied upon *Wright v. State of California*, 128 Cal.App.4th 1123, 1136 (2004), which held that a prisoner must first exhaust administrative remedies when seeking damages even though damages cannot be awarded by CDCR in its Form 602 appeals process.

However, the key distinction was that Gallegos had sued for false imprisonment, not for miscalculation of his release date. While a miscalculation claim would require first seeking administrative relief, false imprisonment was a completed (and corrected) act for which no internal damage remedy was available.

Similarly, the Court of Appeal found the state's immunity defense failed. Relying upon *Sullivan v. County of Los Angeles*,

12 Cal.3d 710 (1974) [county not immune from false imprisonment when it knew prisoner should be released], the court held that the state's failure to perform its mandatory duty under Penal Code § 1384 to release an overdetained prisoner could not operate to immunize it from a tort claim for negligence. "[The state's] mistake in keeping [Gallegos] in custody beyond that date when it should have known that his term had expired was not subject to immunity," the appellate court stated.

Accordingly, Gallegos' false imprisonment judgment was affirmed. Gallegos was represented by Oakland attorney Robert Beles. See: *Gallegos v. State of California*, 2008 Cal. App. Unpub. LEXIS 3230 (Cal. App. 1st Dist. 2008) (unpublished), *petition for review denied*. ■

Study Shows Treating HCV in Prisons with Pegylated Interferon Is Cost-Effective

by Matt Clarke

A new study published in the November 2008 issue of the medical journal *Hepatology* found that treating hepatitis C-infected prisoners with the standard therapy of pegylated interferon and ribavirin was cost-effective. Savings were as high as \$41,321 per year, with 0.75 years of increased quality life expectancy for prisoners 40 to 49 years old without a pre-treatment biopsy.

Between 12 and 31 percent of the 2.3 million people incarcerated in U.S. prisons and jails are infected with the hepatitis C virus (HCV), which causes liver damage and eventual death if left untreated. This compares with a 1.3% infection rate in the general population. The high rate of prisoner HCV infection is due to a high rate of intravenous drug use. Annually, between 29% and 43% of the total number of HCV-infected persons in the U.S. pass through a prison or jail. Thus, the treatment of HCV-infected prisoners has wide-ranging consequences for our nation's public health policy.

Previous studies had shown that the standard HCV treatment was cost-effective for the general U.S. population. This new study, led by Sammy Saab of the UCLA David Geffen School of Medicine, found that it was also cost-effective

in the male prison population. The study used male prisoners because they exceed 87% of the U.S. prison population; the cost-effectiveness threshold was based on \$50,000 per quality-adjusted year of life.

Prisoners often have medical complications, such as a high reinfection rate due to continued intravenous drug use and unsanitary tattoos, and a high mortality rate not related to liver disease. Current standards of treatment also vary within different prison and jail systems, with many requiring a liver biopsy showing liver fibrosis (advanced liver disease) and multiple years remaining on a prison sentence to qualify for any in-custody HCV treatment.

Most prisons and jails use a less-expensive and less-effective older treatment protocol for HCV that does not include pegylated interferon for those prisoners who qualify for treatment. This led researchers to expect that the standard treatment would not be cost-effective. Instead, they found "that treatment was cost-saving for prisoners of all age ranges and genotypes when liver biopsy was not a prerequisite to starting antiviral therapy."

Overall, the study indicated that treatment with pegylated interferon and ribavirin should not be withheld from HCV-infected prisoners based on phar-

macroeconomic interests. The study also recommended educational and substance abuse programs for prisoners to reduce relapses into intravenous drug use and possible reinfection. It further suggested screening for mental illness, with careful monitoring of treatment compliance and follow-up for mentally ill prisoners.

PLN has reported extensively on the epidemic levels of HCV among prisoners, and on the failure by prison officials to provide adequate treatment. [See: *PLN*, Aug. 2007, p.1; April 2005, p.12; Aug. 2003, p.1; Jan. 2001, p.1].

An increasing number of lawsuits have been filed over the failure to treat HCV-positive prisoners; for example, on July 8, 2008, the California law firm of Khorrami, Pollard & Abir filed a class action suit on behalf of state prisoners due to inadequate or non-existent treatment for hepatitis C.

"Despite an established standard of care, the California Department of Corrections and Rehabilitation has adopted protocols designed to exclude patients from diagnostic biopsies and treatment," stated attorney Shawn Khorrami. "This is in contrast to the care and treatment provided to the general population. This practice not only denies inmates proper

care and allows their health to deteriorate, but also presents a health danger of further spreading the disease not only within the prison population but also in the general population once the infected inmates are released from prison." See: *Jackson v. Traquina*, U.S.D.C. (ED Cal.), Case No.

2:08-cv-01954-MCE-JFM. ■

Sources: "Treating Hepatitis C in the Prison Population is Cost-Saving," *Hepatology*, November 2008 (available online at www.interscience.wiley.com); Wiley-Blackwell press release; www.corrections.com

Washington DOC Agrees to Pay \$850,000 to Family of Victim Killed by Drunk Driver Under Community Supervision

On April 16, 2008, the Washington Department of Corrections (DOC) settled a lawsuit brought by the family of a woman killed by a drunk driver under DOC community supervision for \$850,000.

Charles Roberson III was placed on community supervision by the DOC in 2003 for possession of a controlled substance. While driving on Martin Luther King, Jr. Way South in Seattle, Washington, Roberson crossed the center line and struck and killed Gloria Daquep. Roberson had a blood alcohol level twice the legal limit of .08 at the time, and had just been involved in a hit-and-run accident

with another vehicle prior to colliding with Daquep's vehicle. Roberson was later charged and convicted of vehicular homicide and sentenced to nine years in prison.

Daquep's estate sued the DOC, alleging that Roberson was improperly assessed during intake and that he should have been under stricter supervision.

The DOC agreed to settle the case for \$850,000. Daquep's estate was represented by Michael Withey of Seattle and James Johanson of Edmunds. See: *Daquep v. Washington State Department of Corrections*, King County Superior Court, Case No. 06-2-35768-0. ■



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Criminal Defense Attorney Helps “Sting” His Own Clients

by Jimmy Franks

On January 23, 2009, Chevalier Robinson was sentenced to 15 years by a U.S. District Court in Ohio after pleading guilty to drug conspiracy and money laundering charges. Robinson's arrest was one of 30 made by federal agents in connection with an undercover sting operation that lasted more than three years. The primary informant in the investigation was Robinson's attorney, Frank Pignatelli.

Court records indicate that Pignatelli was facing indictment as a co-conspirator for allegedly helping his clients purchase “stash houses,” which were to be used to store drugs and money. Instead, he avoided prosecution by turning on his clients and becoming an informant. Information provided by Pignatelli led authorities to seize hundreds of pounds of cocaine and marijuana, as well as over \$3 million in cash and property.

Although many people expressed outrage or disgust at Pignatelli's questionable behavior, his own attorney, Lawrence Vuillemin, said he had “acted responsibly and as required under the law.” Be that as it may, others believe that lawyers who inform on their clients make a mockery of attorney-client privilege.

Robinson's new attorney, James Campbell, said Pignatelli's decision to turn on his client “leaves a bad taste in my mouth.” Legal analyst Dan Recht stated, “It is in fact outrageous. All involved in the criminal justice system and citizens themselves should be outraged by it.”

Criminal defense attorney Scott H. Greenfield was more blunt and less polite. “It is, quite plainly, about as inconceivably ruinous to the integrity of the criminal justice system for a person masquerading as a criminal defense lawyer to use the information obtained to rat people out,” he said. “[T]here is no place horrific enough in the bowels of hell for the soul of a lawyer who would flip on his clients to save his sorry criminal butt.”

Adding insult to injury was the fact that Pignatelli continued to practice law after cooperating with federal investigators, though he now practices in Colorado instead of Ohio. Under the circumstances, one must wonder if any of Pignatelli's current clients are aware of his cavalier attitude regarding attorney-client confidentiality.

Apparently that issue also concerned Colorado authorities. On February 4, 2009, the Colorado Supreme Court's Office of Attorney Regulation announced it had filed a petition to suspend Pignatelli's law license. He is accused of failing to disclose that he was the subject of a federal criminal investigation in Ohio at the time he applied to the Colorado bar. He also faces allegations of neglecting his clients in Colorado, and the disciplinary charges further address the attorney-client privilege issue.

But not everyone is unhappy with Pignatelli. As it turns out, his actions will serve as a boon for local law enforcement agencies. According to a spokesman for the Criminal Investigative Unit of the IRS, local law enforcement budgets will soon receive a large portion of the money seized during the federal investigation with Pignatelli's help. ■

Sources: *www.ohio.com*, *Beacon Journal*, *Colorado Supreme Court press release*, *www.kdvr.com*, *http://blog.simplejustice.us*

Private Prison Company Cleans Up Texas Creek, Finally Gets Prisoners

by Matt Clarke

In July 2008, Louisiana-based private prison company LCS Corrections Services agreed to remove junked cars, appliances and other debris inhibiting the flow of Petronila Creek, which runs close to LCS's newly-built 1,100-bed Coastal Bend Detention Center near Robstown, Texas.

The company had applied to the Texas Commission on Environmental Quality (TCEQ) for a permit to discharge up to 150,000 gallons a day of treated wastewater into the creek. The permit was opposed by residents, especially those from nearby Lost Creek colonia, because the creek already had putrid, stagnant water and tended to flood due to blockages. A colonia is an unincorporated, often impoverished community in the southwest, usually without potable water, sewage systems or paved roads.

Although water tests had not shown high levels of E. coli bacteria, Lost Creek residents complained that the creek water sickened both community members and livestock. The contamination may have resulted from people dumping animal carcasses into the creek, or from brine pits and brine injection wells located close by. The creek tested high for chlorides, sulfates and total dissolved solids. State agencies had refused to clear the creek's flow obstructions because it cuts through private property and was not considered navigable water.

Initially, LCS had also refused to deal with the creek's flow obstructions. Faced with a September 2008 opening

date for the prison and no discharge permit, however, the company announced it would spend between \$20,000 and \$30,000 to clean up the creek. TCEQ regional director Susan Clewis said the removal of the blockages and increased flow from the prison's wastewater discharge should clear out the stagnant creek and improve its water quality.

The LCS facility, which was expected to hold federal prisoners, received preliminary TCEQ approval for the wastewater discharge. What it didn't receive was prisoners. After the wastewater situation was resolved, LCS's plans to house federal detainees for the U.S. Marshals Service, ICE and Border Patrol stalled, and the prison remained vacant. In late January 2009 the facility laid off 35 employees, and most of the remaining staff had their work hours cut.

The company's contract to house federal prisoners was dependent on a “pass through” agreement with Nueces County, in which the county will transfer overflow prisoners to the LCS facility in exchange for a share of the fees. Federal prisoners were removed from the Nueces County jail in 2006 due to unacceptable conditions. [See: *PLN*, Jan. 2006, p.1; Aug. 2003, p.28].

Under a contract approved by the Nueces County Commissioners Court and the U.S. Marshals Service in February 2009, the county will provide oversight for the Coastal Bend Detention Center and another LCS facility in Hidalgo County,

and will receive pass through fees ranging from \$1.25 to \$2.25 per diem for each federal detainee housed at the private

prisons. Prisoners began arriving in early March, and LCS rehired the employees who had been laid off. Their starting pay

was \$11.00/hour. ■

Sources: www.caller.com, www.recordstar.com

U.S. Military Uses Small Wooden Boxes for Segregation Cells of Iraqi Prisoners

The U.S. military has taken the meaning of segregation back to the most draconian periods in human history. The military's answer to dealing with violent Iraqi or Al Qaeda loyalist prisoners is to place them in small wooden boxes.

Military officials released three grainy black-and-white pictures that show the 3 foot by 3 foot by 6 foot tall wood and mesh boxes. Once an average Iraqi, who is an average 5 feet 6 inches tall, is placed in the box, there is little room to move around.

Because prisoners are only isolated in the box for no more than 12 hours at a

time and they are checked every 15 minutes, military officials contend the boxes are humane. "Someone in a segregation box is actually observed more than those anywhere else," said Maj. Neal Fisher, Marine spokesman for Task force Unit 134. "Their care and custody does not change simply because they are in segregation."

"There are concerns that they could be used in places where detainees are enclosed in extremely hot conditions. It is important to know whether or not detainees are provided with food," said Jennifer Daskel of Human Rights Watch.

The U.S. houses over 20,000 prisoners at Abu Ghraib, having released another 10,000 Iraqi prisoners since it took over the prison. ■

Source: *CNN*

Oregon Jail Oversight Committee Disbanded After Sheriff Resigns

In 2006, the Multnomah County Board of Commissioners in Portland, Oregon responded to a scathing prosecutor's report about dangerous and costly conditions in the county's jails by creating a special advisory committee. [See: *PLN*, Jan. 2008, p.12].

The committee was designed to address the systemic management failures of then-Sheriff Bernie Giusto, who publicly battled commissioners over the way he ran the Multnomah County jail system.

Giusto resigned under fire in July 2008 following findings of ethical violations. [See: *PLN*, Jan. 2009, p.48]. Three months later the advisory committee was disbanded, representing a strong endorsement of the county's new sheriff, Bob Skipper.

"It's an expres-

sion of confidence in my ability and the staff's ability to run this agency as it should be run," said Sheriff Skipper. County Chairman Ted Wheeler praised Skipper's efforts but promised that the Board of Commissioners, which was also faulted for lackadaisical jail oversight, would continue to stay involved. ■

Source: *The Oregonian*

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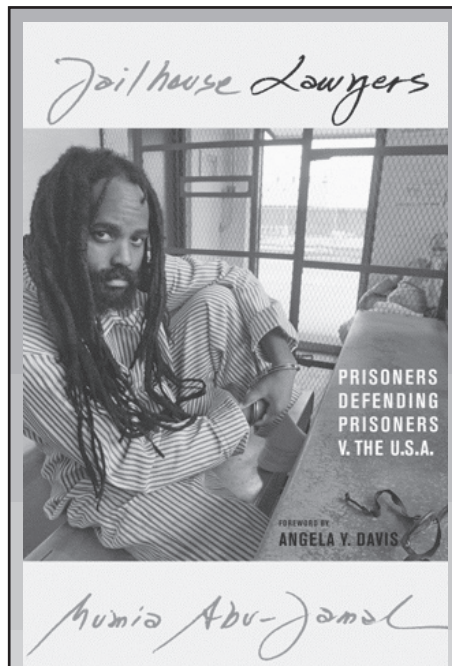
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Prisoners Used for 2008 Voter Registration, Election Campaigning

Last year, prisoners participating in a work release program were hired by Choices Group, a contractor, to register voters in Nevada. Residents of the Casa Grande Transitional Housing Facility in Las Vegas were used to canvass neighborhoods and sign up voters by the Association of Community Organizations for Reform Now (ACORN).

In August 2008, in an attempt to avoid negative press, the Nevada Dept. of Correction (DOC) asked the contractor to suspend its use of prisoners to register voters. "We immediately contacted the Choices Group and asked them to terminate all work release inmates working for the ACORN organization," the DOC said in a written statement.

The company complied, but not before the Nevada Secretary of State and Attorney General's office launched an investigation. A criminal investigator with the Secretary of State reported that ACORN had hired 59 work release prisoners between March 5 and July 31, 2008. One of those prisoners, Jason Anderson, was promoted to a supervisory position.

On October 7, 2008, twenty boxes of files were seized from ACORN's Nevada headquarters along with eight computers and hard drives. ACORN also relinquished 46 application packages related to 33 former canvassers. An examination by election officials turned up voter registrations with fictitious names and data, including the names of the Dallas Cowboys football team.

Bertha Lewis, interim chief organizer for ACORN, called the raid a "stunt that serves no useful purpose other than [to] discredit our work registering Nevadans and distracting us from the important work ahead of getting every eligible vote to the polls."

The investigation had no impact on the November elections and resulted in no arrests. ACORN officials denied wrongdoing; the organization has been accused of voter registration irregularities in other states, including Washington and North Carolina.

On the opposite side of the country, Jonathan Davis, in his bid for city council in Richmond, Virginia, used juvenile prisoners to produce signs, bumper stickers and business cards for his political campaign. Davis reported the services as a \$1,500 in-kind contribution towards his election.

Davis is an advertising design instructor at the Bon Air Juvenile Correctional Center, where the work was done. His election campaign reported \$116 paid to the Bon Air program, which trains older teens in a variety of trades including carpentry, computer repair and food service.

"It's a job-training experience," Davis explained. "It's the same thing I've been talking about in the campaign. We have to make sure when people are incarcerated they will have training to get a job." Especially when that training benefits candidates for public office at a cut-rate price, apparently.

Chris A. Hilbert, who opposed Davis for the 3rd District seat, said he found the matter disturbing. "I just want to make

sure that taxpayers and these incarcerated youth ... were not exploited," he said. "It's difficult to see [how] someone who's incarcerated would do something voluntarily for someone who's supervisory." Davis maintained that he received no special treatment.

The more politics change, the more they stay the same. Almost 15 years ago, *PLN* reported that Washington State Rep. Jack Metcalf had used prisoners as telemarketers in his election campaign [*PLN*, May 1995, p.23], while Florida prisoners were used to type political donor lists. [*PLN*, June 1996, p.9]. ■

Sources: *Las Vegas Sun*, *Richmond Times-Dispatch*, *Washington Post*

Double Standard of Punishment for Supervisors, Line Staff in Colorado DOC

by Gary Hunter

Records show that supervisors who break the rules at the Colorado Department of Corrections (CDOC) are punished less severely, if at all, in comparison with low-level prison employees.

In 2006, Director of Prisons Gary Golder was involved in a dispute with his girlfriend; he was drunk at the time and brandished a loaded weapon.

Golder's distraught girlfriend called 911. "My boyfriend has a gun and he's drunk, and I'm not sure what he's going to do with it," she told the dispatcher. "He's come out and gone back in and told me I just [expletive] him out of a job."

Even drunk, Golder knew he should have been fired for his actions, as CDOC regulations prohibit behavior that brings "disrepute" on the department. But Golder kept his job. He wasn't even arrested.

In contrast, Jason Monett was not only fired, he was prosecuted for possession of chewing tobacco on prison property. Monett was a ten-year employee of the CDOC; the prison system sought to have him charged with felony possession of contraband on prison property. Monett pleaded guilty to a misdemeanor to avoid the felony prosecution. It was his second offense.

"I know a lot of officers, a lot of upper echelon, who have been in trouble for tobacco and stuff, they have been fined, had letters in their files, they have been in

trouble more than once, and they never got fired let alone charges pressed against them," Monett said in his defense. "It's just my opinion, [but] it's a very corrupt system."

An investigation by Colorado's CALL7 television station found some truth to Monett's accusations. Of the 127 CDOC employees fired since 2006, about 12 were low-level supervisors. No high-ranking supervisors were fired. About 20 of the rank-and-file CDOC employees who were terminated had violated the same "disrepute" directive as Golder.

Prison guard Derald Grasmick was fired after two offenses. On one occasion he was accused of smelling like alcohol at work; on another he received a DUI while off duty. Grasmick had a reputation of being a top employee and a "go-to-guy."

However, CDOC Major Curtis Robi-nette, who had two drunk driving arrests, most recently in 2003, was disciplined but not fired.

"There's no question there's a two-tier process in the Department of Corrections," said State Rep. Liane "Buffie" McFadyen. "I think it's been part of the past culture." She went on to say that the inequitable standards have led to low morale and pose a threat to security in the state's prison system.

Recently-appointed CDOC Director Ari Zavaras promised to change the

current standard of injustice within the department. When asked if he was going to ensure that discipline for infractions was going to be meted out in a fair manner, Zavaras responded, "I can not only

say that but in many cases top management would probably be held to a higher standard."

Time will tell. Of course, if prison staff and ranking CDOC officials didn't

violate departmental policies or commit crimes, the disparity in punishment would be moot. ■

Sources: *CALL7, thedenverchannel.com*

Ex-Convict Demoted After Mismanaging Reentry Program

Before his release in 2003, Ronald L. Cuie had served almost three years in Pennsylvania prisons for aggravated assault, robbery and criminal conspiracy. However, it was his successful work under two previous Philadelphia mayors that convinced Mayor Mike Nutter to appoint him over an office created to help former prisoners successfully reintegrate into society.

"My passion is inside the [prison] walls," said Cuie. "I'm as happy as I can be. I'm grateful to have this opportunity."

But after just six months Cuie had managed to overspend the budget for the Mayor's Office for the Reentry of Ex-Offenders, breach existing contracts and hire too many employees. In August 2008, Mayor Nutter reassigned Cuie to another position.

Cuie's original appointment came

with much fanfare. Philadelphia had already taken a novel stance in the way it dealt with released prisoners. In 2005, under the leadership of former mayor John F. Street, city leaders created a \$2.6 million budget aimed at reducing recidivism by assisting ex-offenders following their release from prison. Along with hiring Cuie, Mayor Nutter had championed legislation to persuade businesses to hire ex-offenders by giving them a \$10,000 tax credit.

Further, Impact Services Corp. was awarded \$705,000 to find jobs for former prisoners. Cuie's fiscal mismanagement, however, caused that contract to be terminated about a month before it expired, and with only \$40,000 of the balance paid. At the time of the contract termination, Impact had found employment for 420 ex-offenders. Around 35,000 prisoners are released each year from Philadelphia-area prisons.

Impact Services has since been paid most of the money it was due, but according to Deputy Mayor for Public Safety Everett Gillison, "There was hiring done beyond what the budget could support so we had to end a contract short to make up the deficit." Impact director Ray Jones summed it up by saying, "Somebody dropped the ball in that office." On August 29, 2008, eight of the people hired by Cuie were terminated. He has since been reassigned to a position as special assistant to Deputy Mayor Gullison; his job entails working on reentry projects with prisoners immediately upon incarceration rather than waiting until they are released. Although Cuie initially retained his \$87,500 annual salary, by February 2009 his pay had been reduced to \$60,000. ■

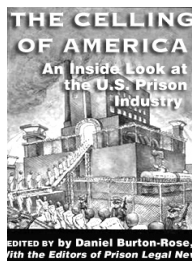
Sources: *Philadelphia Inquirer, www.philly.com*

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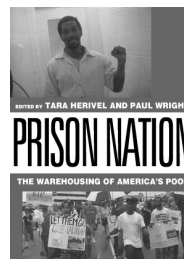
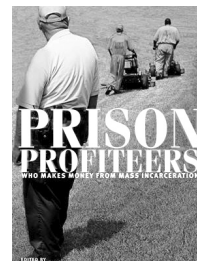
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Mock Prison Disaster Program Discontinued; Mock Prison Riot Training Remains

by Gary Hunter

Practicing for prison riots has been big business in Moundsville, West Virginia for years. The West Virginia State Penitentiary in Moundsville gained notoriety in 1986 when prisoners took control of the facility for 53 hours, holding seventeen employees hostage. Three prisoners were killed.

That same year the state Supreme Court ruled that conditions at Moundsville were unconstitutional. Among other violations, up to three prisoners were being housed in 5' by 7' cells. See: *Crain v. Bordenkircher*, 176 W.Va. 338, 341 (W.Va. 1986). The prison was closed in 1995 and is now used for historical and educational tours.

In 1997, the Office of Law Enforcement Technology Commercialization (OLTEC) saw an opportunity to peddle its high tech security gadgets by staging mock emergency riots and disasters at the Moundsville prison site. By 2000, Moundsville commanded a \$1.4 million allocation from Congress, thanks to senator Robert Byrd, and participants in the disaster and riot training programs infused the local economy with over \$600,000. Guest speakers and salesmen touted everything from Tasers and night vision goggles to pepper spray rifles.

"It was a soup to nuts operation," said Marshall County Sheriff John Gruzinkas. "We would identify training we thought was valuable to local police agencies. They would assist in attracting a trainer to this place, and provide a classroom large or small for that training."

But the recent economic downturn means that the "soup to nuts" operation at Moundsville will no longer be the pork and butter that local citizens had grown to enjoy. In Sept. 2008 the National Corrections and Law Enforcement Training and Technology Center discontinued its mock disaster program at the Moundsville prison, leaving only the mock riot exercise as the town's money maker.

The mock prison riot takes place each May. Core components of the event include a technology showcase, tactical training demonstrations, free workshops, a skills competition and networking opportunities; the mock prison riot attracts personnel from sheriffs' offices, police

departments, corrections departments and the military.

The 2008 mock riot included demonstrations of the Taser XREP – a wireless stun projective fired from a standard 12-gauge shotgun, which is effective up to 100 feet. The next mock riot training program is scheduled for May 3, 2009.

More about the Moundsville mock

prison riot can be found in *PLN's* latest anthology, *Prison Profiteers: Who Makes Money From Mass Incarceration*. For ordering information see the book listings on the last two pages of this issue of *PLN*. ■

Sources: www.statejournal.com, www.policone.com, www.mockprisonriot.org

Florida Prison Officials' Failure to Timely Respond to Grievances Results in Exhaustion of Administrative Remedies

The Eleventh Circuit Court of Appeals held that Florida prison officials failed to timely respond to a prisoner's grievance, which satisfied exhaustion of available remedies under the Prison Litigation Reform Act (PLRA).

The U.S. District Court for the Middle District of Florida dismissed a 42 U.S.C. § 1983 action filed by state prisoner John West Davis, holding he had failed to exhaust administrative remedies as required by the PLRA. Davis appealed.

He argued that the district court failed to consider the time frame in which Florida Dept. of Corrections (FDOC) officials have to answer a prisoner's grievance. Davis contended that because FDOC officials failed to timely respond to his grievances, he had properly exhausted his available administrative remedies.

Florida has a three-tier grievance procedure: informal grievances, formal grievances, and appeals to the Secretary. Prisoners must file informal grievances within a reasonable time after an incident, which is determined on a case-by-case basis. Prison officials must respond to such grievances within 10 days of receipt.

All other grievances or appeals, including an emergency or medical grievance, must be filed within 15 days of an incident. A formal grievance of any type filed at the prison level must be answered within 20 days of receipt by FDOC officials. An appeal to the Secretary must be answered within 30 days of receipt. In the case of an emergency grievance, a response must be made within 72 hours if no emergency is found to exist, with directions to file an

informal grievance with the proper personnel. See: Chapter 33-103.011, Florida Administrative Code (F.A.C.).

Prisoners who are not satisfied with a grievance response must pursue all three levels of the grievance process, and the Eleventh Circuit Court of Appeals has held that if any grievance is denied as being untimely, a federal claim is barred for failure to exhaust administrative remedies.

Relevant to this case, however, was prison officials' failure to timely respond to Davis' grievances. Under FDOC policy, a prisoner may proceed to the next level if a response is untimely. When a prisoner does not agree to an extension of time for prison officials to provide a response, "expiration of a time limit at any step in the process shall entitle the complainant to proceed to the next step of the grievance process."

When an extension of time is not granted to the Secretary and a response is not forthcoming within the mandated time limit, the prisoner "shall be entitled to proceed with judicial remedies as he would have exhausted his administrative remedies." See: Chapter 33-103.011(4), F.A.C.

On appeal, the Eleventh Circuit held that Davis had properly exhausted his available administrative remedies, due to the failure of FDOC officials to provide a timely response to his grievances. As a result, the district court's order of dismissal was vacated. See: *Davis v. Florida Dept. of Corrections*, 264 Fed. Appx. 827 (11th Cir. 2008) (unpublished). ■

Prisons and Jails Preparing for Switch to Digital TV Broadcasting ... or Not

by Matt Clarke

On February 17, 2009, over-the-air television broadcasters were scheduled to complete the switch from analog to digital signals. Following the changeover, analog televisions will no longer receive over-the-air stations without a converter, as all channels will be broadcast digitally.

The conversion is needed to free up airwaves for public safety communications, wireless broadband services and cell phone companies. The deadline for the analog-to-digital broadcasting switch has since been extended; all broadcasters must now make the changeover by June 12, 2009.

Some prison systems are prepared for the switch. In California, for example, all TVs purchased by prisoners since July 2008 have been digital and all state-owned TVs will be equipped with digital converters, according to California DOC spokesman Paul Verke.

Tennessee prisons plan to mount rooftop antennas with a digital service to provide signals to most prisoners' in-cell TVs. Prisoners will be charged a small fee for the service. The Texas Dept. of Criminal Justice has an estimated 7,000 televisions, which will be upgraded by installing digital receivers.

Jails and prisons with cable connections will not have to do anything, as cable service providers will convert the

digital signals for their customers. The U.S. Bureau of Prisons has cable TV in its facilities and thus won't be affected by the digital conversion.

Other states are ill-prepared for the changeover. John Ozmint, Director of the South Carolina DOC, complained that the prison system didn't qualify for government-issued coupons that cover the \$40 cost of a digital converter box. "We asked them for the coupons and they're only available for households. I said, 'We're the big house.' But they didn't buy it," stated Ozmint, who noted that the state won't pay for converter boxes for the prison system's common-area televisions.

The North Carolina DOC has not even determined how many converter boxes it will need, while Florida officials, who balked at spending \$100,000 to upgrade TVs in state prisons, put out a call for converter box donations. Alabama has also requested coupon donations, noting that the coupons can be transferred to others.

In Rhode Island, prisoners are being asked to either purchase a converter box or buy a new digital-capable television. The Massachusetts DOC spent almost \$77,000 on 117 new flat-screen TVs, using money from the prison system's canteen fund.

A number of jails are using funds from commissary sales to pay for digital TV con-

versions, including the Delaware County Jail in Ohio. Others, such as the Seminole County, Florida jail, are doing nothing because they don't provide televisions.

Of course the many prisons, jails and other detention facilities throughout the nation will each address the digital TV changeover problem in their own way – or not. Many will choose to do so, even at considerable expense, as corrections officials consider television to be a management tool that keeps prisoners occupied and compliant.

"It's a big thing for inmates to be able to have television," said Tennessee DOC spokeswoman Dorinda Carter. "It occupies a lot of time, and keeps their minds off other things that could be dangerous." ■

Sources: www.christianpost.com, www.clickpress.com, www.prlog.org, www.tcpalm.com, Columbus Dispatch, Associated Press, Tribune-Herald, www.msnbc.com

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New Jersey Judge Denied Sex Offender a Fair Hearing, Appellate Court Finds

Questioning a lower court's ability to conduct a fair hearing, a New Jersey appellate court ordered a new hearing before a different judge for a sex offender confined under the state's Sexually Violent Predator Act (SVPA).

On March 20, 2007, a sex offender identified as S.B.M. was civilly committed under the SVPA. During a December 20, 2007 hearing to determine if his confinement should be continued, the judge interrupted testimony because she wanted to know if there was a reason why S.B.M. was wearing dark glasses. A witness told her that S.B.M. had a history of eye surgery. She asked if dark glasses had been prescribed, but the witness did not know.

"The judge ordered S.B.M. to 'take them off.' S.B.M. responded, 'I have a medical...' The judge cut him off and ordered him to take them off several times." The judge was subsequently informed that S.B.M.'s medical file indicated "tinted lenses were medically necessary." She did not order him to remove the glasses again but said the "use of black glasses in courtrooms are universally considered to be threatening gestures."

The judge then ordered S.B.M.'s continued civil confinement, stating she was "satisfied that there is no established medical cause of reason for the black glasses" that S.B.M. "voluntarily doffed."

On appeal, the Appellate Division was "very concerned by the judge's demeanor during the hearing. She went off on a tangent regarding S.B.M.'s wearing dark glasses. She interrupted relevant testimony to pursue this inquiry. The judge demanded that S.B.M. remove the glasses repeatedly and disbelieved him without any basis, when he asserted that they were medically approved and that he had authorization to use them."

The appellate court found the judge's conduct "wearisome" because she was the fact finder and the issue of dark glasses was "trivial" and irrelevant. "But, it showed the judge's unwillingness to believe S.B.M., even when his statement ... was corroborated. It also calls into question the judge's ability to conduct a fair hearing," wrote the court.

The appellate court thus ordered a new hearing before a different judge, and instructed that "in the future, the judge

should avoid confrontation over tangential matters." See: *In the Matter of the Civil Commitment of S.B.M.*, Superior

Court of New Jersey Appellate Division, Docket No. A-2384-07T2 (SVP-308-03), Sept. 3, 2008 (unpublished). ■

Second Prisoner Unconditionally Released from Washington State Civil Commitment Center

Washington State, for only the second time ever, has unconditionally released a prisoner from the Special Commitment Center (SCC), a facility for civilly-committed sex offenders located on McNeil Island near Tacoma.

John Henry Mathers, 56, was civilly-committed in July 1997. He was initially incarcerated at SCC but graduated to a less-restrictive SCC halfway house in 2002. There, under escort, he could leave the facility for treatment and work.

Mathers had been convicted of multiple violent offenses that included sexual assaults involving women and girls. The state petitioned to have him deemed a sexually violent predator when he completed his last criminal sentence in March 1996, and he agreed to be civilly committed.

Mathers participated in the sex offender treatment program with favorable staff reports during his stay at SCC. According to court documents, "he has continued to progress in his treatment and to comply with all the rules and conditions. Mr. Mathers has been viewed as a model resident."

Pierce County Superior Court Judge Stephanie Arend heard Mathers' request

for unconditional release on August 15, 2008. The Department of Social and Health Services had opposed any type of release, contending that Mathers still fit the statutory definition of a sexual predator. SCC's superintendent had also opposed unconditional release, arguing for a gradual release.

However, in granting Mathers' unconditional immediate release, Arend found that he no longer met the statutory definition of a sexual predator. See: *In re Detention of John H. Mathers*, Pierce County Superior Court (WA), Cause No. 96-2-07023-3.

Mathers is now residing in the Tacoma area and has registered with various government authorities as a Level 3 sex offender. The first person unconditionally released from SCC was Herman Ross Paschke, in July 2007.

Approximately 275 civilly-committed men and one woman remain incarcerated at SCC; they represent a growing trend of continuing to confine sex offenders after they have served their criminal sentences. ■

Sources: www.thenewstribune.com, www.dshs.wa.gov/lhrs/scc

California Prison Fined \$40,000 for (Another) Raw Sewage Spill

California water officials fined the California Men's Colony State Prison (CMC) in San Luis Obispo \$40,000 for a 20,000 gallon raw sewage spill into Chorro Creek on January 27, 2008. This was just the latest such spill into Chorro Creek, which drains into environmentally sensitive Morro Bay.

The spill was traced to the failure of a backup power generator during a power outage. But CMC has "priors." When its older sewage plant spilled 220,000 gallons of waste into Chorro Creek in 2004, and a records search revealed 450 documented spills in the previous five

years, CMC was fined \$600,000 [see: *PLN*, Nov. 20007, p.2]. Since then, a multi-million dollar plant upgrade has been completed.

In this latest episode, the toxicity of the pollution was mitigated by high winter creek flows. Nonetheless, concerned county officials closed Morro Bay, a state-designated marine protected area, for four days as to water-contact recreation and indefinitely as to sport shellfish harvesting. CMC could have been fined \$200,000 under state law. ■

Source: www.sanluisobispo.com

\$95,000 Awarded After NY Court Officers Fail to Transmit Protective Custody Order to DOC and Rape Occurs

The Supreme Court of New York held that the Court of Claims erred when it dismissed a prisoner's damages claim for injuries suffered when he was not placed in protective custody as had been ordered by the Criminal Court.

Kenneth H. was arrested on September 15, 1998 for grand larceny; he was arraigned in the Criminal Court of New York. Unable to post bail, he was remanded to the New York Department of Corrections (DOC) and placed in general population at the Manhattan Detention Center (MDC), where he was sexually assaulted by another prisoner several times between September 16 and 18, 1998.

At a September 18 court hearing, Kenneth's attorney asked that he be placed in protective custody. The court wrote "Protective Custody" on Kenneth's "Record of Court Action."

However, upon his return to MDC on September 21, Kenneth was again sexually assaulted by the same prisoner. He complained to his attorney that he had

not been placed in protective custody. On September 24 or 25, 1998, he was finally transferred out of general population.

Kenneth filed a claim against the state due to the failure to timely place him in protective custody. It was determined that court officers had the ministerial duty to process such special court orders and transmit them to the DOC, but that the order for Kenneth did not arrive until September 24. The Court of Claims denied Kenneth relief on the grounds that he had failed to show how the state officers had erred.

On review, the Supreme Court distinguished "discretionary acts" from "ministerial acts." The former involve an exercise of reasoned judgment while the latter require strict adherence to a governing rule with a compulsory result. In this case, the record indicated that a strict procedure and duty devolved from standing court procedures to transmit a protective custody order to the DOC. There was no discretion involved. As a result of the failure to perform their ministerial duty, the

court officers were liable for the injuries suffered by Kenneth.

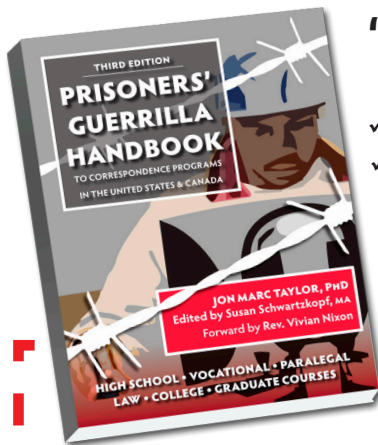
Accordingly, Kenneth's damages claim was reinstated, liability against the state was established, and the matter was remanded for trial to determine damages. See: *Kenneth H. v. State of New York*, 36 A.D.3d 511, 828 N.Y.S.2d 355 (N.Y.A.D. 1 Dept., 2007).

On remand, following emotional testimony by Kenneth regarding the sexual abuse he endured, the Court of Claims awarded him \$95,000 in damages on June 18, 2008. See: *Kenneth H. v. State of New York*, Court of Claims (Albany, NY), Claim No. 101841. The damages judgment in this case is posted on PLN's website. ■

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Eighth Circuit: Missouri Prisoner Has Right to Elective Abortion

The Eighth Circuit U.S. Court of Appeals has held that the Missouri Department of Corrections' (MDOC) blanket policy of prohibiting the transport of female prisoners to outside medical facilities for elective, non-therapeutic abortions violated the Fourteenth Amendment.

An anonymous MDOC prisoner identified as Jane Roe (and later, a class of similarly situated prisoners) sought approval for "outcount" transportation to a medical facility to have an elective, non-therapeutic abortion. MDOC policy restricted all such transports to medical "necessities."

Roe countered that she had a Fourteenth Amendment right to an elective abortion, and the MDOC's policy was therefore unconstitutional; she further alleged cruel and unusual punishment under the Eighth Amendment. The U.S. District Court (W.D. Mo.) ruled for her on both claims, and the state appealed.

The Eighth Circuit conducted a *de novo* review and found that the four-part test of *Turner v. Safley*, 482 U.S. 78 (1987) applied. The state contended that Roe's case was similar to one of racial classifications, and thus was owed a stricter standard of review; however, this argument was rejected by the appellate court.

In applying *Turner*, the Eighth Circuit first agreed with the district court that although a legitimate security interest attached to outcount transportation, the MDOC policy did not rationally advance that interest. MDOC's argument – that security interests are implicated any time a prisoner is removed from a secure facility – was found wanting when the appellate court observed that if the MDOC denied the elective abortion, Roe would likely need more outcount trips for prenatal care and her baby's delivery.

The MDOC then argued that anti-abortion "hecklers" outside the prison gates threatened prison guards' safety during such transports. The Court of Appeals rejected this "heckler's veto" because it would allow the hecklers' alleged First Amendment rights to trump Roe's Fourteenth Amendment rights. Moreover, the MDOC offered no evidence that prison staff was ever actually put in harm's way during a medical transport.

The "alternative means" test under *Turner* failed as well. The MDOC posited unconvincingly that Roe should have

obtained an abortion before her incarceration, implying that she should have been prescient both as to her arrest and the fact of her pregnancy.

The third *Turner* test, related to the impact on guards, other prisoners and prison resources, failed because the cost impact was *de minimus* compared to the prison budget. Again, the predictable need for more outcount transportation costs due to prenatal care and the delivery defeated the MDOC's argument. Similarly, *Turner*'s fourth test for ready alternatives failed because denial of the abortion would inexorably lead to greater costs.

However, the Eighth Circuit dis-

agreed with the district court on its finding of an Eighth Amendment violation. That claim turned on whether an elective procedure constitutes a "serious medical need" sufficient to impart "cruel and unusual punishment" for its denial. The appellate court followed Fifth Circuit precedent in holding that such a denial failed to reach the level of "egregious treatment that the Eight Amendment proscribes."

Accordingly, the Court of Appeals affirmed Roe's Fourteenth Amendment right to medical transport for an elective non-therapeutic abortion, but reversed on her Eighth Amendment claim. See: *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), *cert. denied*. ■

Retroactive Residency Restrictions for Missouri Sex Offenders Unconstitutional

by Matt Clarke

On May 24, 2007, Cole County, Missouri Circuit Court Judge Patricia S. Joyce ruled that a Missouri statute requiring certain registered sex offenders to move if they lived within 1,000 feet of a school (§ 566.147, R.S.Mo.) was unconstitutional as applied to offenders who had established residences that predated the statute.

R.L., a registered Missouri sex offender, filed suit in state court after his probation officer notified him that he had violated probation by failing to move from his residence which was located within 1,000 feet of an elementary school. In 2004, the Missouri Legislature enacted § 566.147.1, which made it a Class D felony for certain sex offenders to establish a residence within 1,000 feet of a school. Effective June 5, 2006, § 566.147.1 was amended to include sex offenders who resided within 1,000 feet of a school if the school existed at the time they established their residence.

R.L. was notified that his residency constituted a Class D felony; he was instructed to stop living at that location and develop a relocation plan with an agreed upon timeframe or face revocation of his probation. R.L.'s probation officer later notified him that he had violated probation by failing to move.

R.L. challenged the constitutionality of the statute. The circuit court held that the amended version of the statute interfered with R.L.'s quiet use and enjoyment of his property. The statute was punitive

because it required affected persons who lived within 1,000 feet of a school before its amendment to vacate their residences or face probation or parole revocation and felony prosecution, and was retrospective in operation. Therefore, the law was in violation of Article I, § 13 of the Missouri Constitution, which prohibits retrospective laws that impair vested rights acquired under existing laws, create new obligations, impose new duties or attach new disabilities. It also violated Article I, § 10 of the U.S. Constitution in that it was a punitive, retrospective *ex post facto* law that disadvantaged and criminalized sex offenders living within 1,000 feet of a school at the time of the statute's amendment, when such residency prior to the 2006 amendment was not criminal. Even if the Missouri legislature had a nonpunitive intent in enacting the statute, the felony criminal effect of the statute negated that intent.

The statute also violated the equal protection clauses of the Missouri Constitution (Article I, § 2) and the U.S. Constitution (14th Amendment), even under the lowest level of constitutional scrutiny, the "rational relationship" test. There was no rational basis for treating those living lawfully within 1,000 feet of an existing school at the time of the statute's amendment differently from those living within 1,000 feet of a school built after the statute's amendment.

The amended statute also violated the due process rights set forth in Article I, §

10 of the Missouri Constitution and the 14th Amendment to the U.S. Constitution by depriving affected persons of their property rights without notice or an opportunity to be heard.

The court specifically differentiated its ruling from that of the Eighth Circuit's opinion upholding the constitutionality of Arkansas' sex offender residency restrictions, which contained an exemption for sex offenders living within the designated distance from a school when the statute was enacted. [See: *PLN*, July 2007, p.40].

The court thus declared the amended statute unconstitutional, and permanently enjoined the Missouri DOC from enforcing it against R.L. and similarly situated sex offenders. See: *R.T. v. Missouri DOC*, Circuit Court for Cole County, Missouri, Case No. 07AC-0000269.

On February 19, 2008, following an appeal by the state, the Missouri Supreme Court affirmed the lower court's ruling. The Court held that "The constitutional bar on retrospective civil laws has been a part of Missouri law since this State adopted its first constitution in 1820," citing *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006), a decision that overturned a statute requiring registration of sex offenders who committed offenses prior to the law's effective date. [See: *PLN*, July 2007, p.36].

"As with the registration requirements in *Phillips*, the residency restrictions at issue in this case impose a new obligation upon R.L. and those similarly situated by requiring them to change their place of residence based solely upon offenses committed prior to enactment of the statute," the Missouri Supreme Court found. See: *R.L. v. State of Missouri DOC*, 245 S.W.3d 236 (Mo. 2008). ■

Additional source: *Associated Press*

South Dakota Jail Prisoner Awarded \$1.1 Million for Rape by Guard

A South Dakota federal jury awarded a former female pre-trial detainee \$1.1 million in damages for being raped by a guard at the Pennington County Jail. The detainee, Mindy Kahle, was a former stripper awaiting disposition of robbery and assault charges.

She claimed that rookie guard Jermaine Leonard entered her cell three times on December 14, 2002, and sexually assaulted her. Leonard conceded the sex occurred but he contended it was consensual. He said Kahle seduced him to receive extra privileges. Not

only was Leonard fired as a guard, but he spent several months in jail for the incident.

On February 23, 2008, the jury found Leonard liable for battery, outrage, and civil rights claims. It awarded Kahle \$600,000 in compensatory damages and \$500,000 in punitive damages. Leonard's supervisor, Tim Malone, was found not liable on a negligent supervision claim. Kahle was ably represented by Rapid City attorney Steven C. Beardsley. See: *Kahle v. Pennington County Jail*, USDC, D SD, Case No. 5:04-5024. ■

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Executioner Banned in Missouri but Available for Hire Elsewhere

by John E. Dannenberg

A former Missouri prison doctor and participant in lethal injections, who was banned from performing executions in that state, is still for hire to conduct executions in other jurisdictions. With over 40 death sentences notched in his belt, he is widely sought after for his purported expertise with lethal injections.

Dr. Alan Doerhoff, 64, proudly told the *Associated Press* on August 14, 2008, "Nobody will ever do as many [executions] as I have." In fact, Doerhoff has assisted with lethal injections not only in Missouri but also in Arizona and Connecticut, and for the U.S. Bureau of Prisons.

His departure from Missouri's execution team was based upon his previously non-disclosed dyslexia, which causes him to transpose numbers and make dosing mistakes. [See: *PLN*, July 2008, p.28]. Doerhoff has since stated that "he is not dyslexic, but does transpose numbers" – a seeming distinction without a difference. He has also been sued for malpractice over 20 times.

Apparently, his current Dept. of Corrections clients don't care. Rather, they rely on his self-proclaimed status as the "world's authority on lethal injection" to perform allegedly painless executions. His procedure is to deliver all the drugs via a large-bore trauma needle with a catheter attached that he threads into a thumb-sized vein in the groin, neck or shoulder, and guides to a position near the heart.

Doerhoff claims this "central line" protocol is crucial to foolproof and painless executions. Once he has surgically installed the catheter and mixed the drugs, the drugs are pumped from an adjoining room using plungers operated by prison employees. It is by this method that he distances himself, as a doctor, from personally executing his patients. He simply ensures that other people are able to execute them, thus making a mockery of the Hippocratic Oath.

Lethal injection procedures in other states often use a peripheral intravenous needle in the arm. Doerhoff called this "unreliable and risky," and said "It's negligent not to use a central line." He observed that while debate continues over which drugs to use in lethal injections, the drugs "always work." Instead, it is IV malfunctions or misplacement by untrained personnel that causes botched executions.

Richard Dieter, executive director of the non-profit Death Penalty Information Center, noted that doctor-participants in executions are hard to come by. Doerhoff had 20 years of practice in Missouri prison hospitals prior to becoming the state's executioner; he conducted executions in Missouri until 2006, when court-ordered reforms were enacted.

The state's new lethal injection protocol, which Doerhoff termed "overly complicated and potentially problematic," involves 10 to 15 syringes instead of the usual three. It will be tested during the state's next-scheduled execution. "It will have the same effect, the guy will die," Doerhoff said. "But it may not be pretty."

Doerhoff noted that he reassures the prison employees who administer the lethal drugs. "These guys are scared

to death, they're shaky," he stated, with no apparent sense of irony. "I help them calmly go through the procedure." He recalled executing federal prisoner Timothy McVeigh, who had bombed the federal building in Oklahoma City in 1995. "He was the most kind, soft-spoken man, very polite," Doerhoff recalled, "a career military man, spit and polish to the end."

To relieve stress, Doerhoff – who has a history of three heart attacks – rides his Harley-Davidson motorcycles. His dyslexia notwithstanding, he quipped, "I can still see the road signs." It's too bad he can't see how assisting in executions violates the central tenant of his chosen profession: To do no harm. ■

Sources: *Associated Press*, *Los Angeles Times*

Los Angeles County Pays \$850,000 for Police Misconduct Death and \$595,000 in Jail Medical-Related Death

Los Angeles County settled two lawsuits in July 2008 for a total of \$1,445,000. Of that amount, \$850,000 went to the survivors of a man shot to death by sheriff's deputies following a car chase, and \$595,000 was paid to the family of a woman who died from lack of medical care at the Los Angeles County jail.

On June 13, 2006, deputies killed 27-year-old Carl Williams after a high-speed chase through Walnut Park, California. Williams allegedly rammed a patrol car and then backed into it again. Six deputies responded and fired 70 rounds, killing him.

Although the deputies claimed that they felt threatened by Williams' use of his car as a weapon, a different story emerged from accident reconstruction experts. The deputies' version of the event "could not be substantiated," and an expert testified that evidence collection methods used by sheriff's investigators were flawed.

Accordingly, "due to the risks and uncertainties of litigation," the county reached a settlement for \$850,000. The county's attorney fees and costs totaled over \$243,000. See: *Logan v. County of Los Angeles*, Los Angeles Superior Court, Case No. BC 361 641.

In the second case, Heidi Verdekel, 29, died of complications from an epileptic seizure while she was incarcerated at the Twin Towers Los Angeles County jail. Although she was placed on anti-seizure medication, she had further seizures and was subsequently transferred to the county's medical center. She developed an infection at the medical center and died three weeks later, on March 14, 2005.

A federal lawsuit filed by her parents alleged that due to Heidi's known long history of seizures, it was deliberate indifference for jail staff not to have given her the same dosage of medication she was on prior to her arrest. Further, she should have been treated sooner and promptly taken to the hospital for earlier intervention. The parties settled the lawsuit for \$595,000, and the county's legal expenses exceeded \$320,000.

Los Angeles County followed up by implementing a corrective action plan that provides specific training to jail staff on dealing with epileptics in custody. See: *Verdekel v. County of Los Angeles*, U.S.D.C. (C.D. Cal.), Case No. CV 06-01518-JFW. ■

Additional source: *Los Angeles Times*

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Ninth Circuit: “Supervised Release” is Not “Imprisonment”

The Ninth Circuit U.S. Court of Appeals has held that with respect to 18 U.S.C. § 3624(e), being on supervised release in a state community pre-release center did not toll a state prisoner’s concurrent federal supervised release. Since the plaintiff had therefore served all of his federal probation period while participating in the state community pre-release program, he was beyond the federal court’s jurisdiction for reincarceration when he failed a subsequent drug test.

Dennis Sullivan tested positive for marijuana in August 2006. The U.S. District Court (D. Mont.) ruled that was a violation of his supervised release from a 1998 federal conviction for possession of a stolen money order. Sullivan had originally been sentenced to 18 months in prison plus three years of supervised release. The latter required him to refrain from any unlawful use of a controlled substance. Upon violating Sullivan, the court sentenced him to an additional 12 months in prison and 20 more months of supervised release.

However, Sullivan had a concurrent sentence from a Montana state court. In February 2001, he was transferred from a state prison to a state pre-release center, from which he was released in September 2002. At issue was whether the 19 months that Sullivan spent in the pre-release center was “imprisonment” – which would toll his federal supervised release period. If not, his federal supervision period would have expired by the time he tested positive for marijuana.

On appeal, the Ninth Circuit joined four other circuits in holding that because the pre-release center did not involve being in a locked facility, it was not “imprisonment” within the meaning of § 3624(e). Indeed, inspection of both Montana and federal statutes revealed that “imprisonment” meant being locked up. Thus, it didn’t matter whether one looked to state or federal law as to the tolling question. The appellate court was guided by U.S. Supreme Court precedent, which stated, “Congress intended supervised release to assist individuals in their transition to community life. Supervised release serves rehabilitative ends, distinct from those served by incarceration.” [*United States v. Johnson*, 529 U.S. 53, 59 (1999)].

Accordingly, the Ninth Circuit de-

termined that the district court had no authority to revoke Sullivan’s federal supervised release, which had expired at the

time of his positive drug test. See: *United States v. Sullivan*, 504 F.3d 969 (9th Cir. 2007). ■

California Prisoner-Pay Deductions for Aiding Crime Victims Distributed to Victim Organizations

In December 2008, the California Department of Corrections and Rehabilitation’s (CDCR) Prison Industry Authority distributed \$131,343 collected from prisoner workers’ pay to twelve crime victims organizations. The money, amounting to 20% of the net wages earned in Joint Venture programs within CDCR, was doled out in amounts ranging from \$3,010 to \$17,632.

The Joint Venture program was created in 1990 when Proposition 139 (“Inmate Labor Initiative”) was passed by the voters. Prop 139 authorized private companies to set up businesses on prison grounds to employ prisoners at comparable market wages. The prisoners’ after-tax “earnings were divided to pay 20% each towards (1) restitution orders (or the victims fund), (2) family support, (3) incarceration costs, (4) a mandatory prison-administered savings account for the prisoner upon release and (5) the prisoner’s current use.

It is from the portion withheld for victims that the \$131,343 accrued. The

organizations receiving the current distribution were: Community Action Partnership of Madera County (\$35,264); James Rowland Crime Victim Assistance Center (\$17,632); Merced County District Attorney Victim/Witness Assistance (\$17,632); Lassen County Victim/Witness Assistance Center (\$3,010); Sunny Hills (\$10,851); Marin Abused Women’s Services (\$10,851); Bay Area Women Against Rape (\$14,468); Project Sister (\$4,876); City of Chino/New Directions Violence Program (\$4,876); San Joaquin County Victim/Witness Assistance Center (\$3,959); Women’s Center of San Joaquin County (\$3,959); and HRC Calaveras, Crisis Center (\$3,959).

But before individual victims see one penny, if they ever do, the distribution first passes through the recipient victims’ organizations and their overhead charges. Also unclear is whether “witness assistance” funding involves witness reward programs or personal payments to victims. ■

Source: www.cdcr.ca.gov/News

\$75,000 Settlement in Utah Jail Prisoner’s Suicide

Officials at the Salt Lake City Jail settled a lawsuit involving a prisoner’s suicide for \$75,000. The settlement came in the hanging death of Arthur Henderson.

When he was booked on January 28, 2006, Henderson revealed he was depressed and had suicidal ideations, stating “there is a 60 percent chance I’ll be dead in the morning.” Prior to his booking, Henderson was relieved from his duties from the Lehi Police Department following a confrontation with family members and police. He was also dependent on pain medications.

Jail officials placed him in the Acute Mental Health Unit in a “suicide smock” and gave him medications. After Hender-

son was found hanging by a bed sheet, his family sued. They alleged jail officials failed to prevent Henderson’s April 19, 2006 death.

The family claimed that Henderson exhibited high risk indicators for self-harm and suicide. While in jail, he had repeatedly banged his head on the floor, swallowed plastic bags from a sack lunch and self-expressed efforts to cut his femoral artery with a broken piece of cast.

The \$75,000 settlement, to be paid by the jail’s mental health contractor, MHM, Inc., was termed a “cost of defense” settlement. See: *Henderson v. Salt Lake County*, USDC, D. Utah, Case No: 08CV272. ■

Federal Supervised Release Must be Credited for Time Served on Prior Revocations

The Eleventh Circuit Court of Appeals held that the maximum allowable period of federal supervised release following multiple revocations must be reduced by the aggregate length of any prison terms served as a result of prior revocations.

In 1999, Stephen Mazarky pleaded guilty to federal drug charges and was sentenced to 42 months imprisonment and 36 months of supervised release. Following his 2004 release, Mazarky violated his supervised release.

The district court revoked his supervised release and sentenced him to 10 months in prison and 26 months of supervised release. Mazarky was released in 2006 and again violated. The court again revoked, and sentenced Mazarky to 8 months in prison and 28 months supervised release.

Mazarky appealed, arguing that under 18 U.S.C. § 3583 his 36-month supervised release term should have been reduced by the 18 months he served in prison on the violations, resulting in

an 18-month supervised release term rather than the 28 months ordered by the district court. The Eleventh Circuit agreed.

Noting that this was “a question of first impression in this Circuit,” the appellate court acknowledged that it “has been addressed in the relevant legislative history, and in the Seventh, Eighth, and Second Circuits.” The court then found that “the relevant legislative history and caselaw from other circuits indicate that” 18 U.S.C. § 3583(h) “was intended to provide credit for the aggregate of prison terms served on prior revocations toward the maximum amount of supervised release permitted by statute.”

As such, the Court of Appeals held “that, under subsection (h), the maximum allowable supervised release following multiple revocations must be reduced by the aggregate length of any terms of imprisonment that have been imposed upon revocation.” The court concluded that “credit must be applied

toward Mazarky’s maximum term of 36 months of supervised release for 10 months of imprisonment served on the first revocation and 8 months of imprisonment served on the second revocation. Thus, Mazarky’s new sentence should be 8 months of imprisonment followed by 18 months of supervised release.” See: *United States v. Mazarky*, 499 F.3d 1246 (11th Cir. 2007). ■

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Bivens Action Unavailable Against Federal Private Prison Employees

The U.S. Court of Appeals for the Eleventh Circuit held that a federal prisoner incarcerated at a privately operated prison may not pursue a *Bivens* action against private prison employees for violating his Eighth Amendment rights.

Luis Francisco Alba, a federal prisoner incarcerated at the McRae Correctional Institution in McRae, Georgia, filed a pro se civil rights complaint claiming deliberately indifferent medical care. McRae is owned and operated by Corrections Corporation of America (CCA) under contract with the Federal Bureau of Prisons (BOP).

According to his complaint, Alba underwent surgery for a benign goiter in his throat while at McRae. He alleged that the surgery damaged his vocal cords, and that despite repeated requests he was not given appropriate post-operative treatment. Alba sued several individual CCA employees, including the warden and other health services staff, but not CCA corporate.

He specifically alleged that prison employees, acting pursuant to CCA policy, had refused to schedule thyroplasty surgery – a corrective procedure recommended by a throat specialist. Alba contended that CCA employees did not authorize the surgery based on a CCA policy that considered the surgery “elective” in order to curtail medical costs. Alba sought monetary damages and an order directing prison officials to perform the thyroplasty.

Proceeding in forma pauperis in the district court, Alba’s complaint was screened pursuant to 28 U.S.C. § 1915a. The magistrate judge issued a report and recommendation that the complaint be dismissed for failure to state a claim.

Characterizing Alba’s complaint as seeking relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 408 U.S. 488 (1971), the magistrate judge concluded that Alba had no cause of action under *Bivens* because adequate remedies in state court existed by way of negligence or medical malpractice actions. The district court concurred with the magistrate’s recommendation and overruled Alba’s objections. With the assistance of appointed counsel, Alba appealed.

In *Bivens*, “the Supreme Court for the first time implied a private right of action for damages against federal officials in the absence of an act of Congress authorizing

such an action.” Since then, the Court has only extended *Bivens* twice. In both cases the Supreme Court found the plaintiffs did not have alternative remedies. Aside from those two cases, the Court has consistently refused to extend *Bivens*. Most recently, the Court declined to do so in *Correctional Services Corp. v. Malesko*, 354 U.S. 61 (2001), a case the Eleventh Circuit described as being “very similar” to Alba’s. In *Malesko* the Supreme Court refused to infer a damages action against a private prison company under contract with the federal government.

Turning to the merits of Alba’s appeal, the Eleventh Circuit declined to extend *Bivens* to claims against private prison employees working under contract with the BOP. Alba had argued that he lacked an alternative remedy because 1) the “remedy must be a federal remedy,” and 2) Georgia’s requirement that a medical malpractice suit be accompanied by an affidavit from an expert was an almost impossible hurdle for an indigent prisoner.

Nonetheless, the Eleventh Circuit, citing *Malesko*, held that an alternative remedy need not be federal. As for the difficulties with Georgia’s affidavit requirement, the appellate court noted that Alba stood “in the same shoes as anyone else in Georgia filing a professional malpractice claim.” Even a “free citizen,” the Court of Appeals observed, would have difficulty in obtaining the required affidavit, “especially one with limited funds.” The fact that Georgia’s procedural rules may complicate the filing of a lawsuit does not mean that a plaintiff lacks “any alternative remedy for harms caused by an individual officer’s unconstitutional conduct.” Lastly, the Eleventh Circuit found that “Georgia’s tort laws are not ‘inconsistent or hostile’ to the rights protected by the Eighth Amendment.”

Accordingly, the judgment of the district court dismissing Alba’s complaint for failure to state a claim was affirmed. See: *Alba v. Daniels*, 517 F.3d 1249 (11th Cir. 2008), *cert. denied*. ■

Ninth Circuit Remands RLUIPA Claim for Group Religious Worship in Maximum Security Jail

The Ninth Circuit U.S. Court of Appeals has held that under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a prisoner seeking group worship in the maximum security section of a jail was entitled to have his religious rights balanced against jail security concerns, rather than be subjected to a blanket ban on all group worship irrespective of less restrictive means.

Darin Greene was housed in the maximum security section of the Solano County, California jail, awaiting trial on charges of terroristic threats and false imprisonment. His requests to have a classroom made available at the jail for the purpose of conducting group religious services was denied due to a blanket policy of movement restriction for high-security prisoners. He attempted to conduct Bible study by yelling to other prisoners through the corner edge of his cell door, but was rebuffed by staff and other prisoners who were bothered by the noise.

Greene sued jail Lt. Peggy Rourk in U.S. District Court (E.D. Cal.) under the RLUIPA, 42 U.S.C. § 2000cc *et seq.*,

claiming the blanket restriction on group worship services violated his rights. The district court granted summary judgment to Rourk and dismissed the case when it found that denying Greene’s request for group worship did not “substantially burden his ability to exercise his religion,” because he “was not required to act contrary to [his] religious beliefs. ... Moreover, alternative means for exercising his religion remained available to [him].”

On appeal, the Ninth Circuit read the RLUIPA more expansively, focusing on the statutory language “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” Thus, it was not the religion itself but the exercise of religion that controlled. In this case, Greene was able to have his own religious thoughts without restriction, but could not exercise his religion through dialogue with other prisoners due to the blanket jail policy against group worship services.

In fact, while Rourk argued that Greene could not use the shield of RLUIPA to name a time and place in the jail to conduct group services, Rourk admitted

that several maximum security prisoners were permitted time in the law library, which had occurred without incident. Thus, it appeared there might be a less restrictive alternative means to satisfy Greene's religious rights, and it was error for the lower court to grant a flat denial without a reasoned weighing under the four-part balancing test of *Turner v. Safley*, 482 U.S. 78 (1987).

The Ninth Circuit held that RLUIPA's plain language compelled the conclusion that Greene's "religious exercise" issue was group worship services, not Christianity. As such, the jail's blanket policy "substantially burdened his ability to exercise his religion," and summary judgment against Greene on this issue was inappropriate. The Court of Appeals reversed and remanded for the district court to conduct a *Turner* analysis.

However, the Ninth Circuit was quick to add that "nothing in our opinion should cast doubt on the fact that prison officials may, under certain circumstances, substantially burden a prisoner's ability to engage in religious exercise. But in light of RLUIPA, no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison. Prison officials must show that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.' If prison officials meet that standard, the prison regulation passes muster under RLUIPA, regardless of the burden it imposes on religious exercise." See: *Greene v. Solano County Jail*, 513 F.3d 982 (9th Cir. 2008). ■

\$7,025 Award in Slip and Fall From Ohio Prison Bunk

The Ohio Court of Claims has awarded a former Ohio prisoner \$7,025 for injuries related to a slip and fall from a prison bunk.

Stacy Rose slipped and fell while climbing down from his bunk at the Chillicothe Correctional Institution. Rose suffered injuries to his lower back, left ankle, and right shoulder. Rose was given ibuprofen by the prison infirmary after the fall, but continued to experience pain.

After his release, Rose sued the Ohio Department of Rehabilitation and Corrections. Rose claimed that the pain from his injuries prevented him from working jobs, like construction, that he used to work before the incident. Tapeka Turner, Rose's girlfriend, confirmed Rose's pain.

Based on the evidence, the court awarded Rose \$7,025. The court found that Rose suffers "some pain" on a daily

basis as a result of the fall. The court, however, found Rose's pain to be neither, debilitating or severe. See: *Rose v. Ohio Department of Rehabilitation and Correction*, 2008 Ohio Misc. LEXIS 53 and 2008 Ohio Misc. LEXIS 110. ■

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Court Rejects Federal Prisoner Worker's Claim of Copyright Infringement

The U.S. Court of Federal Claims dismissed a prisoner's copyright infringement suit for lack of jurisdiction; the dismissal was upheld on appeal.

Robert J. Walton, a federal prisoner, sued the United States for copyright infringement related to his creation of calendars for the General Services Administration (GSA) while working for Federal Prison Industries, Inc., commonly known as UNICOR. Walton alleged that the government never compensated him for use of the calendars, and that government officials were engaged in ongoing infringement.

While working at a UNICOR print factory at the U.S. Penitentiary in Leavenworth, Kansas from 1999 to 2001, Walton designed various calendars for the GSA. The designs were created at the instruction of his work supervisor and prepared with UNICOR equipment. Millions of calendars were produced by UNICOR using Walton's designs, and shipped to the GSA.

At some point Walton expressed concern to his work supervisor that UNICOR was misappropriating his "original art, designs, images, words and phrases, and creations" in violation of his intellectual property rights. As a result, Walton requested permission to include his name and a copyright symbol on the calendars. Walton also requested permission to forward copies of the calendar proofs to his home. Both requests were denied.

Undeterred from protecting his alleged intellectual property, Walton marked his images with Adobe Photoshop's internal copyright function and "hid" copies of the calendar files on hard drives and back-up drives on UNICOR computers. Walton was transferred from Leavenworth in May 2001.

On June 9, 2001, Walton filed a tort claim against the GSA seeking \$500,000 in damages for alleged copyright infringement related to his calendars. The GSA denied Walton's claim, noting that when Walton created the calendars he was "an inmate working for" UNICOR, and that unless Walton had an agreement with UNICOR that preserved his intellectual property rights, UNICOR owned the calendars pursuant to federal copyright law.

On November 21, 2001, Walton filed

suit in U.S. District Court challenging the GSA's denial of his claim. The suit was transferred three times before finally arriving in the Court of Federal Claims, which has exclusive jurisdiction over claims of copyright infringement against the federal government pursuant to 28 U.S.C. § 1498(b). The government moved to dismiss Walton's complaint for lack of jurisdiction or, in the alternative, on summary judgment. Walton cross-moved for summary judgment.

The court began its analysis of the jurisdictional question with the text of the statute. Under § 1498, a party must show that the work that was allegedly infringed – calendars in this case – was not created during the course of "employment or service of the United States" for the court to have jurisdiction.

Turning to the "employment" issue, the court found that Walton was not employed by the United States when the calendars were created. Instead, Walton's relationship with UNICOR was

"part and parcel" of his incarceration. Nevertheless, the court agreed with the defendants that Walton created the calendars during the course of his "service" to the government. Walton worked for both UNICOR and the GSA and supplied them with the "output of his efforts." Further, Walton used government time, materials and equipment to create the calendars. Finally, the court explained, the calendars that Walton created were not his original idea nor was such work an option, as "it was imposed on him as a prison work assignment."

Accordingly, the court granted the government's motion and dismissed Walton's suit for lack of jurisdiction. The ruling was upheld by the Federal Circuit Court of Appeals on January 8, 2009, which found it was "not disputed that in the preparation of Walton's calendar, 'Government time, material, or facilities' were used." See: *Walton v. United States*, 80 Fed. Cl. 251 (Fed. Cl. 2008), *aff'd*, 551 F.3d 1367 (Fed. Cir. 2009). ■

Ninth Circuit: Former Gang Member Entitled to Jury Trial in § 1983 Jail Guard Retaliation Suit

The Ninth Circuit U.S. Court of Appeals ruled that a prisoner's lawsuit against the Los Angeles County Jail for intentionally housing him in the jail's "gang module" as retaliation for his refusal to become a snitch should proceed to a jury trial. The *pro se* plaintiff's attempts in the district court to obtain a jury trial and request appointment of counsel were improperly denied, the appellate court held.

Salvador Solis is a former Mexican Mafia "La Eme" gang member, now serving life without parole in state prison for murder. When he first entered the Los Angeles County Jail, he asked for protective custody because he feared for his safety from active gang members. Although given a jail segregation form to complete, he answered "no" where it asked if he feared for his safety, because at the time he was being observed by other gang members. Accordingly, he was placed in general population.

Later he privately asked jail guard

Miguel Beltran to put him in the segregation module, explaining that he did in fact fear for his safety – showing Beltran documents proving his former gang affiliation. Beltran then asked Solis to become a snitch, which Solis refused. Allegedly in retaliation for that refusal, Beltran had Solis moved to the "gang module" that night. Two weeks later, gang members informed Solis that Beltran had told them who he was, and beat him severely. Solis filed a 42 U.S.C. § 1983 civil rights complaint against Beltran, Los Angeles County and jail officials.

With only an eighth grade education and as a *pro per* litigant, Solis was severely challenged before the district court. The court penalized him for not complying with all filing requirements by taking that as a waiver of his right to a jury trial. After dismissing all of the defendants except Beltran, the district court held a telephonic bench trial. While finding Solis' version of the events "more credible than that of [Beltran]'s

witnesses,” the court ruled in favor of Beltran.

Furthermore, the court taxed \$1,115 for trial and deposition fees against Solis. He appealed, where he was represented by counsel. The Ninth Circuit first ruled that Solis’ notice of appeal was timely because it was filed within 30 days of entry of judgment on the civil docket.

The appellate court then held that the district court’s summary judgment ruling in favor of all the other defendants was inappropriate because Solis was not given fair notice of the requirements and consequences of a summary judgment motion, as mandated by *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (*en banc*).

As to the denial of a jury trial, the Court of Appeals found that Solis had properly demanded a jury trial and that right could not be waived by a procedural rule of court. Moreover, Solis did not consent to such a waiver, as would be required by Fed.R.Civ.P. 38(d). But the mere existence of error on this issue was not sufficient; it also must have resulted in harm.

In reviewing the record, and particularly the admission of the trial court that Solis’ credibility on key facts was greater than Beltran’s witnesses, the Ninth Circuit held that a “reasonable jury could have found that Solis ... proved by a preponderance of the evidence that Beltran acted with deliberate indifference in transferring him to the gang module.” The erroneous denial of a jury trial therefore was not harmless, and Solis was entitled to a retrial before a jury.

Further, when Solis returns to the district court, he may reapply for appointment of counsel. The Ninth Circuit noted that the district court had denied Solis’ two prior written requests for counsel without explanation. If upon reapplication the

district court again denies appointment of counsel, even after considering all of the relevant factors noted by the Court of Appeals, it must provide an adequate explanation of its reasons.

Accordingly, the appellate court reversed and remanded the case for a jury trial and vacated the bill of costs. See: *Solis v. County of Los Angeles*, 514 F.3d 946 (9th Cir. 2008). ■

Oregon Jail Suicide Nets \$59,422

On March 14, 2008, Multnomah County, Oregon paid \$59,422 to the estate of a mentally ill female detainee to settle a suit stemming from her jail suicide.

Berta Ray Lee was a 27-year-old mother of three minor children, ages five, seven and nine. She was arrested on December 17, 2004 in Portland, Oregon for prostitution and confined in the Multnomah County Detention Center (MCDC).

During booking, Lee told jail staff she was bipolar and had attempted suicide ten times. Yet she was not medicated or prop-

erly monitored. As a result, on December 20, 2004, she twisted a sheet around her neck, strangling herself to death.

Lee’s estate sued the County in state court for failing to medicate or properly monitor her. The estate sought damages of \$2 million for past and future wages, burial expenses and general damages. On March 14, 2008, however, the suit settled for a mere \$59,422. Portland attorney Paul Sherman represented Lee’s estate. See: *Frampton as Personal Representative for the Estate of Berta Ray Lee v. Multnomah County*, Mult. County Circuit Court No. 0612-13216. ■



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Michigan Auditor General: DOC Overspends Millions on Overtime

by Matt Clarke

In October 2008, Michigan's Auditor General released a performance audit on selected personnel and other administrative costs at the Department of Corrections (DOC) for the previous fiscal year. The report revealed that the DOC had overspent millions on overtime pay.

As of December 31, 2007, the DOC spent \$1.91 billion to operate 41 prisons and 8 camps that housed over 50,000 prisoners. The department had 16,260 employees with an annual payroll of \$1.41 billion, including \$95.3 million in overtime costs.

The audit's objectives were to assess the effectiveness of the DOC's management of staffing, overtime, salaries/benefits and other administrative expenses. To do this, the auditors interviewed DOC employees and reviewed statutes, directives, policies, legislative reports and additional documents related to administrative costs. The DOC's price negotiations with Michigan State Industries (MSI) were audited, but MSI operations and DOC costs for food, prisoner transportation and health care were not.

The most glaring deficiency found in the audit was the DOC's reliance on paying overtime instead of hiring more guards. The auditors discovered that 121 guards had each worked more than 1,000 hours of overtime. One worked 2,390 overtime hours in addition to his 2,080 full-time work hours. Thirty-five guards worked at least 14 consecutive days and some worked as many as 85 consecutive days. Seven guards worked double shifts of at least 16 hours during consecutive days. One guard worked 19 double shifts within 40 consecutive days.

"There were staff that accrued as much overtime as they possibly could," said DOC spokesman John Cordell. "We knew there was an overtime problem even before this audit came out."

The report noted that the DOC's method of projecting staffing requirements was inaccurate and might lead to unanticipated overtime. Such overtime "may impair the physical and mental abilities of custody officers, resulting in less effective management of prisoners, thereby jeopardizing the safety of other custody officers, pris-

oners, and the general public." Thus, overtime was determined to be a public safety issue.

It is also expensive; since four out of five DOC guards are at the top of the pay scale, overtime can reach up to \$37 an hour. And while overtime leads to larger paychecks, not all guards appreciate the extra work. In 2008, the Michigan Corrections Organization, which represents state prison guards, unsuccessfully sued the DOC for assigning excessive mandatory overtime at some prisons. Several guards filed affidavits stating they were exhausted and had difficulty staying awake due to overtime work.

The audit recommended that the DOC improve guard staffing levels through additional hiring, calculate overtime based on paid actual hours worked, and eliminate the prohibition against temporarily assigning guards to other nearby prisons. Auditors further recommended improving contract salaries and benefits negotiations to eliminate benefits such as the \$575 annual dry cleaning allowance, sick leave bonuses, physical fitness bonuses and high-security retention premium payments. Regionalization of maintenance,

business offices, warehousing and food service staff was suggested. Finally, the report recommended that the DOC formalize its process for price negotiations with MSI.

The DOC agreed to make some of the changes cited in the audit, including hiring 500 new guards. Additionally, prison officials adopted a novel method to reduce overtime costs: They altered how overtime was defined.

A contract change that went into effect on October 1, 2008 no longer allows DOC employees to include sick days as work hours. The change means that sick days do not count toward the 80 hours per two-week period that guards must work before they start earning overtime pay, and has already resulted in \$4 million in savings. Vacation days still count toward the 80-hour work week for DOC employees, though. See: *Michigan Office of the Auditor General: Performance Audit of Selected Personnel and Other Administrative Costs, Department of Corrections (October 2008)*. ■

Additional sources: *Detroit Free Press, Associated Press*

News in Brief:

Florida: On October 7, 2008, Dade County circuit court Judge Maria Espinosa Dennis accused fellow judge David Miller of assaulting her when he attempted to use the fax machine in her chambers. Dennis told police that Miller had "grabbed her by her shoulders and pushed her toward her office in an attempt to close the door behind them." The Dade county State Attorney's office refused to file charges in the case. Prosecutors denied they were showing Miller favoritism because he is a judge. Miller was reassigned to family court in 2009.

Georgia: On April 23, 2009, Fulton county jail guards Lt. Robert Hill, 46 and Lt. Earl Glenn, 47, were arrested by FBI agents and charged in federal court with violating the civil rights of a prisoner; obstructing justice; filing a false report and making false statements to federal agents. The charges stem from the unprovoked beating of an unidentified jail prisoner on August 9, 2008.

Kansas: On April 27, 2009, Jacob Roscoe, a former recreation specialist at the US Penitentiary in Leavenworth was sentenced to 366 days in prison for accepting a \$1,400 bribe to bring marijuana and jewelry into the prison.

Louisiana: On April 28, 2009, Angelo Vickers, 47, a guard at the juvenile detention center in Houma, was charged with sexually abusing two female prisoners in the facility, a 15 and a 16 year old girl. In exchange for sex, Vickers would give the girls snacks and telephone access.

New York: On April 26, 2009, Frederick Velez, 40, a prisoner at the Oneida Correctional Facility was stabbed to death by another prisoner, Jose Rodriguez, 55, during a fight. The reasons for the dispute were not reported in the media.

North Carolina: On April 20, 2009, Jeffrey Miles, 27, a prisoner who escaped from the Swain County Detention Center in March was captured in Vallejo, California. Also captured with him was

Anita Vestal, 32, the jail guard who helped him escape while he was awaiting trial on double murder charges.

Tennessee: On April 22, 2009, Dawn Heading, 25, a former guard at the Elizabethton county jail was sentenced to 18 months probation after pleading guilty to five counts of sexual contact with jail trusty Phillip Greenwell. Greenwell was transferred to a state prison and lost good time credits for his role in the affair.

Texas: On April 27, 2009, thirty prisoners at the Texas Youth commission prison in Crockett held a protest on top of the prison's gymnasium for several hours. Since the prison did not return media phone calls and reporters had no access to prisoners the reason(s) for the protest were not disclosed.

Texas: On June 19, 2008, Brown county jail guards Jason Behler, 21, Josh Crowder, 19 and Anthony Spivey, 37, were fired for allegedly giving jail prisoners cell phones and snuff.

Texas: On June 2, 2008, a Harris county jury acquitted Pasadena policemen Jason Buckaloo, 33, and Christopher Jones, 30, of criminally negligent homicide for their role in beating jail prisoner Pedro Gonzales, 51, to death. When they arrested Gonzales on July 21, 2007, they hit him with their knees and elbows, breaking eight of his ribs. Gonzales later died in his cell when his chest cavity filled with blood and he suffocated. The jury verdict indicated the jury did not believe the police were responsible for Gonzales's death. 🐻

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This is an open letter from Ms. Talvi, multiple-award-winning journalist, PLN board member, and author of Women Behind Bars (2007). Dear PLN Readers: In August 2007, I requested correspondence from prisoners who had been placed in control units (e.g. IMUs, SHUs, Ad-Segs) and/or supermax prisons. To date, I've collected nearly 800 letters--many of them extensively detailed and documented. By the end of April 2009, *every* prisoner should have received at least one postcard reply. If you have *not* received such a reply, please write to me again, indicating where/when you sent your letter, and what documents, if any, that letter might have contained.

Initially designed as a series of articles, I am now committed to writing a book to bring much-needed national attention to this issue. Research will continue through 2010 (including select in-person or phone interviews with prisoners, former prisoners, and/or family members). I'm still open to hearing from people willing to share their stories, particularly from prisoners experiencing long-term isolation as a result of STG/gang classification (real or fabricated); jailhouse lawyers experiencing retaliation; female prisoners and juveniles; veterans of the U.S. Armed Forces (including recent wars in Iraq and Afghanistan); ex-prisoners who endured control unit/lockdown conditions, resulting in re-incarceration; as well as Pacific Islander, Native American, Native Alaskan, or Native Hawai'ian prisoners doing time in control units. Thank you for your willingness to share your stories. Silja J.A. Talvi, 2424 E. Madison St #203, Seattle, WA, 98112.

Four BOP Guards Sentenced To Prison For Beating, Cover-Up

U.S. District Judge Carol B. Ann has ordered four former Bureau of Prisons (BOP) guards to serve time for the beating of a prisoner and subsequent cover-up.

Jaime Toro and Glenn Cummings, former guards at the Metropolitan Detention Center in Brooklyn, New York, were sentenced to 41 and 35 months imprisonment, respectively, after a jury found them guilty of beating a handcuffed prisoner. The assault occurred in April 2006 while Toro and other guards were escorting a prisoner--accused of assaulting another guard—to the Special Housing Unit.

Upon reaching the elevator, Toro stuck his leg out and threw the prisoner to the floor of the elevator. Cummings then ran into the elevator and repeatedly stomped on the prisoner's back and shoulders. Cummings stomped the prisoner so hard he left boot prints on the prisoner's back. The prisoner was handcuffed behind his back during the entire incident. Lieutenant Elizabeth Torres and Angel Perez, another guard, watched the beating from the hallway in front of the elevator but did nothing to stop it.

After the beating, Toro, Cummings, Torres, and Perez tried to cover-up what

happened. They lied to investigators and submitted false memorandums. Torres was sentenced to 15 months in prison and Perez was sentenced to nine months for obstructing the investigation into the assault. ■

Source: U.S. Dept. of Justice

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Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Gay & Lesbian Prisoner Project

Provide limited pen pal services and information for GLBT prisoners, and publishes Gay Community News several times a year, free to lesbian and gay prisoners. Volunteer-run with limited services. G&LPP, P.O. Box 1481, Boston, MA 02117

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

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ful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

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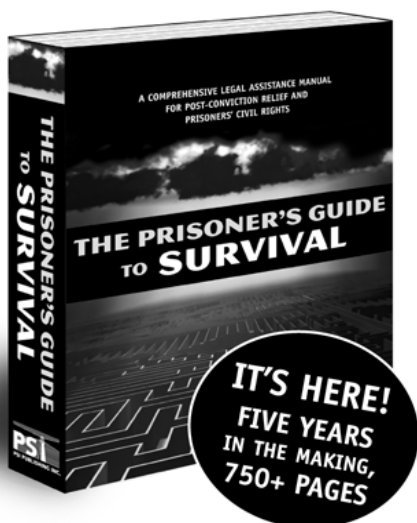
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June 2009

Cheney and Gonzales Indicted in Connection with Private Prison in Texas

by Matt Clarke

On November 17, 2008, a Texas grand jury returned an indictment against then-Vice President Richard B. Cheney and former U.S. Attorney General Alberto Gonzales, charging Cheney with contributing to prisoner abuse in privately-run prisons and Gonzales with covering up the abuse by interfering with investigations.

The indictment named GEO Group (formerly Wackenhut Corrections), CCA and Cornell Corrections as unindicted co-actors. It stated that Cheney and the companies, in a for-profit scheme, neglected federal prisoners by allowing them to be assaulted by other prisoners and denying them proper medical care, among other allegations.

Cheney's ties with the private prison firms were twofold: (1) his \$85 million investment in the Vanguard Group, which "appears on the top ten list of companies that house Federal detainees that are being rounded up by ICE officials," and (2) his position as Vice President, through which he exerted "a tremendous influence on ICE and has a say in how much ICE will pay the said private prison per diem."

The grand jurors stated it was "appalling to find that numerous elected officials from different levels of our government throughout our country to our U.S. Vice President Richard B. Cheney, defendant, are profiting from depriving human beings of their liberty."

The indictment was presented to the grand jury by then-Willacy County District Attorney Juan Angel Guerra. Another indictment charged Texas State Senator Eddie Lucio, Jr., with accepting bribes from private prison companies. That charge was based on Lucio's employment as a consultant for Management and Training Corporation (MTC), CorPlan Corrections, Aguirre Inc., Hale Mills Corporation, TEDSI Infrastructure Group Inc. and Dannenbaum Engineering Corp., all of which are involved in the private prison industry.

The indictment alleged that Senator Lucio would not have been paid by the companies had he not been a public servant. The grand jury also indicted state judges Janet Leal and Migdalia Lopez, former special prosecutors Mervyn Mosbacker, Jr. and Gustavo Garza, and district clerk Gilbert Lozano for abusing their offices in relation to criminal charges – later dismissed – that had been

previously filed against Guerra.

Yet another indictment charged GEO Group with murder and manslaughter in connection with the April 2001 beating death of prisoner Gregorio de la Rosa, Jr. The indictment alleged that GEO had allowed two other prisoners to beat de la Rosa to death with padlocks stuffed into socks. In 2006, a state civil suit that accused GEO of a cover-up and failing to search prisoners for weapons ended with a jury award of \$47.5 million in favor of de la Rosa's family. That verdict was recently upheld on appeal [see related article in this issue of *PLN*].

District Judge J. Manuel Bañales dismissed the indictments against Cheney, Gonzales, GEO Group, Senator Lucio and the county officials on December 1, 2008, on the basis that two alternate jurors who participated in the grand jury had been improperly seated, and the indictments were therefore defective. Cheney and Gonzalez didn't even bother to send attorneys to represent them at the hearing. "I expected it," said Guerra. "The system is going to protect itself."

Guerra had unsuccessfully tried to have Judge Bañales recused due to his close relationship with Senator Lucio. Instead, on December 10, Bañales removed Guerra from any further cases related to the defendants charged in the indictments and ordered him to turn over his files to another prosecutor, District Attorney Pro Tem Alfredo Padilla. Guerra appealed the order, but his appeal was denied by the Texas Court of Appeals on December 29, 2008 for lack of jurisdiction. See: *In re Guerra*, Tex.App. LEXIS 9657 (Tex.App. Corpus Christi 2008).

Inside

Pen Pal Bans Challenged	9
\$42 Million Geo Death Verdict Upheld	10
BOP Health Care Deficient	12
Michigan Jail Lies About Death	18
Florida Judge Reprimanded over Jail	21
California Strip Search Settlement	24
Indiana Prison Phone contract Upheld	28
Oregon Juvenile Prisons	30
Immigrant Prison Guards in Texas	32
JEHT Foundation Closes	34
Ohio Juvenile Prisons Revamped	40
News in Brief	50
Amnesty International Sources Protected	55

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Cheney, Gonzales Indicted (cont.)

Padilla presented the evidence collected by Guerra to a new grand jury in January 2009; as of April, the grand jury was still considering whether to reissue the indictments. "It continues its work," Padilla stated.

Guerra said his investigation into private prison corruption, profiteering and prisoner abuse was long-standing and ongoing. "A half a billion dollars they made," he noted, referring to GEO Group's lucrative federal contracts. He cited Philip Perry, Cheney's son-in-law, who was general counsel of the U.S. Department of Homeland Security (DHS) under the Bush administration, as an example of how corruption was permeating high levels of government. DHS, which is over ICE, contracts with private prison firms to house immigration detainees.

Senator Lucio claimed that the Texas Ethics Commission (TEC) had approved his consulting work with private prison companies. Guerra disagreed, saying Lucio was citing generalized opinions as if they were made regarding his specific circumstances, and that neither the TEC nor the Attorney General had specifically approved his relationship with private prison firms, which Guerra steadfastly maintains is corrupt.

Guerra said he just wants the companies, some of which had been implicated (but not charged) in the bribery of three county commissioners, to appear in court and explain what services Senator Lucio provided in exchange for the payments he received. The companies claimed Lucio was paid for public relations work but have refused to specify exactly what work he performed.

Senator Lucio has acknowledged he received consulting fees for introducing corporate employees to public officials, and said he had been doing consulting work for private prison firms since 1999. "Public relations doesn't require a product in terms of written material," noted James M. Parkley, president and co-founder of CorPlan. "He [Lucio] keeps our names in front of people."

Senator Lucio's attorney, Michael R. Cowen, said Lucio had to do outside consulting work to make a living since he is only paid \$600 a month as a legislator and is unable to support his family on \$7,200 a year. Indeed, such consulting work is much more lucrative than public service.

TEC records show Senator Lucio received at least \$300,000 from CorPlan Corrections, Aguirre Inc., MTC, TEDSI Infrastructure Group, Inc. and Dannenbaum Engineering Corp. from 2003 to 2007. In January 2005, when three of the companies became the focus of a bribery investigation, Lucio took a "leave of absence" from working for those firms due to potential bad publicity.

Guerra has successfully prosecuted people connected with private prisons in Willacy and Webb Counties. He indicted three county commissioners for accepting bribes in conjunction with federal private prison contracts. They later pleaded guilty, but one died prior to sentencing. Although Lucio's name surfaced in that investigation, he denied wrongdoing and was not charged. [See: *PLN*, Sept. 2007, p.1; Nov. 2005, p.20].

On December 31, 2008, his last day in office, Guerra filed a civil lawsuit to seize 10.6 acres of San Benito property owned by Senator Lucio. The suit alleged the property was purchased with ill-gotten funds.

Critics claim that Guerra has been pursuing a retributive campaign against his political opponents. Guerra was himself under the cloud of an indictment for 18 months; Judge Bañales dismissed the charges after Guerra lost his re-election bid in the March 2008 Democratic primary. The indictment alleged that Guerra had extorted money from a bail bonding company and had used his office for personal business.

Guerra's office was raided during the investigation, and he obtained national attention by camping outside the courthouse in a borrowed camper with a rooster, three goats and a horse in protest of the raid and the criminal charges, which he claimed were politically motivated and intended to keep him from being re-elected. He believes his earlier success against the county commissioners involved in the private prison bribery scandal was the motivation behind the charges filed against him.

As a result, Guerra ran his investigation into private prisons and prisoner abuse from his home, without informing his staff. He called the investigation "Operation Goliath" and gave his witnesses code names from the Bible, calling himself "David." When witnesses were to appear and testify, he publicized false reasons for them to be summoned to the courthouse so they wouldn't face retaliation for their cooperation.

Cheney, Gonzales Indicted (cont.)

Following the dismissal of the indictments that Guerra had obtained against GEO Group, Cheney, Gonzales, Senator Lucio and the other defendants, GEO was in the news again after riots broke out at the company's Reeves County Detention Complex in Pecos, Texas. The 2,400-bed facility experienced major riots on December 12, 2008 and January 31, 2009 that resulted in over \$1 million in property damage.

The first riot started following the death of a prisoner due to medical causes; prisoners at the facility, which mainly houses illegal immigrants, said they wanted better healthcare and wanted to speak with the Mexican consulate. Two prison employees were reportedly held hostage in the January incident, which lasted several days; 25 prisoners have since been indicted on federal charges for participating in the riots.

"If people are rioting, something is going on," said Guerra. "They're not being treated right." The ACLU has called for an investigation of the GEO facility. "Such an investigation should focus on both the immediate causes of the disturbances as well as the root causes, which may involve poor conditions ranging from inadequate medical care to poor food, ventilation, etc.," stated Elizabeth Alexander, director of the ACLU National Prison Project, and Terri Burke, director of the ACLU of Texas.

Guerra, no longer a district attorney after his term ended, says he now represents 250 prisoners at the facility but GEO was not letting him meet with them. "They're my clients," he said. "That's a basic right that anybody who's detained on United States soil has, is the right to see

an attorney." GEO cited safety concerns as the reason for denying Guerra access to the prison, which was on lockdown.

On March 5, 2009, Reeves County Detention Complex prisoner Jose Manuel Falcon, 33, died due to injuries that prison officials claimed were self-inflicted. He reportedly had only two months left to serve before his release.

In April 2009, after he was denied access to meet with prisoners at the Reeves facility, Guerra camped out on the road a short distance from the prison. He erected 90 white crosses, which represent prisoners who have died at privately-operated prisons in the past three years. He remained outside the facility for weeks, and was joined by Falcon's mother.

GEO has experienced a number of other recent problems at its Texas facilities. Randy McCullough, an Idaho state prisoner incarcerated at the GEO-run Bill Clayton Detention Center (BCDC) in Littlefield, Texas, committed suicide on August 18, 2008. The prison was so understaffed that Warden Arthur Anderson, who found McCullough's body just after midnight, was working the graveyard shift as a guard.

An investigation by the Idaho Department of Corrections (IDOC) determined that no one had checked on McCullough after he was fed supper at 5:45 p.m., that log book entries from the night he died were inaccurate, and that the security system's videotape displayed a different date and did not show the arrival of emergency responders. The investigation also concluded that none of GEO's staff responded to the emergency properly or followed prison policy.

In November 2008, the IDOC announced it was terminating its contract with GEO Group and removing its 300 prisoners, who were returned to Idaho. Consequently, GEO abruptly canceled its contract to manage the city-owned prison and announced plans to fire 74 employees. This led to Fitch Ratings lowering Littlefield's \$1.4 million combination tax revenue bonds and certificates of obligation to a "BBB" rating.

In more bad news for GEO, Emmanuel Cassio, 20, a former guard at the company's Val Verde Detention Center (VVDC), was sentenced in November 2008 to 16 months in federal prison – 10 months for deprivation of a prisoner's civil rights under color of law and 6 months for hindering communication of information related to a federal offense. He also

received three years supervised release and a \$3,000 fine.

Cassio was a guard at VVDC from April through November 2006. The charges stemmed from his punching a prisoner without provocation and lying to investigators. The troubled GEO facility has been monitored by the county since settling a lawsuit over a previous incident involving sexual abuse and medical neglect that led to a female prisoner's suicide. [See: *PLN*, Dec. 2007, p.23].

Further, a GEO employee has filed suit alleging racial discrimination at the prison, and in 2007 four VVDC prisoners caught a mysterious illness. Three died. The Texas Jail Project named the facility the "worst Texas jail."

And, of course, there was the scandal involving the GEO-run Coke County juvenile facility in 2007. [See: *PLN*, July 2008, p.18]. "It's staggering to think about how many problems the GEO Group has had in Texas," said Bob Libal, who coordinates Texas operations for Grassroots Leadership, a civil rights organization.

Not that GEO has any worries that such problems or bad publicity will result in any lasting impact, as the company wields significant clout through its well-connected lobbyists and political allies. For example, Carlos Zaffirini, an attorney who represents GEO, is the husband of State Senator Judith Zaffirini. State Rep. Rene Oliveira and his cousin David Oliveira are partners in another law firm that represents GEO. The company's lobbyists have included former State Rep. Ray Allen; Scott Gilmore, Allen's former legislative chief of staff; Bill Miller, who is a personal friend of former House Speaker Tom Craddick; and Michelle Wittenburg, Craddick's former general counsel.

While it was atypical for GEO Group to be indicted on murder charges related to the death of a prisoner at one of the company's for-profit lockups, the charges were dismissed, the prosecutor who obtained the indictment is no longer in office, and it's now back to business as usual. ■

Sources: *Indictment No. 2008-CR-0128-A, State of Texas v. Richard B. Cheney and Alberto Gonzales*; Associated Press; *Brownsville Herald*; *Valley Morning Star*; *narconews.com*; *newschannel15.tv*; *newschannel10.com*; <http://biz.yahoo.com>; *Del Rio News-Herald*; <http://seekingalpha.com>; *freeneews.com*; *texasprisonbidness.org*; *northcountrygazette.org*; *nbcnewyork.com*; www.texaswatchdog.org

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Massachusetts DOC Settles *PLN* Censorship Suit

Effective May 12, 2009, the Massachusetts Dept. of Correction (MDOC) agreed to settle a First Amendment censorship lawsuit filed by *PLN*.

PLN brought suit in U.S. District Court on April 23, 2008 following repeated efforts over a 5-year period to be added to the MDOC's approved vendor list, which would allow *PLN* to sell or distribute books to Massachusetts prisoners. MDOC officials had offered pretextual excuses for failing to include *PLN* as an approved vendor. [See: *PLN*, June 2008, p.36].

One week after the lawsuit was filed, MDOC Commissioner Harold Clarke

added *PLN* as an approved vendor; the litigation then proceeded on *PLN*'s damages claim.

The May 12 settlement provides that the MDOC will pay \$5,000 to *PLN*, and that *PLN* "may distribute to ... inmates any of the publications it currently distributes," subject to prison mail policies. The MDOC agreed to provide notice to all prison superintendents that prisoners may receive *PLN*'s publications, and to inform all Massachusetts state prisoners that they can order books from *PLN*. Further, prison officials agreed to notify *PLN* of the censorship of any future

PLN publications sent to MDOC prisoners. As a result of the litigation the approved vendor scheme was scrapped.

"This is a victory for the First Amendment rights of publishers and a victory for Massachusetts prisoners," said *PLN* editor Paul Wright.

PLN was ably represented by Boston attorneys Howard Friedman and David Milton with the Law Offices of Howard Friedman, P.C. See: *Prison Legal News v. Clarke*, USDC (D. Mass.), Case No. 1:08-10677-RGS. The settlement and complaint in the case are available on *PLN*'s website. ■

Michigan Sex Offender Freezes to Death on Street As Housing Crisis Continues

by Jimmy Franks

On January 26, 2009, Thomas Pauli, 52, was found dead on the cold streets of Grand Rapids, Michigan. Pauli, a registered sex offender, was apparently the latest victim of stringent residency restrictions imposed on people convicted of sex-related crimes.

As in most states, Michigan law prohibits registered sex offenders from establishing a residence within 1,000 feet of a school, even for one night. This restriction includes homeless shelters, two of which reportedly turned Pauli away due to his sex offender status in the days prior to his death.

Bill Merchut, who works at the Mel Trotter Mission in Grand Rapids, stated "We have to follow the law, but, ethically, it feels like we're responsible." Shelters that violate the residency restrictions face fines and loss of their license. In Pauli's case, however, he lost his life.

Similar problems with sex offender restrictions have been widely reported in Dade County, Florida, where a "colony" of sex offenders has taken up residence under the Julia Tuttle Causeway to avoid violating a county ordinance that establishes a 2,500-foot exclusion zone around schools, daycare centers and playgrounds. [See: *PLN*, June 2008, p.1].

Considering that the number of sex offenders living beneath the causeway has more than doubled in the past two years, one wonders what it will take to get state

legislators and city leaders to address the problem. One thing is certain: the situation will not spontaneously resolve itself. The *Associated Press* reported on March 29, 2009 that the number of sex offenders living under the causeway had increased to 52.

"If I was a murderer, they would help me, they would find me a home, they would find me a job," noted homeless sex offender Patrick Wiese.

PLN has reported on this problem in other states, including California [*PLN*, April 2008, p.30] and Massachusetts [*PLN*, Jan. 2008, p.26]. "These men and

women are clearly 'The Scarlet Letter' folks of our day," said Bill Shaffer of the Guiding Light Mission. "And where do they go? I have no answer."

The lawmakers who pass harsh residency restriction laws, however, have clearly told convicted sex offenders where they can go. ■

Sources: *Grand Rapids Press*, *mi-aminewtimes.com*, *Associated Press*

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From the Editor

by Paul Wright

Our cover story this month examines the travails of Geo Corporation, the second largest private prison company in the world in the state of Texas. We recently noted their pullout from the state of Pennsylvania. Also in this issue of *PLN* is the Texas court of appeals ruling upholding a \$42 million wrongful death verdict against Geo. We are not singling Geo out. They are neither better nor worse than their colleagues in the private prison industry. Since its inception in 1990 *PLN* has opposed the private prison industry. In doing so we have never claimed or argued that government prisons were somehow “better” or a panacea of some sort. Rather the comparison is between rotten apples and rotten oranges.

But as the cover story illustrates, government prison officials are not hiring politicians and giving them hundreds of thousands of dollars a year in “consulting fees” to push their “lock ‘em up agenda”. And when a prisoner dies

because of short staffing, under trained guards or simple neglect, the warden at a government prison can’t expect to get a bonus for saving the company money. The most pernicious impact of the private prison industry has been its expansion of physical prison beds. Able to raise capital quicker and easier than governments, they can and do build prisons on “spec” that they will eventually be filled by someone. Like the *Field of Dreams*, build the prisons and they will be filled. Were it not for the 115,000 private prison beds many states would have long ago had to enact sentencing reform to reduce their prison populations. States like Hawaii and Vermont for example, have a quarter to half their prison populations housed in private prisons out of state. Half of New Mexico’s prisoners are housed in private prisons.

The stunning lack of leadership by the legislative and executive branches of government on criminal justice issues have ensured a burgeoning prison population even as crime rates drop and the massive diversion of scarce resources to mass incarceration. The private prison industry has acted as the enablers of this political failure by ensuring that when states run out of prison space and voters will not approve bonds to build more, the prison space is there. Combined with direct and indirect industry lobbying for longer sentences this ensures a steady revenue stream for the private prison industry, every single penny they receive is paid for by tax payers somewhere. As an industry, private prisons can measure their impact in dollars and bodies. Ironically the US had private prisons for most of its history until most were abandoned by the 1920s as the public revulsion for their brutality and corruption grew. Like a cancer, the idea has returned. But all of the reasons private prisons were banished in the 1920s remain today. The time is long past to permanently eliminate the private prison industry.

I would like to thank our readers who send us information about the cases they win. To speed things up, if you win a case send us the last amended complaint in the case and either the settlement or the verdict sheet. A letter saying you won isn’t enough and while we can track down the details for most

state court cases in particular, it is slow and time consuming. And please do not write on the court documents you send us! We can scan them in and post them on our website. It is a little tacky to post court documents when someone used a big red marker to write “I won” on the verdict! Please don’t send us legal pleadings or documents for assistance or when a case is filed. We lack the resources to do more than we are doing and we rarely report cases that are not final decisions on the merits.

This issue of *PLN* reports on the settlement of our lawsuit against the Massachusetts Department of Corrections which for 5 years censored books sent by *PLN* claiming we were not an “approved vendor”. A week after we filed suit the department eliminated the approved vendor rule. We would like to thank Boston attorneys Howard Friedman and David Milton for their great representation of *PLN* in the case. In *PLN v. Lappin* we achieved another favorable ruling in our long running Freedom of Information Act suit against the Bureau of Prisons. Ed Elder is the D.C. attorney who has represented us through the litigation. Unfortunately, shortly after the decision was released he was struck by a hit and run driver and seriously injured. He is on his way to recovery and should be back at the helm in a few months. We are grateful to Ed for his tenacious representation of *PLN* in this case and we wish him a speedy recovery. Partnership for Civil Justice is now co-counseling the case and were gracious enough to quickly step in to assist after we received news of Ed’s accident.

For the past few years *PLN* donated about 2,000 copies of *PLN* to Books to Prisoners programs around the country for distribution to prisoners unable to afford subscriptions. We have had to discontinue this program due to a lack of funds. So if you were one of the prisoners who received *PLN* through a BTP program, the time has come to subscribe! Lastly, if you patronize *PLN*’s advertisers, please tell them you saw their ad in *PLN*. It helps them know where their message is being seen.

Enjoy this issue of *PLN* and please encourage others to subscribe. 📖



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Pro Se Muslim Prisoner Reaches Religious Rights Settlement Agreement with Virginia Prison Officials

by David M. Reutter

A pro se Virginia prisoner has entered into a settlement agreement with prison officials that provides him a \$2,250 cash payment and a change in policies surrounding the provision to allow prisoners to celebrate Muslim feasts and their yearly fast.

Prisoner William R. Couch brought an action pursuant to 42 U.S.C. §1983 and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), claiming that his rights to freedom of religious expression pursuant to the First and Fifth Amendments and RLUIPA had been violated by Virginia Department of Corrections (VDOC) employees.

The cash settlement includes the \$250 that Couch, who is held at Keen Mountain Correctional Center, paid to file the action. The other provisions of the settlement detail specific actions that VDOC must take to ensure that the religious rights Couch enjoys in prison will not be violated. The entire VDOC prison population that practices the Muslim faith will

be affected because the settlement requires VDOC to modify its Division Operating Procedures, Institutional Operating Procedures and Food Service Provisions that concern matters under the agreement.

According to that agreement, prison officials must determine the dates for Ramadan in advance by mutual agreement with Couch and the assistance of an expert from the Islamic Center of Virginia (ICV) if needed.

"The Eid Ul Fitr prayer service shall be for the morning after the last day of fasting shall be held before noon." In addition, the "Eid Ul Fitr meal will be held no earlier than the first day after the last day of the Ramadan fast, nor no later than the third day after the last day of the Ramadan fast."

If Couch requests it, prison officials will schedule the Eid Ul Adha prayer service and meal at a mutually agreed upon time approximately four months after Ramadan and the ICV expert can be requested to determine

the appropriate date.

Most impressive was the requirement that VDOC employees "will not schedule a quarterly lockdown during the Ramadan period." A lockdown may, however, occur if an emergency necessitates it. Finally, prison officials must make sure "Couch and other participating Sunni Muslim inmates" are "served a hot breakfast and hot dinner consistent with that served non-fasting inmates." They must also be provided a meal each evening and the total calories and nutrition provided in the meals to fasting inmates will equal or exceed that provided to non-fasting inmates during the same period."

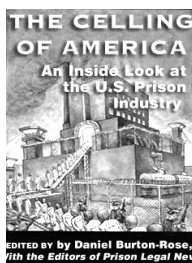
This is a rare and significant victory for a prisoner acting pro se. See: *Couch v. Jabe*, USDC, W.D. Virginia, Roanoke Division, Case No: 7:05-cv-00642. The voluntary dismissal order provides for the court to retain jurisdiction to enforce the Settlement Agreement reached on March 16, 2007. Previous proceedings in this case were reported in the August 2008 PLN. ■

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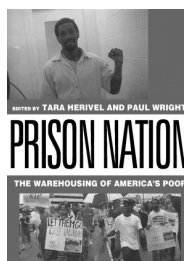
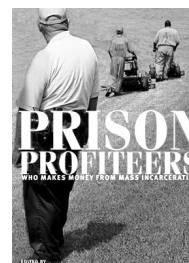
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Washington DOC Pays Pro Se Prisoner \$110,043 For Illegally Withholding Records

The Washington State Department of Corrections (WDOC) will pay former Airway Heights Corrections Center prisoner Derek E. Gronquist \$110,043 for mishandling his requests for public records. This represents the largest payout the WDOC has ever paid to a prisoner who represented himself.

The dispute began when Gronquist submitted a request to inspect public records to the Airway Heights Corrections Center (AHCC) on October 21, 2001. The WDOC denied the request pursuant to Policy 280.510(III)(F), which prohibits incarcerated prisoners from inspecting any public record not contained within their own Central or Health Care Files. On August 29, 2003, the Spokane County Superior Court held that Policy 280.510(III)(F)'s "incarcerated offender" exclusion violated the Public Records Act's requirement of free and open inspection of public records. WDOC was ordered to disclose all requested records and to pay Gronquist \$2,543 in penalties and costs.

(PLN readers should note that Division Three of the Washington State Court of Appeals has since ruled to the contrary. See *Sappenfield v. Department of Corrections*, 127 Wn.App. 83, 110 P.3d 808 (2005), review denied, 156 Wn.2d 1013 (2006)).

The WDOC subsequently disclosed records where the names of prisoners had been blacked out under a claim of exemption under Washington Administrative Code 137-08-150, and claimed to have made a full and complete disclosure. WDOC then subjected Gronquist's monetary award to a 35% seizure for cost of incarceration, crime victim's fund, and savings pursuant to House Bill 1571 and the newly amended RCW 72.09.480(3). A lawsuit was later filed in Thurston County Superior Court challenging the constitutionality of HB 1571.

Approximately three years later, Gronquist discovered the existence of at least one record that the WDOC neither disclosed nor claimed to be exempt; a grievance filed by AHCC prisoner Todd Wixon. On October 4, 2006, Gronquist filed a Motion for Contempt and/or to Compel Public Disclosure alleging that the WDOC had silently withheld requested inmate grievance records and had improperly subject other records to redac-

tion. The Court ordered the WDOC to "conduct a thorough and complete search for all records responsive to Plaintiff's public disclosure request", "to produce . . . all records responsive . . . without any redaction", and to "[p]ay Plaintiff \$50.00 a day [from August 29, 2003] . . . until the Defendant demonstrates to the Court's satisfaction that a thorough and complete search for all responsive documents has been made and that all responsive and un-redacted records have been disclosed to Plaintiff."

On May 11, 2007, the WDOC filed a Motion for Entry of Judgment arguing that the Public Records Act "does not require the grievance coordinator to hand search 2793 grievances filed at AHCC in 2001 to determine if there might be another document responsive to this part of Plaintiff's request." The Court denied WDOC's motion, increased the penalty to \$100 a day, and ordered the WDOC to "conduct a hand search of and/or for grievance records responsive to Plaintiff's public disclosure request . . ." Reconsideration of the penalty assessment was denied. After conducting its search, the WDOC disclosed three previously withheld responsive grievances.

On July 26, 2007, the WDOC filed a second Motion for Entry of Judgment, arguing that it had fully complied with the Court's orders. Within this filing, the WDOC disclosed for the first time that it had "disposed of" almost all grievance records filed between 1993 and 1999. WDOC's motion was stayed pending discovery into the destruction of grievance records. On April 18, 2008, the WDOC agreed to settle this case for \$79,000. It also agreed to pay Gronquist \$1,000 to resolve litigation over the monies seized from the August 29, 2003, penalty award. See *Gronquist v. Department of Corrections*, Spokane County Superior Court No. 02-2-05518-9; and *Gronquist v. Barshaw*, Thurston County Superior Court No. 05-2-01941-4.

A second lawsuit was filed over WDOC's mishandling of a separate records request submitted to AHCC on December 28, 2005, seeking employment and misconduct records concerning AHCC Correctional Officer, Jeffrey Ward. Within five weeks of receiving this Public Records Act request, WDOC began

destroying its grievance records. After all grievance records filed between 1993 and 1999 had been destroyed, WDOC asserted that it would begin searching for responsive records. The WDOC then filed a Motion for Summary Judgment claiming full compliance with the Public Records Act. After WDOC's motion was denied, it agreed to settle this case for \$27,500. As part of the agreement Gronquist agreed not to pursue two other unrelated cases upon appeal. See: *Gronquist v. Department of Corrections*, Spokane County Superior Court Case No. 07-2-00562-0.

Commenting upon this litigation, WDOC Secretary Eldon Vail stated "clearly how we respond to public disclosure requests needed some attention and we've made a lot of changes since then to be better stewards of the taxpayer's money in these kinds of cases." For an agency with a history of never admitting fault, Vail's comments may sound a shift in how the WDOC responds to Public Records Act requests in the future. Gronquist is skeptical that WDOC's practices will change, believing that "these cases demonstrate the lengths that DOC and the Washington State Attorney General's Office will go to withhold records of governmental misconduct from public knowledge." In Washington State it is a Class B felony punishable up to ten years in prison and a \$20,000 fine to destroy public records following a citizen's request for those records. Nevertheless, no WDOC official has ever been charged with a crime or subject to any discipline for unlawfully destroying the grievance records in these cases. Mr. Gronquist represented himself in each of these cases. The state's response was predictable: it obtained legislation to allow state agencies to seek injunctions against prisoners who file public records requests. ■

[Editor's Note: Gronquist has been a long time PLN subscriber. During the course of the above litigation he contacted PLN and asked for assistance locating counsel to represent him in the above cases. Despite our best efforts we were unable to find an attorney in Washington to take the cases. The moral to this story is just because a lawyer won't take a case does not mean it lacks merit. With counsel the payout in fees alone would have been much higher. PW]

Lawsuits Challenge Prohibition on Prisoner Pen-Pal Services in Indiana, Florida

by David M. Reutter

To the extent that an Indiana Department of Corrections (IDOC) policy "denies prisoners the right to advertise for pen-pals and receive material so they can advertise for pen-pals, the [policy] violates the First Amendment to the United States Constitution," contends a civil rights action filed by the American Civil Liberties Union (ACLU) on behalf of two Indiana prisoners.

The lawsuit, which seeks class action status, was brought after state prisoners Dana Woods and Earnest Tope had exhausted their administrative remedies claiming that IDOC Policy and Administrative Procedure No. 02-01-103 violates their right under the First Amendment to correspond with people outside of prison. Both had sought to place ads with *PLN* advertiser WriteAPrisoner.com to find freeworld pen-pals.

IDOC officials refused to let Woods and Tope receive any materials from WriteAPrisoner.com based on Policy 02-01-103's prohibition on prisoners' use of the mail to "solicit or otherwise commercially advertise for money, goods, or services," which includes "advertising for pen pals." The policy also prohibits receipt of mail from individuals or organizations that market such advertising services.

The suit was filed on December 24, 2008 by ACLU of Indiana attorney Kenneth J. Falk, and was certified as a class action by the court in April 2009. See: *Woods v. Commissioner, Indiana Department of Corrections*, USDC (S.D. Ind.), Case No. 1:08-cv-1718 LJM-TAB.

On May 5, 2009 a similar lawsuit was filed in U.S. District Court in Florida, challenging an almost identical Florida DOC policy that prohibits prisoners from utilizing pen-pal services. The case was brought by Randall C. Berg, Jr., Executive Director of the Florida Justice Institute, on behalf of Prison Pen Pals, WriteAPrisoner.com and Joy Perry, who operates Freedom Through Christ Prison Ministries.

The suit questions the constitutionality of FDOC Rule 33-210.101(9) F.A.C., which proscribes prisoners from placing pen-pal ads or receiving "correspondence or materials from persons or groups marketing advertising services, or from

subscribing to advertising services." This rule has resulted in a *de facto* ban on Mrs. Perry's prison ministry program, which connects prisoners with churches and religious pen-pals. The FDOC policy is being challenged on First and Fourteenth Amendment grounds and as a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). See: *Perry v. Hicks*, USDC (MD Fla.), Case No. 3:09-cv-403-J-34 JRK.

PLN will report the outcomes of the Indiana and Florida pen-pal lawsuits, which may have an impact on prisoners in other states since restrictions on pen-pal services by prison officials are becoming more widespread. ■

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Texas Court of Appeals Upholds \$42.5 Million Award Against Wackenhut / GEO Group

by Matt Clarke

On April 2, 2009, a Texas Court of Appeals upheld a jury award of \$22,000,000 in actual damages and \$20,500,000 in punitive damages against Wackenhut Corrections (now known as GEO Group) in a lawsuit filed over the 2001 beating death of a Texas state prisoner at a Wackenhut-run facility. [See: *PLN*, Feb. 2007, p.34].

"This case involves the horrific and gruesome death of Gregorio de la Rosa, Jr. Gregorio, an honorably discharged former National Guardsman, was serving a six-month sentence at Willacy County State Jail, a prison operated by Wackenhut Corrections Corporation, for possession of less than 1/4 grams of cocaine," the Court of Appeals wrote. "A few days before his expected release, Gregorio was beaten to death by two other inmates using a lock tied to a sock, while Wackenhut's officers stood by and watched and Wackenhut's wardens smirked and laughed."

The two prisoners who beat de la Rosa to death, Daniel Sanchez and Pedro de Jesus Equia, had been allowed to pass through a control gate without being pat searched just before the attack; they were armed with at least two locks tied to a sock. De la Rosa was hit from behind, rendered unconscious and then repeatedly kicked for 15 to 20 minutes, according to witnesses. Furthermore, the witnesses, including Wackenhut employees, recounted how Warden David Forrest and Assistant Warden Elberto Bravo laughed about the fatal assault.

One guard had noticed that something was wrong when Sanchez and Equia, without being searched, followed de la Rosa into a 100-yard-long walkway connecting the prison's buildings called the "bowling alley." However, when the assault occurred he was prevented from entering the normally unmanned area to break up the fight, and he testified that he believed de la Rosa's death was a "hit" in which guards were paid off to allow attacks against prisoners. A teacher employed at the prison begged other guards to intervene while de la Rosa was being beaten to death, but they refused despite several guards being present near the gate to the "bowling alley."

De la Rosa survived the initial assault and regained consciousness. Yet it took over an hour before medical personnel ar-

rived, even though some were employed by and available at the prison. He was eventually transported to a hospital where he died during emergency surgery due to internal bleeding. De la Rosa was four days away from completing his six-month sentence.

His family filed suit against Wackenhut and Warden David Forrest in Willacy County District Court, alleging a wrongful death claim and asserting the defendants had acted with malice and gross negligence. Evidence introduced at trial revealed the prison had been repeatedly cited by state auditors for failing to pat search prisoners. Further, Wackenhut officials had knowledge of four prior assaults in which locks were used as weapons, but did nothing to prevent prisoners from obtaining locks.

Guards testified that locks were easily found during pat searches, and de la Rosa would not have been killed had Sanchez and Equia been searched as required by post orders. The jury found the defendants had acted with malice and gross negligence, and awarded de la Rosa's family a total of \$47.5 million in damages – which included punitive damages of \$20 million against Wackenhut and \$500,000 against Forrest.

Actual damages were awarded as follows: \$2.5 million against each defendant for past mental anguish, future mental anguish, past loss of companionship and future loss of companionship for de la Rosa's mother; \$2.5 million each for past mental anguish and past loss of companionship for the estate of his father, who died before the lawsuit was filed; and \$2 million each for future mental anguish and future loss of companionship for each of de la Rosa's three daughters. After trial, the district judge awarded de la Rosa's estate an additional \$7,000 in funeral expenses and \$511 in EMS expenses. Wackenhut appealed the jury verdict.

During a deposition, Warden Forrest testified that he had seen a videotape of the fatal beating recorded by a camera situated to observe events in the bowling alley, and he described the assault in detail. "Amazingly, Warden Forrest amended his deposition to testify that the 'video' he testified to seeing was in reality a movie he had 'created' in his mind based

on information he had learned about the beating," the Court of Appeals noted. Forrest had also claimed the attack on de la Rosa lasted about 30 seconds and medical personnel were called immediately, which conflicted with witness accounts.

Wackenhut had argued that only one lock was used in the beating, while a report about the incident stated two lock shanks were discovered at the scene after the assault. Another videotape was made of de la Rosa following the attack, but Assistant Warden Bravo was seen taking it to the parking lot and Wackenhut claimed it didn't have the tape, which was never found. The only videotapes produced were of guards restraining de la Rosa's assailants and escorting them to the medical department; one of those tapes had been partly erased. These events resulted in the trial judge giving the jury a spoliation-of-evidence instruction, allowing them to assume the missing evidence would have been to Wackenhut's detriment.

The Court of Appeals was concerned about the missing evidence and Warden Forrest's dubious testimony, too, and called Wackenhut's conduct "clearly reprehensible and, frankly, a disgusting display of disrespect for the welfare of others and for this State's civil justice system. ... Moreover, Wackenhut's conduct in maliciously causing Gregorio's death and thereafter spoliating critical evidence so offends this Court's sense of justice that a high ratio [of punitive damages to actual damages] is warranted."

The Court of Appeals held there was sufficient evidence to support all elements required to justify the damage awards. Many of Wackenhut's issues on appeal were not preserved because the company's attorneys failed to object or had actually caused the alleged errors, including a failure to raise the affirmative defense of a statutory cap on punitive damages, which could have limited the punitive damages award to \$751,103 against each defendant.

The appellate court found the punitive damages were not excessive even though de la Rosa's estate received no actual damages, considering the large amount of actual damages awarded to the plaintiff family members. The Court

of Appeals held it was improper for the trial court to award \$7,000 in funeral expenses because there had been no proof of the amount of the funeral costs. The Court further held that the \$5 million in actual damages awarded to the estate of de la Rosa's father was improper because wrongful death claims do not survive the plaintiff's death.

The Court of Appeals upheld the remaining \$42,500,511 in actual and punitive damages and costs. See: *Wackenhut Corrections Corporation v. de la Rosa*, Tex. App. Corpus Christi, Case No. 13-06-00692-CV; 2009 Tex. App. LEXIS 2262.

The GEO Group is expected to petition the Texas Supreme Court to review the 114-page appellate ruling. One of the attorneys representing the company on appeal, David Oliveira, a partner in the Brownsville law firm of Roerig, Oliveira & Fisher LLP, is a cousin of Texas State Representative Rene Oliveira, who is also a partner in the firm. GEO Group's trial lawyer, Bruce Garcia, has since been hired by the Texas Attorney General's office.

Rep. Oliveira sits on the House Corrections Committee, which considers legislation that affects private prison companies. "Oliveira should have been

conducting investigations into these very disturbing facts surrounding de la Rosa's death at the hands of the GEO Group in his capacity as a member of the Texas House Corrections Committee," said Ronald Rodriguez, the attorney who represents de la Rosa's family. "Incredibly, instead Oliveira's law firm was and is representing GEO Group in the de la Rosa litigation." Rep. Oliveira did not comment on this apparent conflict of interest. ■

Additional sources: www.texaswatchdog.org, *Brownsville Herald*

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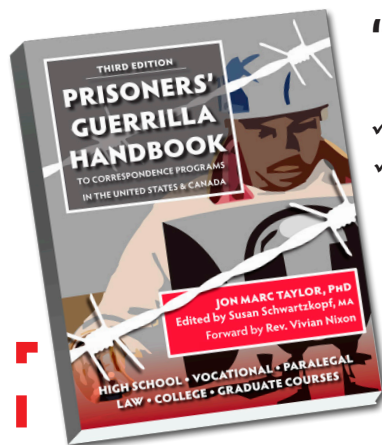
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McNeil Island Prison Fined \$28,400 for Improper Asbestos Removal

The McNeil Island prison in Washington state was fined \$28,400 in July 2008 for two “willful” and seven “serious” violations related to three renovation projects in November and December 2007. The projects involved the removal of vinyl tile glued down with adhesive that contained asbestos. Eight prisoners, eight Department of Corrections employees and at least two flooring contractor crew members were exposed to asbestos-contaminated dust during the removal process.

Despite the fact that two of the supervisors involved in the projects had been previously certified for asbestos removal, fundamental precautions such as using a vacuum with a HEPA filter and water for dust suppression were not taken. Construction Maintenance Supervisor Gar Rodside had been first certified in 2000 and taken seven refresher courses, but he let his certification lapse. Plant Manager Tom Hili was initially certified in 2004 and had taken three refresher courses.

“All asbestos certification classes, for workers and supervisors, emphasize the use of water as a universal control of asbestos fibers,” said a state Department of Labor and Industries (L&I) report released in September 2008. “A certified asbestos supervisor should know the proper method of removing class 2 asbestos material.”

The L&I issued the fine for willful violations of not using wetting agents to control asbestos dust, sweeping up tile and sealant while dry, and not using a vacuum with a HEPA filter. The serious violations included lack of direct oversight by a certified supervisor, using uncertified prisoners as removal laborers, failing to provide written notice of the presence of asbestos, failure to use respirators, failing to make an exposure assessment before removal, mechanically removing tile outside a “negative pressure” environment, not removing the tile intact, and not using “critical barriers” to prevent the spread of dust.

Prison officials claimed they did not know the removal was done improperly. They appealed the L&I findings, requesting a reduction in the severity of the most serious violations and asking that some of the fine money be diverted to asbestos training for maintenance workers and supervisors. They did not dispute the underlying facts of the case, but Rodside claimed “there was little dust during the

removal of the tile.”

Prisoners who worked on the projects said they were ignored when they raised safety concerns, and that there was a large amount of dust. The superintendent’s administrative assistant confirmed there was a “large amount of dust when the floor tile was removed outside her office.”

L&I stated there was minimal dan-

ger in this case because the tile adhesive had a low percentage of asbestos and the exposures were for only a few hours on each project. However, no safe minimum exposure time to asbestos has been established, and breathing asbestos dust has been linked to an increased risk of lung cancer and other respiratory illnesses. ■

Source: www.thenewstribune.com

OIG Audit Finds Major Deficiencies with BOP Health Care

by *Brandon Sample*

A comprehensive audit by the Department of Justice’s Office of the Inspector General (OIG) found numerous problems with the provision and management of medical services by the federal Bureau of Prisons (BOP).

The OIG’s latest audit focused on the effectiveness of measures taken by the BOP to control medical treatment costs, the quality of medical care provided to federal prisoners, contract administration, and the monitoring of BOP health care providers.

Since fiscal year 2000, the BOP has undertaken twenty initiatives to control medical costs, which reached \$736 million during fiscal year 2007. Some of those initiatives included charging prisoners a \$2.00 co-pay for health care visits, increased use of tele-medicine, implementation of an electronic medical records program, and the adoption of a Patient Care Provider Team (PCPT). Under the PCPT model, each BOP prisoner is assigned to a physician’s assistant. This approach is designed to improve the consistency of treatment and eliminate so-called “practitioner shopping” by prisoners.

In general, the OIG applauded the BOP for its cost-containment efforts. However, the auditors found the BOP had failed to maintain cost-related data for each of its initiatives, making it impossible to “assess the impact of each initiative individually.” As a result, the OIG recommended that BOP officials establish protocols for collecting and evaluating data for current and future health care initiatives to determine whether individual initiatives are

cost-effective and producing the desired results.

Next, to assess whether the BOP was providing prisoners with appropriate care, the OIG looked at the BOP’s Clinical Practice Guidelines (CPG). There are 16 CPGs that cover various areas ranging from the management of diabetes, hypertension and coronary artery disease to preventative health care. Each CPG contains services that the Medical Director of the BOP expects institutions to provide. For the purpose of its audit, the OIG selected the Preventative Health Care CPG because it includes set criteria for medical services, which makes it easier to detect non-compliance.

OIG auditors visited five BOP facilities to evaluate whether required care was being provided: United States Penitentiary (USP) Atlanta, USP Lee, Federal Correctional Complex (FCC) Terre Haute, Federal Medical Center (FMC) Carswell, and FCC Victorville. The results from the site visits were troubling.

Of the 30 medical services required by the Preventative Health Care CPG, more than ten percent of prisoners did not receive care for 14 of 30 of the CPG services. For example, 94 percent of prisoners who should have received a cardiovascular risk calculation within the past five years had not. Similarly, 87 percent of prisoners born after 1956 had failed to receive a measles, mumps and rubella vaccine, while 64 percent of female prisoners had not been tested for chlamydia.

The OIG asked BOP officials at each of the five institutions why the CPG services had not been provided. FMC Carswell staff declined to offer an explanation. The other four institutions told the auditors

that they had “overlooked the requirement,” “believed the procedure was too costly,” or blamed “staffing inadequacies and scheduling constraints” that precluded them from providing the medical services.

Failure to adopt the PCPT model was another factor that contributed to the non-provision of required services, the OIG report noted. Of the five institutions surveyed, only FMC Carswell had fully adopted the PCPT model. These deficiencies, according to the audit, indicated a “need for better BOP headquarters oversight and guidance.”

The OIG also examined the management of the BOP’s medical care contracts. As with prior audits, the OIG found major deficiencies with contract management. In one example, the auditors noted that seven BOP institutions lacked “critical controls” for certain contract administration functions, while about half of the institutions with critical controls failed to document their procedures associated with the controls. According to the OIG, the lack of adequate controls resulted in “questionable payments to contractors.” Consequently, the audit recommended that the BOP strengthen controls over its contract administration and procedures to ensure that “systemic deficiencies are corrected.”

Finally, the OIG looked at the BOP’s monitoring of its health care providers. Of 40 internal audits conducted by the BOP, the OIG found that 25 separate medical services had not been provided to prisoners and 14 of those 25 deficiencies were noted at multiple institutions. In spite of these deficiencies, the BOP had failed to “develop or clarify agency-wide guidance on systemic weaknesses.”

In reviewing the current privileges, practice agreements and protocols for each of the BOP’s medical practitioners, the OIG auditors identified 134 practitioners who were allowed to provide medical services to prisoners without BOP privileges, practice agreements or protocols. Based on this data, the OIG concluded that “BOP officials do not fully understand the type of authorization different health care providers should receive, or ensure that the health care providers have them.”

Allowing practitioners to provide medical care without current privileges, practice agreements or protocols “increases the risk that practitioners may

provide medical services without having the qualifications, knowledge, skills and experience necessary to correctly perform the services.” The OIG also noted that the BOP could face liability if improper medical care was provided by such practitioners.

The audit further found that 48 percent of BOP Clinical Directors, Chief Dental Officers and Clinical Psychiatrists had failed to undergo a peer review. As with the lack of privileges, practice agreements or protocols, failing to conduct peer reviews placed the BOP at “a higher risk of providers giving inadequate professional care to [prisoners], thus subjecting the BOP to formal complaints and lawsuits.”

Additionally, the audit noted that several BOP institutions were not submitting performance measures. Most institutions failed to provide an explanation for this failure while others attributed the problem

to “staffing shortages.”

For those institutions that did report performance measures, nine of the measures fell below target levels for more than 20 percent of the quarters reported. Despite these deficits, no agency-wide corrective actions were taken by the BOP. The OIG stated it was essential that the BOP take corrective action when performance is “below targets to help ensure that [prisoners] are provided adequate medical care.”

In total, the OIG made 11 recommendations to the BOP regarding deficiencies found during the audit. BOP officials have accepted the recommendations, and the OIG has closed its audit report pending a review of corrective measures taken by the agency. See: OIG Audit Report No. 08-08 (*The Federal Bureau of Prisons’ Efforts to Manage Inmate Health Care*), February 2008. The report is posted on PLN’s website. ■



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Cost of Defending Federal Death Penalty Cases on the Rise

by *Brandon Sample*

The cost of defending federal death penalty cases has increased sharply since 1998, according to a preliminary report by the Judicial Conference Committee on Defender Services.

Congress first revived the federal death penalty in 1988, authorizing capital punishment for so-called "drug kingpin" murders. In 1994, Congress expanded the scope of the federal death penalty with the passage of the Federal Death Penalty Act, making some fifty crimes punishable by death.

The decision to seek death in a particular case has always rested with the Attorney General. However, prior to 1995, individual U.S. Attorneys retained the discretion to not seek the death penalty in death-eligible cases. That changed with the adoption of a uniform policy regarding the handling of death-eligible cases by the then Attorney General, Janet Reno.

Under Attorney General Reno, all death-eligible cases were required to be reviewed by the Attorney General, regardless of whether the U.S. Attorney believed death was an appropriate punishment. From time to time, this resulted in the certification of cases that local prosecutors did not believe warranted the ultimate penalty. Certification, however, could be ameliorated by local prosecutors through plea bargaining to a non-death sentence.

That discretion was eliminated in 2001 with the arrival of Attorney General John Ashcroft. Attorney General Ashcroft imposed policies showing less deference to local prosecutors. He approved more capital prosecutions that were unsupported by local U.S. Attorneys, and he required formal approval from Washington before settlement of a certified case by plea agreement.

Naturally, with the expansion of the federal death penalty, capital prosecutions have increased, as have the costs associated with defending them.

Since 1998, for instance, the mean cost of capital trials has more than doubled from \$269,139 to \$620,932. While attorney fees have remained the same, \$125 per hour per the Criminal Justice Act, other costs have increased. Expert costs in some cases have reached as high as \$101,592, while transcript costs have topped \$16,000 in capital trials.

Many of these costs according to the

report are due to the Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), which requires counsel to conduct a full social history investigation of a capital defendant.

The largest cost increases, however, stem from the Justice Department's decision to bring death penalty cases in areas with little or no history with the death penalty. Federal capital prosecutions have been authorized in non-death penalty states such as Iowa, Michigan, West Virginia, Vermont and Massachusetts, for instance. The cost of death penalty prosecutions in such states tend to be higher due to the amount of time invested

by counsel to become familiar with death penalty issues.

The cost of death penalty representation has even been correlated with whether a defendant is ultimately sentenced to death. According to the report, in cases where the cost of representation was less than \$320,000, defendants had a 50 percent chance of being sentenced to death. When costs exceeded \$320,000, the chance was 35 percent. Thus, the adage "you get what you pay for" remains true even in death penalty cases. ■

Source: Judicial Conference Committee on Defender Services.

Jury Nullification: Power To The People

by *Paul Butler*

Jury nullification is power to the people. It's a constitutional doctrine that allows juries to acquit defendants who are technically guilty, but who don't deserve punishment. Does this sound like anyone you know?

As a former prosecutor, I think it sounds like many of the non-violent drug offenders whom I am responsible for locking up. I can't take credit for all of the hundreds of thousands of people now in state and federal prisons for non-violent drug crimes but, as a Special Assistant United States Attorney in the District of Columbia, I prosecuted my share. Now, as a "recovering prosecutor," I want to share a secret power with my fellow Americans -- a power that ordinary people have -- that could help end the destructive "War on Drugs."

The Fifth Amendment prohibits defendants from being tried for the same crime twice. This means that when a jury finds someone not guilty, there can never be a re-trial -- even if the judge disagrees with the jury's verdict, or if there is compelling new evidence of guilt. The Supreme Court has ruled that this doctrine gives juries the power to nullify the law. If jurors believe the law is unjust, they don't have to apply it. There is nothing that anyone can do to prevent jurors from nullifying -- under the Constitution, when it comes to acquittals, jurors have the last word.

Nullification works only in one direction -- in favor of acquittals. If a jury

finds someone guilty, and there is compelling evidence that the person is innocent, judges have the power to overturn the jury's conviction (that doesn't happen a lot in the real world). Giving jurors more power to acquit is based on the constitutional principle that it's better to let guilty people go free than to allow the innocent to be punished.

The idea that jurors should judge the law, as well as the facts, is a proud part of American history. High school students learn about famous examples of nullification, like the John Peter Zenger case. Zenger was an American revolutionary who was accused of criminal libel when he published statements critical of English rule of the colonies. He wasn't just accused of this crime -- he was actually guilty! Zenger's attorney conceded his guilt in his closing statement to the jury but said that the jury should decide whether the law itself was fair. The jury famously acquitted Zenger.

The Zenger case came to stand for the idea that American juries have the power to overturn unfair laws and defeat overzealous prosecutors. The concept that jurors decide justice became an important part of American jurisprudence. For about the first hundred years of our constitutional democracy, most courts endorsed this principle, and jurors were routinely instructed on their power to nullify.

Perhaps the most shining example of

nullification occurred during the shameful time in US history when slavery was legal. People who helped slaves escape committed a federal crime -- violation of the Fugitive Slave Act. But [if it's a shining example it's not really a "problem" I think] when Northern jurors sat in judgment of these "criminals," they would often acquit, even when the defendants admitted their guilt. Legal historians credit these cases with advancing the cause of abolition of slavery.

It wasn't until the late 1800's that some judges started to question jurors having all this power. The Industrial Revolution created big businesses that wanted the law to be more settled and predictable. The idea of ordinary citizens deciding justice suddenly seemed threatening. In 1895, in *Sparf v. United States*, the Supreme Court tried to clamp down on nullification. It declared that while nullification is a "physical power" that jurors have, they have no "moral right" to practice it. The Court then created this weird anomaly that is still the law today: jurors have the power to nullify, but defense attorneys can be barred from telling them about that power. Jurors have to learn about it outside the courtroom.

That's where we come in. In my new book *Let's Get Free: A Hip-Hop Theory of Justice*, (The New Press) I suggest that citizens be educated about nullification, and that they be encouraged to consider it in non-violent drug cases. Here's the idea: as President Obama has stated, "The war on drugs has been a failure." Obama specifically criticized "the blind and counterproductive warehousing of non-violent offenders." Locking up so many non-violent offenders has led to the United States having the highest incarceration rate in the history of the world. Indeed the US incarcerates more people for drug crimes than the European Union does for every crime -- and the EU has 200 million more people than the U.S.!

To protest this senseless and very expensive mass incarceration, I call for "Martin Luther King jurors." They would engage in strategic jury nullification designed to safely reduce the number of people in prison for non-violent drug crimes, and to send the message that "we the people" ain't gonna take it anymore. Like the "creative disobedience" that Martin Luther King used to advance civil rights, strategic nullification would be a powerful call for change.

My proposal is that Martin Luther King jurors vote "not guilty" in cases in which a defendant is accused of possessing drugs for his or her own use, or selling a small quantity of drugs to another consenting adult. In cases of *violent* crime, or selling drugs to minors, jurors should convict, if they are persuaded beyond a reasonable doubt that the defendant is guilty.

This strategic nullification is legal, and already proven to work. During Prohibition, when it was against the law to sell or manufacture liquor, jurors frequently nullified when people were charged with those crimes. Their actions were credited with helping end that "War on Liquor." Martin Luther King jurors could have the same impact on the present War on Drugs.

Tell everyone you know about jury nullification. It's legal, it's powerful, and it could help bring about the change American criminal justice desperately needs. 🗣️

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\$1.4 Million Settlement in Three-Day Long Sexual Assaults of Alaska Prisoners

by David M. Reutter

Two male Alaska prisoners who were sexually assaulted by other prisoners have reached a \$1.4 million settlement in a lawsuit filed against prison officials. The incident occurred at the Yukon Kuskokwim Correctional Center in September 2006.

The sexual assaults took place in a 10-man dorm over a period of three days. At least three other prisoners abused the two victims, who have not been publicly identified. One victim, who was in his 20s, had his eyebrows ripped off; he was kicked, beaten and sexually assaulted with a toilet plunger, according to his attorney, Sean Brown. The injuries of the second male victim, who was developmentally disabled, were not revealed. Both victims were so traumatized they couldn't talk about the incident.

"As soon as the inmates reported the assaults, Department of Corrections' staff at the facility took immediate and appropriate action," prison officials said in a written statement. Yet the Alaska State Police, which investigates crimes that occur inside prisons, was not alerted until the youngest victim's family retained Sean Brown to represent him in his criminal case. Brown contacted state troopers after he spoke with his client.

"But of course, the harm had already been done by then," said Brown. The two victims were moved to protective custody and guards began making more frequent rounds. Since the incident, cameras have been installed to monitor the dorms.

Why someone in authority did not notice what was happening, especially after the younger victim had his eyebrows ripped off, left Brown concerned about the guards' failure to protect vulnerable prisoners. "It's harm that could have been so easily prevented and it wasn't," he said.

Two of the prisoners who participated in the physical and sexual abuse pleaded no contest to first degree assault. Raymond Tinker, 27, and William Wassillie, 25, were sentenced in May 2008 to twenty years flat time. A second degree assault charge is pending against a third prisoner, Steven Lewis, 23, who was also named as a defendant in the criminal prosecution.

The two victims have since been released from prison. The younger victim's felony sexual assault charge was reduced

to a misdemeanor, while the other resolved his misdemeanor charge. The December 2008 settlement reached in their lawsuit does not disclose how much each will receive, but the \$1.4 million total includes attorney fees. See: *Doe v. Alaska Dept. of Corrections*, 4th Judicial District (Alaska),

Case No. 4BE-07-00027CI.

Incidents of this nature are not new for Alaska prisons. Brown said he has settled two other suits involving physical abuse of prisoners and has a third lawsuit pending that alleges a guard sexually assaulted a female prisoner. ■

As Economy Falters, Rehabilitative and Substance Abuse Programs Get the Axe

by Mark Wilson

Facing the worst economic crisis since the Great Depression, states are slashing rehabilitative criminal justice programs in a desperate attempt to save money. Critics contend, however, that this is a shortsighted approach that will lead to increased crime rates and associated costs in the long run.

Juvenile offenders are among the hardest hit groups affected by recent budget cuts. Tennessee, South Carolina, Kentucky, Virginia and other states have responded to declining tax revenues by reducing juvenile justice spending by up to 30 percent.

According to a 2008 survey by the American Correctional Association, five states reported cuts to their juvenile justice budgets totaling over \$62 million. Youth advocates predict that as the recession deepens, such cuts will become more widespread. [See: *PLN*, April 2009, pp.8-9].

As counseling services and group homes are closed, America's youngest offenders are being shifted from rehabilitative programs to juvenile facilities and sometimes even to adult prisons, with predictable results. "If you raise a child in prison, you're going to raise a convict," noted South Carolina Juvenile Justice Director Bill Byars.

Byars is credited with converting the state's juvenile justice system from one that warehouses children to a more progressive model that counsels juveniles and teaches them life skills. Yet in the last half of 2008, South Carolina officials seeking to cut \$1 billion from the state's budget slashed \$23 million in funding, or 20 percent, from the juvenile justice system. Byars has since been ordered to

cut another 15 percent from his budget, effectively gutting reform efforts. All five of South Carolina's group homes for juvenile offenders have been closed, forcing their residents into secure facilities. The state has also terminated after-school and intensive reform programs for at-risk youths. Interestingly, there is always money for prisons.

Similarly, Kentucky has ended its boot camp-style programs for juveniles which were developed by the National Guard. Virginia has cut camps, behavioral services staff, community programs and a transitional facility. Young offenders who participated in those programs are being sent to juvenile prisons.

"It's not like we're going to say, 'O.K., let's close a juvenile detention center,' or something like that," said Gordon Hickey, spokesman for Virginia Governor Timothy M. Kaine. "We have to reduce spending across the state and the governor looked at suggestions and recommendations from all departments. He certainly realizes that all of these reductions have consequences."

One of the programs that South Carolina cut was run by Florida-based non-profit Associated Marine Institution (AMI), which operates intensive counseling and wilderness camps. The recidivism rate for AMI graduates was 22%, less than half the state's juvenile recidivism rate, according to Byars.

Florida also discontinued three AMI programs that cost a total of \$1.7 million as part of an effort to reduce its juvenile justice budget by 4 percent, or \$18 million. Even more cuts are expected as Florida struggles to fill a \$2 billion budget short-

fall. The state's juvenile justice system "is going to die the death of a million 4 percent cuts," declared Jacqui Colyer, who leads a Florida juvenile justice advocacy group.

The Oregon Youth Authority is preparing for a potential 30 percent budget reduction for 2009-2011. In May 2009 the agency announced it was closing 25 beds at the MacLaren Youth Correctional Facility; 11 non-violent juvenile offenders will be released, while 14 will be sent to the adult prison system. The state may have to close four juvenile facilities due to budget cuts, including a transitional program.

In New York, the juvenile prison population has actually declined as the state has shifted to a more community-based approach. Governor David Patterson has proposed closing six youth facilities and consolidating or downsizing others that are not fully operational, saving an estimated \$26 million over the next three years.

In the adult prison system, however, New York has terminated an \$8.6 million drug counseling contract between the Department of Correctional Services (DOCS), the Division of Parole

and non-profit groups. Approximately 2,700 parolees received alcohol and drug services under that contract last year, and research indicated the program had effectively reduced recidivism.

"It is a panicky response," said Harry K. Wexler, whose research for New York-based National Development and Research Institutes found that community-based substance abuse treatment reduced recidivism rates by half over five years. "They are cutting their nose off to spite their face," he observed.

In October 2008, the DOCS declined to renew a \$577,000 annual contract with "Stay'n Out," a respected drug treatment program that had provided prison-based services since 1977. Simultaneously, the Division of Parole discontinued its entire drug treatment portfolio, including outpatient and residential treatment statewide.

The DOCS defended its termination of the "Stay'n Out" contract as necessary to "protect its own people." The department operates an extensive prison-based substance abuse program, serving nearly 11,000 prisoners at a cost of \$20 million a year. The program, which is staffed by state prison employees, is more cost-ef-

fective than the private programs, claimed DOCS Spokesman Erik Kriss.

Yet no independent group has evaluated the effectiveness of the DOCS prison-based substance abuse program. One reason to be skeptical is the failure of DOCS to provide aftercare to released prisoners. Research has "shown you have to have an aftercare program. It is a big part of the deal," said Wexler.

"With the state facing record budget deficits, the unfortunate reality is that there will be many worthy programs with laudable goals that will experience reductions in funding," stated Matt Anderson, spokesman for New York's Division of the Budget.

While that is certainly true, when it comes to priorities it is unfortunate that rehabilitative programs for juveniles and substance abuse treatment for prisoners are among the first to be cut. Unfortunate not only for juvenile offenders and prisoners with drug and alcohol problems, but also for society as a whole – which will face the long-term consequences of such shortsighted fiscal decisions. ■

Sources: *New York Times*, *Associated Press*, *www.aca.org*, *Statesman Journal*



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Michigan Jail Officials Lied and Hid Documents in Lawsuit Over Prisoner's Death

by David M. Reutter

On the eve of trial, a Michigan U.S. District Court adjourned a civil rights suit to reopen fact finding in the case. That rare development resulted after it was revealed that officials at the Lenawee County Sheriff's Department concealed statements in an internal affairs investigation and gave false testimony in a lawsuit over the death of a prisoner at the county jail.

The adjournment occurred on December 23, 2008 in a federal suit filed by the family of 45-year-old Yolanda Flores, a diabetic heroin addict who died after guards refused to give her insulin, even when she had it delivered to the jail. Another prisoner said Flores had begged for her medication, but guards placed it outside her cell door where she couldn't reach it.

During discovery depositions, jail officials testified under oath that they had turned over all documents relative to Flores' December 13, 2006 death, that no internal investigation had been conducted, and that they did not know Flores needed medical attention.

Meanwhile, attorney David A. Robinson, who represents former Lenawee County jail prisoner Aaron Borck in an unrelated lawsuit, was pressing for records of medical complaints despite being told they did not exist. His efforts resulted in the eventual release of previously undisclosed February 2007 statements taken during an internal affairs investigation conducted by former Undersheriff Gale Dotson.

Borck is suing jail officials who ignored his repeated requests for medical care, which resulted in his appendix bursting and severe complications that included removal of his colon. See: *Borck v. County of Lenawee*, USDC (ED Mich.), Case No. 2:07-15124-MOB-RSW.

The district court had previously dismissed jail guards James Whiteman, Paul Dye and Leo Swinehart as defendants in the Flores litigation because there was no evidence linking them to her death. Each had denied in sworn depositions that they had any contact with investigators, or that there was even an investigation into Flores' death. The new documents uncovered in the Borck case, however, included

statements from the three guards; they all had been disciplined, with Whiteman being fired.

"The Court has a few concerns," said U.S. District Judge David M. Lawson, referring to statements made in four separate depositions – including one given by former Sheriff Lawrence Richardson, Jr. – that indicated all documents relevant to the Flores case had been provided to plaintiff's counsel. "It's difficult to assess the impact of these statements and the failure to disclose information that should have been turned over," Judge Lawson noted.

For example, Swinehart had testified during his deposition that he didn't know Flores was in need of medical treatment. But in his statement from the internal affairs investigation, he admitted he was aware of Flores' blood sugar level and said, "I dropped the ball when I did not call the doctor."

Robinson has requested a forensic examination of the Sheriff Department's computers and video records, claiming the department can't be trusted that its records are complete in light of the recent disclosure of previously concealed documents.

Craig Tank, the attorney for Flores' family, said the guards' statements show the defendants "have lied ... and hid documents that could have drastically changed the course of the proceedings."

In an April 1, 2009 order, the district court granted in part a motion to reopen the case, reinstated Swinehart, Whiteman and Dye as defendants, and provided time for additional discovery. A new trial date has been scheduled for September 15, 2009. See: *Flores v. County of Lenawee*, USDC (ED Mich.), Case No. 2:07-cv-11288-DML-SDP. ■

Additional source: *Detroit News*

First Circuit Awards Defendant Costs Under FRCP 68; Plaintiff Rejected \$10,000 Offer, Was Awarded \$5,500

by Mark Wilson

The First Circuit Court of Appeals has awarded a defendant costs under Federal Rule of Civil Procedure (FRCP) 68, after a prisoner rejected a joint settlement offer of \$10,000 and was subsequently awarded only \$5,500 at trial.

On July 14, 2002, Hillsborough County, New Hampshire jail guard Cesar Rivas was supervising detainees who were out of their cells for recreation when he "radioed for assistance, falsely reporting that he was in jeopardy of being taken hostage." Rivas accused Antonio King and eight other prisoners of threatening him, and they were placed in segregation.

On July 19, 2002, King received disciplinary punishment of 30 days in segregation based on Rivas' false report. He was then confined until December 23, 2002 on administrative segregation status.

"While in the hole, King was allowed only a mattress, sheet, pillow, and prison uniform; everything else was forbidden (including personal hygiene products and toilet paper). King had to ask guards to turn on the water to flush the toilet, drink, or wash his hands – requests not always satisfied promptly. He was allowed out of his cell only once every three days, shackled, in order to shower and was subject to frequent strip searches. These conditions remained throughout his time in segregation." Yet, the court noted, "this description does not fully capture the grim and unsanitary circumstances of the confinement," which are described in more detail in *Surprenant v. Rivas*, 424 F.3d 5, 10-11 (1st Cir. 2005) [*PLN*, July 2007, p.28].

King sued seven jail employees in federal court, alleging he had been falsely accused of threatening Rivas and was mistreated in violation of the Eighth

Amendment and the Due Process clause. Several other prisoners who had been accused by Rivas also brought suit. One was awarded \$20,503 in damages, \$29,754.50 in attorney's fees and \$3,897.72 in costs following a jury trial. See: *Surprenant v. Rivas*, 2004 DNH 123 (D.N.H. 2004) [PLN, Aug. 2005, p.17], *aff'd* 424 F.3d 5 (1st Cir. 2005).

Another jury awarded two prisoners \$150,000 in damages, plus \$33,952.50 in attorney's fees and \$1,247.32 in costs. See: *Paladin v. Rivas*, 2007 DNH 122 (D.N.H. 2007), 2007 U.S. Dist. LEXIS 73416 [PLN, July 2007, p.28]. Other prisoners settled before trial, while two could not be located.

After King filed suit, the "defendants, jointly represented, invoked Rule 68 and made an offer on January 24, 2005 to settle with King for a single payment of \$10,000, together with attorney's fees and costs as determined by the court." The offer expired under FRCP 68 when King failed to respond within ten days.

On January 6, 2006, King voluntarily dismissed claims against four defendants and proceeded to trial. A jury found only Rivas liable, and awarded King \$1 in nominal damages and \$500 in punitive damages. "On King's motion, the trial judge ordered a new trial on compensatory damages ... because the jury had necessarily found that Rivas had falsely accused King and led to his wrongful punishment." Therefore, "the \$1 nominal damage award was contrary to the substantial weight of the evidence." A second jury awarded King \$5,000 in compensatory damages, resulting in a total award of \$5,500.

King moved for an award of at-

torney's fees under 42 USC § 1988, but Rivas objected, "arguing that the plaintiff's \$5,500 judgment was less than the \$10,000 offer and that Rule 68 therefore shifted costs to King; accordingly, Rivas sought to recover his attorney's fees and costs." The district court found "that Rule 68 did not apply because the \$10,000 offer had not been apportioned among the defendants." The court therefore awarded King attorney's fees and costs against Rivas. [See: PLN, Feb. 2009, p.30].

Noting that "the circuit courts have been divided about variations on the central problem" – i.e., whether an offer must be apportioned among the defendants for FRCP 68 to apply – the First Circuit concluded that "an allocation requirement makes no sense."

The appellate court said it agreed with the decisions in *Harbor Motors Co., Inc. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638 (7th Cir. 2001) and *Johnston v. Penrod Drilling Co.*, 803 F.2d 867 (5th Cir. 1986), and also aligned itself "with the Third Circuit, save that we do not see why it matters whether liability was joint or several or how the defendants were related: a package offer is simply to be taken on its own terms and compared with the total recovery package."

Finding that FRCP 68 applied, the First Circuit vacated the district court's order denying Rivas relief. The case was remanded with instructions that "Rivas is entitled under Rule 68 to costs incurred after the Rule 68 offer but no attorney's fees. King, as the prevailing plaintiff, is presumptively entitled to attorneys' fees and costs accrued prior to the Rule 68 offer." See: *King v. Rivas*, 555 F.3d 14 (1st Cir. 2009). ■

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BOP Settles Suit Over Telephone Access, Electronic FOIA Claims

The Bureau of Prisons (BOP) has agreed to settle another lawsuit brought by *PLN* contributing writer, Brandon Sample. The settlement resolves several disputes between Sample and the BOP. Sample had complained, for instance, that the call prompt announced over the prisoner telephone systems requiring called parties to push the number five before being connected violated his First Amendment rights.

Sample had attempted to contact various government agencies via telephone, but the agencies could not accept his calls because they were answered by an automated telephone answering system (ATAS). ATASs are incapable of pushing "5." The BOP agreed to settle the push "5" issue by allowing Sample to contact several different pre-designated government agencies using a normal telephone.

The BOP also agreed to resolve Sample's claim that the BOP was in noncompliance with 5 U.S.C. § 552(a)(2) of the Freedom of Information Act (FOIA). Under § 552(a)(2), government agencies are required to post various records on the Internet in their FOIA public reading room. Records that are required to be posted include "final opinions...made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A).

Sample alleged that each grievance response the BOP issued constituted a "final opinion made in the adjudication of a case" and was therefore required to be made available on the BOP's website. To resolve this claim, BOP agreed to do three things.

First, the BOP agreed to assess the feasibility of placing all its administrative remedy responses on the Internet in the BOP's electronic FOIA reading room. The BOP will report back to Sample with its feasibility findings by December 2009. If the BOP finds the posting of its grievance responses infeasible, Sample retains the right to re-litigate the issue.

Second, BOP agreed to give Sample computer access to view FOIA material sent to him in electronic format. This provision resolves an issue left open by *Sample v. Bureau of Prisons*, 466 F.3d 1086 (D.C. Cir. 2006), which held that the BOP was required to provide prisoners with FOIA material in electronic format, but that FOIA did not require the BOP to provide Sample with access to a computer to inspect FOIA material obtained in electronic form.

Finally, the BOP agreed to allow Sample to send FOIA requests and inquiries to the BOP's FOIA office electronically using the BOP's Trust Fund Limited Inmate Communication System (TRULINCS). TRULINCS is the BOP's new e-mail system that allows prisoners to exchange messages with individuals, busi-

nesses and other entities in the community. TRULINCS is slated to be installed in all BOP institutions by mid-2011.

Sample represented himself throughout the case. See: *Sample v. Federal Bureau of Prisons*, No. 06-715 (PLF) (D.Col. 2008). The settlement is posted on *PLN*'s website. ■

Racial Impact Statements: An Effort to Eliminate Legal Racism

by Gary Hunter

Barack Obama's election to the White House has many citizens convinced our country is closing its racial divide. Perhaps we are. But the disproportionate number of black Americans that fill our nation's prisons testifies to the fact that we still have a long way to go.

Marc Maur, Executive Director of The Sentencing Project and author of *Race to Incarcerate* explains in his latest thesis why the incorporation of racial impact statements prior to the passage of prison legislation would be an effective tool in reducing racist sentencing practices while simultaneously improving the entire legal process.

From arrest to parole law, enforcement legislation has both a direct and collateral effect on all citizens. Yet, in certain instances the "war on drugs" has effectively become a war on African-Americans. Michael Tonry, author of *Malign Neglect - Race, Crime and Punishment in America*, writes that "[a]lthough disadvantaged young people of all races and ethnicities have been affected by the drug wars, the greatest attention has been on Hispanics and blacks," which has "forseeably and unnecessarily blighted the lives of hundreds of thousands of young disadvantaged black Americans and undermined decades of effort to improve the life chances of members of the urban black underclass."

The use of impact statements to steer legislation is not a new idea. Environmentalists have for years used impact statements to compare cost versus effectiveness of proposed legislation. Racial Impact Statements would have the positive social and financial effect of helping legislators more accurately determine whether money would be better spent on social services as opposed to ineffective

incarceration.

One obvious instance where racial impact statements would have been advantageous occurred after the tragic death of University of Maryland basketball star Len Bias in 1986. Bias's death awakened Americans to the existence of crack cocaine.

On the very evening when Bias had been the number two pick of the Boston Celtics he died of an overdose while celebrating his selection. Initial reports said that he died of a new and insidious drug called crack cocaine. The knee-jerk reaction of federal legislators, led by Democrats Tip O'Neil and John Kerry, was to enact harsh prison laws for the possession and distribution of crack cocaine. Congress established a mandatory minimum of five years in prison for the possession or sale of five grams of crack as opposed to the same five year minimum for the sale possession of 500 grams of powder cocaine.

This legislation was guided by myths surrounding the ability of crack to immediately addict its users and the uncorroborated allegations of high rates of violence attributed to dealing the drug. Not only did scientific evidence debunk both myths; an autopsy eventually established that Bias actually died from freebasing powder cocaine and not from smoking crack.

The use of a racial impact statement in this instance would have derailed two tragic outcomes. First, it would have prevented opportunistic legislators from too quickly passing laws that unfairly target the black community. Of the 4,000 defendants incarcerated annually on crack charges 80% are black. Second, data from a 1997 survey shows that blacks as a whole would have avoided over 21,000 years in

prison from a fair assessment prior to passing crack cocaine laws.

Crack laws present just one example. Mauer presents abundant statistical data to confirm that the use of racial impact statements would also benefit a number of other socially problematic areas.

The advantages of racial impact statements are already being touted by the American Bar Association's Justice Kennedy Commission which is calling for legislators to "propose legislative alternatives intended to eliminate predicted racial

and ethnic disparity at each stage of the criminal justice process."

Oregon's legislature has proposed a study of "racial and ethnic impact statements that assess impact [sic] of prison-related legislation...on racial and ethnic profile of prison populations."

As Mauer points out, almost all states have both the database and mechanisms already in place to develop racial impact statements. Sentencing commissions and DOCs are two such resources.

While the racist effect of thoughtless

drug legislation is most likely unintentional, its socially crippling consequences are alarmingly real. Hopefully, as society presently relishes the noble strides it has made in the political arena it will continue to demand equally egalitarian efficiency from its elected officials. Because the truth is that from prison cells to pocketbooks, bad laws adversely affect everyone. ■■

Source: *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*

Florida Judge Publicly Reprimanded for Trying to Ease Jail Overcrowding

On May 6, 2009, the Florida Supreme Court publicly reprimanded a St. Lucie County judge who had tried to do something about overcrowding at the county's jail.

Earlier this year, following a two-day hearing, the Judicial Qualifications Commission (JQC) found Judge Clifford H. Barnes guilty of creating an appearance of impropriety, advocating a position that benefited a third party while sitting as a judge, making unfounded public attacks on the judiciary and other public officials, and demeaning the integrity and independence of the judiciary.

In affirming the JQC's decision, the Supreme Court held that Barnes had "clearly crossed the line between what is appropriate and what is not" when he filed a petition for mandamus in an appellate court to ease the jail's overcrowding problem. Chief Justice Peggy Quince reprimanded him for undermining public confidence in the judiciary by criticizing other judges and public officials, and for advocating for defendants.

After Barnes was elected in 2005, another judge requested that he be removed

from the criminal division because he was inappropriately setting or reducing bonds to relieve jail overcrowding. When Barnes was removed from the criminal division, he filed the petition for a writ of mandamus. It sought to require a public defender, the state attorney, the county sheriff and other judges to provide criminal defendants "a meaningful first appearance hearing."

He contended that indigent defendants were not provided counsel, which meant they were not released on bond prior to trial. A study of the St. Lucie County jail by the Institute for Law and Policy Planning found that the lack of a pretrial release program was a major cause of the jail's overcrowding. Barnes later withdrew his petition.

Barnes, who was a St. Lucie County Commis-

sioner for 12 years prior to becoming a judge, remains on the bench. He accepted the public reprimand. "They have the final word. They are my boss," he noted. The Florida Supreme Court also taxed costs against Barnes in the amount of \$4,595.83. See: *Inquiry Concerning a Judge, No. 05-437 v. re Clifford H. Barnes*, Florida S.Ct., Case No. SC06-2119. ■■

Additional sources: *National Law Review*, *Associated Press*, *Miami Herald*

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\$875,001 Verdict in Beating of Massachusetts Prisoner

by David M. Reutter

Finding that a guard at Massachusetts' Suffolk County House of Correction (SCHC) had violated a prisoner's Eighth Amendment rights and committed assault and battery, a federal jury awarded the prisoner \$875,001 in damages.

The 121-page complaint in this U.S. District Court action named 54 plaintiffs and 88 SCHC employees, and presented a wide range of constitutional violations. At issue for the jury were claims related to former prisoner Donnell Thompson.

While incarcerated at SCHC on October 22, 1999, a shakedown of Thompson's unit began at around 1:00 p.m. During the shakedown all of the prisoners were locked in their cells, which lacked toilets. After his cell was "trashed" at 7:00 p.m., Thompson asked the unit guard, William Torres, if he could use the bathroom. Torres said no.

As Torres was sitting and reading magazines, Thompson again asked to use the bathroom at 8:30. Again he was denied. When Thompson was not allowed to use the bathroom a third time at 9:45, he began beating on his cell door. Minutes later, Torres and Lt. Basile pulled Thompson out of his cell.

Basile and Torres proceeded to punch and kick Thompson. Basile then "swept" Thompson's feet out from under him and used his full body weight to drop his knee onto Thompson's back, causing him to defecate on himself.

After Thompson was taken to segregation he asked if he could have some toilet paper. A guard responded, "Are you kidding?" Thompson was not allowed a shower or change of clothes for four days. His requests for medical attention for back, hip and knee pain were denied. Problems from those injuries have been persistent and ongoing since the beating.

On February 23, 2009, a federal jury found Torres had violated Thompson's Eighth Amendment rights and had committed an assault and battery. The jury awarded Thompson \$825,001 in compensatory damages and \$50,000 in punitive damages.

This case also included consolidated class action claims, which settled prior to Thompson's trial. The settlement "provided for the implementation of a wide range of remedial changes by the Sheriff

designed to prevent abusive conduct by correction officers in the future," according to a November 27, 2007 order by the district court. See: *Allen v. Rouse*, 2007 U.S. Dist. LEXIS 95887.

The court had previously ordered that the individual plaintiffs' claims be tried in groups of five. Two other plaintiffs have lost at trial, one prevailed on a claim of assault and battery but was awarded no damages, and others have been dismissed

on motions for summary judgment or because they could not be located. This case is ongoing and trials have been scheduled for the remaining plaintiffs.

The former prisoners are represented by attorneys Theodore H. Gougen, Jr., Joseph Mahaney and Sean T. Gougen of the Gougen, McLaughlin, Richards and Mahaney law firm. See: *Allen v. Rouse*, USDC (D. Mass.), Case No. 1:00-cv-10981-RWZ. ■

New Trial and JNOV Denial Upheld in \$15,545,000 Michigan Prisoner Sexual Harassment Case

by Matt Clarke

On January 27, 2009, the Michigan Court of Appeals upheld a trial court's denial of a motion for judgment notwithstanding the verdict (JNOV) or a new trial in a case that resulted in a \$15,545,000 jury award for ten Michigan Dept. of Corrections prisoners who were victims of a systemic pattern of sexual harassment and abuse. [See: *PLN*, Oct. 2008, p.42].

This class-action suit was brought by over 500 current or former female state prisoners. The case was originally filed in circuit court pursuant to the Michigan Civil Rights Act (CRA), MCL 37.2101, et seq. For background, see: *Neal v. Department of Corrections*, 232 Mich.App. 730, 592 N.W.2d 370 (1998). The state had attempted to kill the lawsuit by passing legislation to exclude prisoners from the CRA, an effort that was later deemed unconstitutional. [See: *PLN*, Jan. 2008, p.40; March 2000, p.22].

Due to the large number of plaintiffs and the fact that the locations and times of the alleged sexual harassment were spread out, the court opted to handle the case in stages, "bundling" plaintiffs according to when and where they were incarcerated. The \$15.5 million jury award resulted from a January 2008 trial involving ten prisoners who were incarcerated at the Scott Correctional Facility from 1991 through 1999.

The defendants, composed of various prison officials, filed a motion for JNOV or a new trial, alleging that they were not given notice of the harassment, that the plaintiffs had failed to prove a violation of the CRA, that "bundling" the plaintiffs

into separate trials was improper, that a necessary defendant was not sued, that the jury award was excessive and against the weight of the evidence, that evidence of pre-incarceration sexual assault should not have been admitted, that allowing a jury charge that a hostile environment was to be presumed due to the defendants' destruction of evidence was improper, and that the defendants were improperly prevented from calling a witness and recalling a plaintiff. The circuit court denied the motion and the defendants appealed.

The Court of Appeals held the plaintiffs sufficiently proved their allegations of having been forced to dress, undress, shower, use the toilet and submit to medical examinations in full view of male prison guards. They also proved that male guards performed pat searches, including touching their breasts and genitals, and subjected them to offensive touching and verbal sexual harassment, including threatening the loss of privileges and rights or offering rewards in exchange for sexual favors. This proved their claim of sexual harassment, a CRA violation.

The appellate court found the defendants were given notice of the harassment, bundling the plaintiffs for separate trials was proper, the defendant who was not sued was not necessary, the evidence supported the jury award (which was not excessive), evidence of pre-incarceration sexual assault was relevant, the jury charge was proper due to the defendants' spoilage of evidence, the defendants were not improperly prevented from calling a

witness as they failed to put her on their witness list, and they were not entitled to recall one of the plaintiffs to testify.

The trial court's denial of the defendants' motion for JNOV or a new trial was therefore affirmed. See: *Neal v. Dep't of Corrections*, 2009 Mich. App. LEXIS 182 (Mich.Ct.App. 2009) (unpublished).

PLN has reportedly extensively on the systemic sexual abuse of female prisoners in Michigan. [See, e.g.: *PLN*, Jan. 2006, p.12]. The second set of prisoners in the *Neal* class-action suit went to trial in November 2008, resulting in a \$8.45 million jury award. Michigan officials continue to fight this case and defend sexually abusive

prison guards and the supervisors who ignored or condoned their misconduct. *PLN* will report the outcome of future trials in the *Neal* litigation. Over 400 more sexually abused women prisoners are awaiting trial on their civil rights claims. ■

Additional source: *Detroit Free Press*

\$155,000 Settlement in Sexual Assault of Washington Jail Prisoner

Washington State's King County Jail has paid \$155,000 to settle a lawsuit brought by a female prisoner who was sexually assaulted by two guards.

While imprisoned at the Jail between August 25, 2004 and April 1, 2005, prisoner Jennifer Christina Vermeulen became an object of interest to guards Cedric McGrew and Louis G. Laurencio. Shortly after her arrival at the jail, McGrew began asking Vermeulen about her breasts. He offered to give her illegal drugs and alcohol if she would perform sexual acts for him. Laurencio repeatedly made sexual advances to her.

As Vermeulen was cleaning the isolated area of the Jail's yard on March 16, 2005, Laurencio approached her to show a picture of his penis with a naked woman in it. He asked Vermeulen to allow him to take a picture of her breasts. When she lifted up her jail shirt, he took a picture.

Laurencio then told her that he wanted to have sex with her. He pushed Vermeulen against the wall and put his

hand down her pants to touch her vagina. Shortly after Laurencio left Vermeulen standing there, McGrew appeared to ask when she was going to have sex with him. He told her to go to the recreation room when she was done cleaning.

When she arrived at the room, McGrew told her to sit in a chair. He pulled his penis out and put it in her mouth. While McGrew and Laurencio were at their antics, they took turns covering each other from the control room.

Shortly after the incident, Vermeulen was transferred to the state prison in Purdy. The incident came to the attention of King County officials when prisoner Shana Zutter informed a guard at the Jail. That began an investigation that resulted in Vermeulen being brought back to the Jail for a fake court hearing. She had agreed to wear a recording device while Laurencio and McGrew escorted her. They confirmed the sexual misconduct and the picture-taking.

Immediately thereafter, both were placed on leave. They both were charged

and pled guilty to Custodial Sexual Misconduct in the Second Degree, a misdemeanor. Vermeulen filed a civil rights complaint in State Court.

On February 5, 2009, King County paid her \$155,000 to settle the claim. She was represented by Tukwila attorney John Kannin. Documents related to this case are available on *PLN*'s website. See: *J.V. v. Laurencio*, King County Superior Court, Case No: 07-2-27495-2-SEA. ■

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Florida U.S. District Court Rescinds Policy Restricting Access to Plea Agreements

by David M. Reutter

The Chief Judge for the U.S. District Court for the Southern District of Florida has entered an order that rescinds a previous policy of limiting access to plea agreements in criminal cases. The former interim policy restricted public access by not making plea agreements available online; rather, they could only be viewed in person at the clerk's office. [See: *PLN*, May 2008, p.41]. The new policy makes all plea agreements filed on or after February 20, 2009 publicly available online.

The policy change is a defeat for the U.S. Department of Justice (DOJ), which pushed for a nationwide policy of secrecy to protect its snitches and informants. The DOJ stated it was concerned about websites that post information on informants, such as www.whosarat.com, "for the clear purpose of witness intimidation, retaliation, and harassment."

The Southern District Court had implemented an interim policy restricting public access to plea agreements after the Judicial Conference of the U.S. Courts, through its Committee on Court Administration and Case Management, asked "each court to consider adopting a local policy that protects information about cooperation in law enforcement activities but that also recognizes the need to preserve legitimate public access to court files."

A subcommittee of the Southern District's Ad Hoc Committee on Rules and Procedures was charged with making recommendations for updating or changing the public access policy. As that committee was evenly comprised of representatives from the U.S. Attorney's Office and the defense bar, an agreement could not be reached, requiring an *en banc* hearing of the Court.

A substantial majority of the Southern District judges voted to rescind the interim policy and provide complete online access to plea agreements. "The sense of the Court is that the public's interest in access must prevail in this instance and that restricting access to all plea agreements is overly broad," Chief Judge Federico A. Moreno stated in a January 22, 2009 administrative order. "Other means are available to the prosecution and defense to insure that the public record does not

contain information about cooperation arrangements in these instances where the interests of safety or other considerations require different treatment."

The order does not affect or apply to plea agreements that are sealed by court order in individual cases. All plea agreements made prior to February 20, 2009

will remain restricted from online access under the previous policy; the new policy applies only to cases filed on or after that date. See: *In re: Remote Electronic Access to Plea Agreements*, Administrative Order 2009-2, USDC (S.D. Fla.). ■

Additional source: *National Law Review*

Alameda County, CA Settles Juvenile Detainee Strip Search Suit for \$4.3 Million

by John E. Dannenberg

In July 2008, Alameda County, California settled a class-action civil rights suit brought by former juvenile detainees of the Alameda County Jail for \$4,286,600. The suit was brought on behalf of all juvenile detainees jailed for minor charges who had been strip-searched, in violation of California law and in violation of their civil rights. The three named plaintiffs were awarded a total of \$225,000; their attorney Mark Merin received \$1 million. The claims administrator was given a budget of \$250,000, leaving individual claimants to receive awards drawn from the remaining \$2,811,600. Individual awards ranged from \$300 to \$2,500, depending upon specified circumstances.

The case began when plaintiff Lisa Suon, then 14, was arrested for a misdemeanor and taken to the San Leandro jail. There, she was subjected to visual body cavity searches in the presence of other juveniles who could view her naked body during the search. Plaintiff Jeffrey Pay was similarly abused after minor misdemeanor arrests in 2004 and 2005. Plaintiff Andy Mean complained that he was subjected to body cavity searches also after each court appearance. All plaintiffs claimed that defendants had no legal cause to conduct strip searches on them. They asserted that the defendants similarly mistreated many other juveniles within the two year period preceding the filing of the instant lawsuit on March 23, 2007.

The plaintiff class sought declaratory and injunctive relief as well. On July 12,

2006, Alameda County changed its policy so as to not strip-search those juveniles whose alleged crimes were minor and did not involve violence, drugs or weapons ("VDW").

Class member claims were graded for degree of damage from each booking, subject to a 2-booking limit. An arrest for specified misdemeanors would result in a \$500 award. If the arrest was for a non-VDW felony, compensation was limited to \$300 per booking. If the misdemeanor was not on the provided list - i.e., was very minor - the award was set at \$2,500 per booking, as long as the individual had not been arrested for more serious offenses in the prior five years. If the latest offense was a felony not on the provided list, the award would be for \$1,500. Plainly, the settlement recognized that those whose offenses were the least serious had been the most disproportionately harmed by the one-size-fits-all treatment that should have been reserved only for VDW offenders.

Since all claimants were minors at the time of their arrests, they were ineligible to collect settlement funds unless a guardian appeared for them. All claims not thus protected were placed in trust of Attorney Merin to hold until the claimants turned 18. However, one caveat was that if any claimant owed work furlough fees, a debt to Alameda County, unpaid child support or court-ordered restitution, up to 50% of their claim award would first be paid against such debt.

Alameda County was tasked with providing the last known addresses of

all potential class members. In addition, advertisements were placed in the *Oakland Tribune* and on three youth-oriented radio stations. Approximately 7,000 claims were anticipated.

Attorney Merin has made a very successful business of this type of case, having won a \$6.2 million settlement against

Santa Rita Jail in Alameda County one month earlier and a \$3.875 million case against Santa Cruz County in August 2008. Other notches in his belt include a \$15 million settlement in Sacramento County for adult violations plus another \$4 million for juveniles there. He has similar cases pending in Contra Costa,

Solano, San Mateo and San Francisco Counties. The latter covers a whopping 47,000 potential claimants. See: *Suon v. County of Alameda*, U.S.D.C. (N.D. Cal.) No. CV 07-01770MMC. ■

Other sources: *San Francisco Chronicle*, *Santa Cruz Sentinel*.

Protecting Your Health & Safety

Book review by Brandon Sample

The murky waters of prisoner self-representation just got a little easier to navigate with the arrival of the second edition of *Protecting Your Health & Safety, A Litigation Guide For Inmates*.

Published by the Southern Poverty Law Center and distributed by PLN, *Protecting Your Health & Safety* is an easy to read, plain language guide prisoners can use to identify and litigate federal civil rights claims against prison officials.

Written by Robert E. Toone and edited by PLN columnist Daniel Manville, *Protecting Your Health & Safety* dedicates over 100 pages to the different kinds of constitutional and statutory violations prisoners frequently encounter while incarcerated. Topics discussed include the First to Fourteenth Amendments, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, the Americans with Disabilities Act, and the Rehabilitation Act.

Each issue, whether it may be First Amendment retaliation or a violation of the Equal Protection Clause, is addressed

in laymen's terms and supported by case citations from federal district courts, federal courts of appeal, and the United States Supreme Court. Difficult concepts like deliberate indifference are simplified in just seven pages, giving you what you need to know to make out a cognizable Eighth Amendment claim.

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In all, the second edition of *Protecting Your Health & Safety* is a well written, must buy, for any serious prisoner litigant. Copies can be obtained from PLN for a mere \$10.00, plus \$6 shipping for orders under \$50.00, with a check or money order at PLN, 2400 NW 80th Street #148, Seattle, WA 98117-4449. To book can also be ordered on online at www.prisonlegalnews.org or by phone at 206-246-1022. ■

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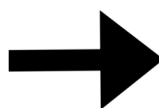
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PLN Awarded Summary Judgment In FOIA Case Again

by *Brandon Sample*

On March 26, 2009, U.S. District Judge Reggie Walton entered summary judgment for PLN in an ongoing battle between Prison Legal News and the BOP over the release of certain records.

In 2003, PLN submitted a Freedom of Information Act (FOIA) request to the BOP for “all documents showing all money paid by the Bureau . . . for lawsuits and claims against it . . . between January 1, 1996 . . . and . . . July 31, 2003.” This covered a wide range of documents including copies of verdicts, settlements, claims, and complaints filed in each case. In addition, PLN requested a fee waiver for its request.

The BOP denied PLN’s request for a fee waiver. After the Department of Justice’s Office of Information and Privacy affirmed the BOP’s decision, PLN brought suit against the BOP. On June 26, 2006, Judge Walton granted summary judgment for PLN, ordering the BOP to provide PLN with the requested records without costs. See: *Prison Legal News v. Lappin*, 436 F.Supp.2d 17 (D.D.C. 2006).

Thereafter, the BOP provided PLN over 10,000 pages of records related to its request. Many of the documents that were produced, though, were heavily redacted, rendering most of the disclosures useless. In addition, the BOP failed to turn over numerous complaints, judgments, and settlements, providing copies of docket sheets instead.

PLN filed a second motion for summary judgment challenging the adequacy of the BOP’s search for records along with its numerous redactions. The BOP opposed PLN’s motion, relying primarily upon an affidavit from Wilson J. Moorer, a paralegal within the BOP’s Washington FOIA office. The Moorer affidavit claimed that the BOP had conducted an adequate search and that all of the redactions were proper. After considering the parties cross-filings, Judge Walton granted PLN’s motion. While the BOP had attempted to defend the adequacy of its search based on the Moorer affidavit, the court agreed with PLN that the affidavit submitted by the BOP was inadequate. The Moorer affidavit “does not outline the search methods undertaken by the Bureau to respond to the plaintiff’s FOIA request, who would

have conducted the searches, and, as the plaintiff correctly points out, nowhere does the affiant indicate how he is personally aware of the search procedures or that he knows they were followed by each of the Bureau’s entities tasked with responding to this request,” the court wrote. “All of these deficiencies undermine the sufficiency of the affidavit.”

Similarly, Judge Walton concluded that the BOP’s redactions pursuant to various FOIA exemptions could not be upheld. “Because the Bureau bears the burden of demonstrating that its utilization of the FOIA exemptions was proper, it must provide to the Court an affidavit or other form of submission that” is based on personal knowledge, Judge Walton wrote. “That has not been accomplished here.”

Because the BOP’s affidavit was deemed insufficient to support the ad-

equacy of its search and numerous redactions, the court gave the BOP two options: (1) conduct a new search for the records sought by PLN or (2) provide the court with a new affidavit or affidavits evidencing, based on personal knowledge, that the searches “actually conducted were reasonably designed to locate documents responsive to” PLN’s request, and that the redactions were proper under FOIA. See: *Prison Legal News v. Lappin*, USDC D DC, Case No. 1:05-CV-01812-RBW (D.D.C. 2009). The BOP has since sought reconsideration of the Judge Walton’s order. PLN has been well and diligently represented through the course of this litigation by Ed Elder. Shortly after the court’s decision in the latest round of litigation Ed was struck by a hit and run driver and seriously injured. However, he is expected to make a full recovery. ■

California Prison’s Drinking Water Cited for Excessive Arsenic Levels

by *John E. Dannenberg*

Whenever prisoners at California’s Kern Valley State Prison (KVSP) watch the classic 1944 movie *Arsenic and Old Lace*, they have to swallow hard. That’s because the drinking water supply at KVSP was cited in December 2008 by the state Department of Public Health (DPH) for contamination that exceeded twice the maximum allowed levels of arsenic, a cumulatively poisonous heavy metal.

Although KVSP Warden Anthony Hedgpeth notified all staff and prisoners that there was no current danger, one can’t help remembering the movie’s little old ladies’ plot to poison their victims by spiking their wine with minute portions of arsenic over time. And it doesn’t inspire confidence to observe KVSP staff drinking bottled water while prisoners must begrudgingly quaff arsenic-contaminated well water. DPH ordered KVSP to come into compliance with the current federal standards by February 2009 or obtain approval for an extension. Hedgpeth notified KVSP prisoners that a new arsenic treatment system was planned for June 2009.

Contaminated prison drinking water is not uncommon. [See: *PLN*, Nov. 2007, p.1, *Prison Drinking Water and Waste-*

water Pollution Threaten Environmental Safety Nationwide]. However, arsenic contamination is often overlooked because it is colorless, odorless and tasteless. Unless enough arsenic is ingested at one time to cause a violent reaction (often followed by a painful death), it will rarely be suspected. Indeed, naturally occurring arsenic contamination in water sources is normally so low that the long-term effects, such as cancer, skin disease, circulatory problems and renal disease, are not well documented. It is precisely due to arsenic’s stealthy nature that federal drinking water standards mandate testing for that particular type of contamination.

In 2001, the U.S. Environmental Protection Agency (EPA) adopted lower maximum contaminant levels (MCLs) for arsenic in drinking water. Previously set at 0.050 milligrams per liter (mg/L), the MCL limit was reduced to 0.010. Water suppliers were given until January 23, 2006 to come into compliance. Thereafter, the DPH commenced compliance tests in California. KVSP’s drinking water wells failed all quarterly tests performed in 2007 and 2008, with results ranging from 0.014 to 0.024 mg/L.

DPH initially issued a violation no-

tice to KVSP on March 10, 2008, which required the facility to inform prisoners and employees of the contamination. KVSP posted notices that downplayed the seriousness of the situation, saying it would take a lengthy period of time for the minor arsenic levels to cause any health problems. Those with medical concerns were told to consult their physicians. But when KVSP failed to correct the problem, DPH cited the prison on December 12, 2008, noting violations of the Code of Federal Regulations, California's Health and Safety Code, and Title 22 of the California Code of Regulations. DPH ordered KVSP to come into compliance with a corrective plan by February 1, 2009.

Disaffected prisoners filed administrative grievances, and a standard response was issued after the first grievance appeal was heard. That response quoted R.J. Geller, MD, with the California Poison Control System. Dr. Geller said the arsenic levels at KVSP were "insignificant," and that the "expected numbers of health problems, either acute or chronic, caused at KVSP by arsenic at a concentration of 22 ppb [parts per billion] in drinking water is zero." Dr. Sherry Lopez, KVSP's Chief Medical Officer, called the issue

"much more a regulatory problem than a public health problem." Then again, it's unlikely that Geller or Lopez have to drink arsenic-laced water. Prisoners' requests for transfers to other facilities with non-contaminated water were denied.

KVSP opened in 2005 as a state-of-the-art prison. Nevertheless, no one could explain why it did not include a heavy metal water filtration system. Prison officials belatedly requested and received \$2.5 million from the state legislature to install one. To date \$629,000 has been spent on designing the system, but the balance of the money was siphoned off for other purposes and the filtration system was never completed.

Concerns about arsenic contamination persist in KVSP's region. The nearby city of Delano operates one of eleven California water systems ordered by the EPA to reduce arsenic levels. Arsenic contamination has also been a problem at the High Desert State Prison in Susanville.

Dr. Gina Solomon, a scientist with the Natural Resources Defense Council (an environmental advocacy group), decried ignorance of the new arsenic contamination standards – particularly among disempowered populations such

as prisoners. "The standard was set for a reason, and the reason is that arsenic is known to cause cancer in humans. So the clock is ticking. The longer that people are drinking the water, the higher the risk," she said.

The two old ladies who starred in *Arsenic and Old Lace* would no doubt agree. ■

Sources: *Los Angeles Times*; Department of Public Health Compliance Order No. 03-12-080-037 (Dec. 12, 2008); KVSP bulletins; KVSP appeal log #KVSP-O-08

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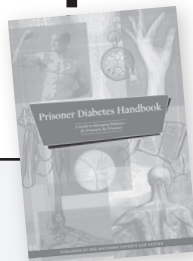
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Nevada Ramps Up Prisoner Deportations – Even Those Ineligible for Early Release

by Matt Clarke

In an attempt to reduce prison overcrowding and save money, Nevada has expanded its efforts to deport incarcerated non-citizens, including those not eligible for early release.

Nevada began its deportation program in 2007 when 100 parole-eligible prisoners signed an agreement not to contest their deportations if the Pardons Board would grant them parole. Those prisoners were then turned over to ICE, transported to the border in Arizona and returned to Mexico.

The program's success caused state officials to seek additional prisoners to deport. Those eligible for parole were scheduled for hearings, while those not immediately eligible for parole were nonetheless referred to the board for review. In the course of the past fiscal year, another 600 Nevada prisoners were transferred to ICE to begin deportation proceedings.

Still, 1,720 prisoners with ICE holds remain in the Nevada prison system, or about 13.2% of the state's prison population. They are not eligible for the deportation program, which is limited to nonviolent prisoners with little or no prior criminal history.

Nevada Supreme Court Justice James Hardesty, a member of the Pardons Board, strongly supports the program and said he will ask the board to consider additional deportation cases to further reduce the state's overcrowded prison system.

Nevada is also considering early release for non-immigrant prisoners convicted of nonviolent crimes who have two years or less to serve on their sentences. Those prisoners would be evaluated on a case-by-case basis and placed in alternative-to-incarceration programs, such as probation. Justice Michael Cherry, another member of the Pardons Board, noted that such programs should be "much cheaper than prison."

While Nevada's deportation program may help reduce prison overcrowding and cut costs, it also has a negative impact on the families of deported prisoners. According to a Human Rights Watch report released on April 15, 2009, twenty percent of deported non-citizens had been in the U.S. legally but were subject to deportation under the draconian Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

The most common crimes resulting in deportation were nonviolent drug charges and traffic offenses. The report estimates that over 1 million family members – many of whom are U.S. citizens – have been separated from their loved ones due to deportations from 1997 to 2007.

"We have to ask why, in a time of fiscal crisis, significant immigration enforcement funds are being spent on deporting legal residents who already have been punished for their crimes," said Alison Parker, deputy

director of the U.S. Program for Human Rights Watch. "Many of these people have lived in the country legally for decades, some have served in the military, others own businesses. And often, they are facing separation from family members, including children, who are citizens or legal residents." ■

Sources: *Las Vegas Sun*; *Fresno Bee*; "Forced Apart: Non-Citizens Deported Mostly for Nonviolent Offenses," *Human Rights Watch* (April 2009)

Indiana Court Denies Challenge to Monopolistic Prison Phone Contracts

by John E. Dannenberg

The Indiana Court of Appeals has rejected a class-action suit brought by families and friends of prisoners who challenged prison telephone contracts as monopolistic and prison phone rates as oppressive. The appellate court held that it was not illegal for the Indiana Department of Corrections (IDOC) and the Marion County Sheriff to enter into monopolistic contracts, and that the phone rates were reasonable.

Chanelle Alexander and family members, friends and attorneys of prisoners who paid for collect calls from IDOC facilities and the Marion County Jail filed suit to stop excessive billings from the sole-source telephone service providers. They claimed that state law prohibited such sole-source contracts, and that the excessive phone rates were the result of this state-sponsored monopoly.

In 1995, the Marion County Sheriff contracted with Ameritech for a two-year renewable contract wherein the company would install and maintain at least 222 prisoner phones at no cost. In return, Ameritech guaranteed the county 40% of gross revenues from the phones plus a signing bonus of \$524,000. The payments were to be placed in the Marion County Jail Commissary Trust. There were no contractual limits placed on phone rates.

Separately, the IDOC contracted with AT&T to provide prison telephone services; the contract provided the state a 53% commission on all phone revenues

from prisons and other state facilities. The IDOC later contracted with T-Netix, with a 35% commission on prison calls.

In July 2007, the trial court ruled in favor of the defendants on summary judgment motions. Specifically, the court found they had acted under legal authority to enter into such contracts and the phone rates were "reasonable and appropriate."

On appeal, the plaintiffs countered that the state's "reaping a benefit" from the phone contracts contravened state laws prohibiting excessive license fees, unreasonable user fees and restraint of trade. Based upon precedent, the appellate court found that the challenged phone revenue commissions did not amount to an actual "license fee."

"The Sheriff was not granting a permit to Ameritech to provide telephone services," the Court of Appeals stated. "Rather, the Sheriff entered into a bilateral contract with Ameritech in which the Sheriff granted Ameritech the right to provide telephone service to inmates of the county jail and in exchange, Ameritech agreed to pay commissions and an annual signing bonus to the Sheriff." The Court also rejected the plaintiffs' claims that the high phone rates amounted to an improper tax.

Regarding the "restraint of trade" argument, the appellate court observed that the phone contracts were awarded after a proper request-for-proposal process, and that the defendants were free to contract with just one provider for all

phone services.

The plaintiffs further argued that a March 2002 emergency state law expressly regulating the payment of telephone commissions to governmental entities retroactively superseded the earlier prison phone contracts. Disagreeing, the Court of Appeals reasoned that the law's language requiring such contracts to "emphasize lower per call charges, per minute rates, and commission rates" implicitly validated the propriety of commission agreements; e.g., the legislature did not ban the commissions but only sought to regulate them.

As to the phone rates themselves, the Court compared the prison rates of \$3.00 per call plus \$0.39 per minute with Ameritech's collect public payphone rate of \$4.90-\$5.50 plus \$1.71 per minute, and with competitor MCI's filed rate of \$3.15-\$3.85 plus \$0.10-\$0.31 per minute. Because the prison rates were less than the public payphone rates, the appellate court found they were "reasonable." Of course this ignores the fact that the public can use lower-cost home phone or cell phone plans instead of ridiculously expensive payphones, while prisoners and their families have no such choice when the state enters into monopolistic prison phone contracts.

Although the Court recognized that telephone communication between prisoners and their families aids with rehabilitation, helps to maintain family cohesion and lowers recidivism rates, it held that impairing those laudable public goals would not inherently render the phone rates per se unreasonable.

Accordingly, the Court of Appeals affirmed the trial court's dismissal of the suit. See: *Alexander v. Marion County Sheriff*, 891 N.E.2d 87 (Ind.Ct.App. 2008), *rehearing denied*. On January 29, 2009, the Indiana Supreme Court declined to hear this case on appeal. ■

Oregon Detainee Paid \$30,000 for 90 Days Illegal Jail Confinement

The State of Oregon and Multnomah County have paid a man \$30,000 to settle his suit for 90 days of illegal confinement.

Ira Robinson was detained in the Multnomah County jail to face criminal charges. Oregon's speedy trial law mandates dismissal of the charges if the Defendant is not brought to trial within 60 days.

Robinson was not brought to trial within 60 days, and eighteen days later, on December 8, 2006, the trial court ordered his immediate release. He was not released, however, for another 72 days, resulting in a total of 90 days of illegal confinement.

Robinson sued the State and County in federal court alleging that he was illegally detained and seeking \$35,000 in damages. It was unclear whether his illegal confinement was caused by the State's failure to transmit the release order to the County or the County's failure to comply with the order. Robinson's attorney was obviously asleep at the wheel but he wasn't named as a defendant.

On October 29, 2008, the case settled when the State and County agreed to pay Robinson \$15,000 each for a total of \$30,000. Portland attorney Kevin Lucey represented Robinson in the civil case. See: *Robinson v. Multnomah County*, USDC, D OR, Case No. 08-CU-821-HU. ■

Oregon Prison Romance Nets Probation/Community Service

A Oregon prison contractor a felony conviction, probation and 80 hours of community service.

Fifty-seven-year-old Sharon Simovic was a contractor at the Columbia River Correctional Institution (CRCI), a minimum-security prison in Portland, Oregon. As the prison's Education Coordinator, she helped prisoners plan course work to earn high school equivalency diplomas (GEDs).

The Oregon Department of Corrections (ODOC) began investigating Simovic when prisoner and staff reported suspicions about the way she behaved with her

clerk, Joshua Dennison, a 32-year-old prisoner.

Ultimately, investigators discovered notes passed between them and letters mailed "in extremely large quantity," said Don Ress, a Multnomah County deputy district attorney who prosecuted Simovic. No physical relationship was revealed, so Simovic was convicted of only Official Misconduct in the First Degree, rather than being prosecuted under Oregon's new custodial sex abuse statute. ■

Source: *The Oregonian*.

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Ohio Supreme Court Restricts Public Access to Court Records

by David M. Reutter

The Ohio Supreme Court has approved new rules that allow state courts to restrict public access to court documents or entire case files if deemed necessary.

The new rules, which have an effective date of July 1, 2009, are codified in Rules 44 to 47 of the Rules of Superintendence for the Courts of Ohio. The public access rules begin with the usual definition of terms before stating that a “court or clerk of court shall make a court record available by direct access, promptly acknowledge any person’s request for direct access, and respond to the request within a reasonable amount of time.”

Court records are presumed to be open to the public, and except for a request for bulk distribution the requestor has the option “to have a court record duplicated on paper.” If the records are obtained for commercial use, a policy may be adopted by the court or clerk that limits the number of court records provided per month. The term “commercial” is to be narrowly construed and “does not include news reporting, the gathering of information to assist citizens in the understanding of court activities, or nonprofit educational research.”

In responding to a request for direct access to a court record, the court or clerk may charge actual costs. That term was defined as “the cost of depleted supplies; records storage media costs; actual mailing and alternative delivery costs, or other transmitting costs; and any direct equipment operating and maintenance costs, including actual costs to private contractors for copying services.”

Additionally, the rules require the removal of all personal identifiers (such as Social Security numbers) from documents filed with the court, which is the responsibility of the party filing the documents. Personal identifiers must be submitted to the court on a separate form that is restricted from public access.

The rules further address requirements when the court or clerk restricts access to a document or case file. Records requests may be restricted if the court finds “clear and convincing evidence that the presumption of allowing public access is outweighed” after considering three factors: (a) whether public policy is served by restricting public access; (b) whether any state, federal or common

law exempts the document or information from public access; and (c) whether factors exist that support restricting public access, such as risk of injury to persons, individual privacy rights and interests, propriety business information, public safety, or fairness of the adjudicatory process.

Any person may file a motion to obtain documents or case files that have been restricted from public access; such motions require a hearing to determine if there is “clear and convincing evidence that the presumption of allowing public access is no

longer outweighed by a higher interest.”

The new rules only apply to cases filed on or after the date the rules become effective. They were to go into effect on May 1, 2009, but the effective date was later changed to July 1 “to allow more time for judges, court staff, members of the public and the media to become familiar with new rules on public access to court records.” ■

Source: *Amendments to Rules 44-47 of the Rules of Superintendence for the Courts of Ohio*

Oregon Slow to Address Problems at Contract Juvenile Facilities

by Mark Wilson

Oregon officials knew of significant problems at two Oregon Youth Authority (OYA) contract facilities for months before taking action.

The Kirkland Institute for Child and Family Study (“Kirkland”) is a secure facility in Burns, Oregon under contract to accept juvenile offenders in OYA custody. The state Department of Human Services also contracts with Kirkland to house teenage boys who are rejected by family foster homes and group homes.

With just two licensing specialists responsible for overseeing all 240 child care facilities in Oregon, including Kirkland, site visits occur just once every two years. Even then, the specialists have little authority. “Short of suspending their license, we have no alternative kind of remedy,” admitted Erinn Kelley-Siel, interim director of Oregon’s Children, Adults and Families Division.

During a Kirkland site visit, Licensing Coordinator Monika Kretschmar discovered significant deficiencies. Some Kirkland staff members had been convicted of crimes – though the state and Kirkland refused to provide details – while others lacked qualifications for their positions.

Medication logs revealed that some teens had not received their prescribed medications or were issued someone else’s pills. One juvenile was hospitalized after Kirkland staff gave him an accidental drug overdose.

Kretschmar ordered Kirkland to take 19 corrective actions to avoid losing its license. Weeks later, Kirkland appointed Rich

Streeter as its new executive director.

“We’re trying to do everything we can,” claimed Streeter. “You’re talking about some of the most difficult kids in Oregon, and some of the most difficult to place. We’re making sure we’re providing them a safe, secure environment when they’re here.”

However, despite assurances of a “safe, secure environment,” a September 2008 report revealed that a Kirkland employee broke a boy’s collarbone. Staff claimed the injury occurred while attempting to subdue the teen, but an investigation by the State Office of Investigations and Training found that the employee’s conduct amounted to child abuse.

“I just feel uncomfortable with our youth staying there since there have been so many red flags over the last several months,” wrote Erin Fultz, an OYA staff member, in a September 19, 2008 email to her supervisor. But OYA youths remained at Kirkland and problems continued.

In November 2008, the state received another report that a juvenile was treated in an emergency room for injuries sustained during a “run in” with Kirkland staff. That was apparently the last straw, as the state finally stopped sending juveniles to Kirkland and began placing them elsewhere. The last OYA teen was removed from the contract facility on December 18, 2008, according to Streeter. Unfazed, he said Kirkland is working with the state so it can resume accepting OYA youths.

Oregon officials also stopped sending juveniles to another contract child care

facility, Pendleton Academies, following an October 2008 incident in which a 17-year-old boy had sex with a 13-year-old girl. The state Addictions and Mental Health Division announced on November 17, 2008 that it would revoke the facility's certification to provide mental health care for juveniles. Other areas of concern included inadequate supervision, inadequate mental health treatment,

and 56 police calls to the facility in the first half of 2008. Previously, Pendleton Academies had been cited for six areas of non-compliance in a 2006 review by the state Department of Human Services.

The OYA is not only experiencing problems at contract facilities. According to a state audit released in May 2009, the Oregon Juvenile Justice Information System, which is utilized by the OYA,

contains inconsistent and sometimes unreliable data concerning juvenile offenders. The audit made several recommendations for improvements. See: "Oregon Youth Authority: Improvements Needed in Availability and Reliability of Critical Juvenile Justice Information," Secretary of State Audit Report, No. 2009-11. ■

Sources: *The Oregonian*, *Associated Press*

Empty Oregon Jail Has Cost \$1.25 Million; Grand Jury Demands Humility and Creative Solutions

by Mark Wilson

The Wapato Jail in Multnomah County, Oregon was completed in 2004 at a cost of \$58 million, but has sat empty ever since because the county can't afford to operate the facility.

On December 18, 2008, a Special Corrections Grand Jury issued a report calling the never-used 525-bed jail an embarrassment, and recommending that the county offer a reward to anyone who offers a viable solution.

"Year after year, nothing seems to get done and budget constraints always seem to be the reason," the report stated. Given that budget deficits won't be improving anytime soon, the county must get creative, said grand juror Vickie Cogill.

"It's costing \$25,000 a month for basically mowing the lawn," Cogill noted. "That's ridiculous for me as a taxpayer." To date, maintenance on the vacant jail over the past four years has topped \$1.25 million, with another \$379,000 earmarked for the next fiscal year.

"We strongly believe that the issue of the ongoing maintenance fee ... should not be an issue with which the 2009 Corrections Grand Jury needs to deal," the report declared. The Grand Jury called on county officials to show some humility and admit they need help.

"We thought the county should ask for the public's input," said Cogill. The grand jurors suggested exploring unconventional solutions, such as leasing the jail out for laser tag, martial arts training, Boy Scout events, office space or storage. The report also expressed concerns about conditions at the county's dilapidated courthouse jail.

A plan to use part of the Wapato facility for a substance abuse treatment program was criticized by the union that represents corrections deputies, which noted that the Multnomah County Detention Center and Inverness Jail would lose funding and bed space if prisoners were transferred to Wapato. The plan was

later scrapped.

Most recently, in March 2009, it was announced that the Oregon Department of Corrections and Multnomah County were discussing using the Wapato Jail to hold female prisoners. The state would pay the county \$4 million over a two-year period to house up to 200 female prisoners who are nearing release. Another option is a bill introduced by state Senator Floyd Prozanski (SB 684), which would require Multnomah County to sell the jail to the state. The legislation appropriates only \$1.00 to purchase the facility, but includes provisions to determine a fair price.

Presently, however, the Wapato Jail remains empty; it has never housed a single prisoner and stands as a monument to government ineptitude and fiscal irresponsibility. ■

Sources: *The Oregonian*, *Multnomah County 2008 Corrections Grand Jury Report*



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Florida Judge Criticizes State's Efforts to Seize Prisoner's Federal Civil Rights Judgment

by David M. Reutter

In a concurring opinion that affirmed the imposition of a "civil restitution" lien of \$50 per day for a prisoner's cost of incarceration, a Florida appellate court judge said he was "troubled" by the actions of the Office of the Attorney General.

While incarcerated at Florida's Santa Rosa Correctional Institution, Carlos Green filed a federal lawsuit against prison and medical staff related to a cell extraction in which he was beaten and pepper sprayed, then denied adequate medical care. He prevailed at trial against two prison guards and was awarded \$180,000. The guards appealed to the Eleventh Circuit, which affirmed the verdict. [See: *PLN*, Sept. 2006, p.16].

One month after the unsuccessful appeal, the Attorney General's office filed a "motion for imposition of civil restitution lien judgment" in Green's criminal case in state court. The court rejected Green's opposition to the motion and entered a lien of \$273,750 in "restitution" for the 5,475 days Green was expected to serve on his 15-year sentence at the statutory rate of \$50 per day, pursuant to Fla. Stat. § 960.293.

Florida's Second District Court of Appeals affirmed the lower court in a *per curiam* order without a written ruling, and Judge Chris Altenbernd issued a concurring opinion "with reluctance." Altenbernd said he had no problem with a policy of requiring prisoners to pay the costs of their incarceration. What was worrisome, however, was "the State's tactic of filing a motion in the criminal court to obtain a civil restitution lien essentially to serve as a setoff against the federal judgment for the violation of the prisoner's civil rights."

"This case appears to permit the State of Florida to allow its prison guards to violate the civil rights of any prisoner with impunity so long as the judgment entered against the prison guards does not exceed the \$50 per day 'civil restitution lien' for 'damages or losses' the State can obtain for the costs of incarceration," Altenbernd noted.

It was apparent to Judge Altenbernd that the state planned to pay the federal civil rights judgment into Green's prison account, then immediately garnish those

funds to satisfy the restitution lien entered in state court. He opined that it was "debatable whether federal law permits this action," citing *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992), which held that 42 U.S.C § 1983 preempts a state cost-of-incarceration reimbursement act.

Judge Altenbernd noted that federal civil rights statutes serve as a tool to deter abuses by public officials, including abuses inflicted against prisoners. Absent that tool, the only other effective means of deterrence is criminal prosecution – and *PLN* readers are well aware that abusive prison officials are rarely prosecuted.

Altenbernd concluded his concurring opinion by saying, "As a citizen of this state, I am troubled by the tactics of the Office of the Attorney General in its legal disputes with Mr. Green." See: *Green v. State of Florida*, 998 So.2d 1149 (Fla. Dist.Ct.App. 2d Dist. 2008), *per curiam* (unpublished).

Green has since filed a pro se suit in U.S. District Court challenging the state's attempt to seize his federal civil rights judgment through a restitution lien. See: *Green v. State of Florida*, USDC (MD Fla.), Case No. 8:09-mc-00023-JDW-EAJ. ■

Texas Lawmakers "Surprised" Over Hiring of Non-Citizen Prison Guards on Work Visas

by Matt Clarke

Texas has 112 prisons and employs 23,700 guards – which is 2,600 shy of the number authorized by the state legislature. The shortage of prison staff is not new and neither is the state's use of non-citizens as guards. The Texas Department of Criminal Justice (TDCJ) has a large number of immigrant employees, especially from Nigeria and Mexico, who were hired after they obtained permanent residency status; e.g., the prized "green card."

What is new is the TDCJ's recent admission to having hired at least 34 foreign guards on work visas. Over the past decade, the number of immigrant guards has greatly increased. For example, a decade ago there were a half-dozen Nigerian guards working at the TDCJ's Ramsey Unit; currently, entire shifts are largely composed of Nigerians, who make up a significant minority on other shifts.

The prevalence of hiring non-citizen prison guards is well known to Texas' 156,000 prisoners. Immigrant guards bring with them a host of potential problems, such as limited English language skills and cultural differences that can lead to misunderstandings and confrontations. They can also reflect a greater propensity for violence or corruption that is more common among public officials in their home countries. On the positive side, some foreign guards came to America seeking

education and may already have college experience or degrees that their U.S. citizen co-workers lack.

State Senator Robert Nichols recently received constituent questions about Nigerian guards on work visas being hired at the TDCJ's Michael Unit. When Senator Nichols investigated, he was surprised to learn the concerns were true and the use of guards on work visas was widespread. TDCJ spokeswoman Michelle Lyons said the hiring of non-citizen guards was legal, and has been an ongoing practice due to a chronic shortage of prison staff. [See: *PLN*, Sept. 2008, p.38].

"Those with work visas work mostly as correctional officers, but also in food service and transportation," said Lyons. "Traditionally, they've mostly worked in the Houston area, but they're now working in Huntsville and Palestine." She also noted that the TDCJ keeps track of foreign workers to make sure they stay current on their visas.

"It's legal," said Senator Nichols, "but it doesn't appear to be a very good policy." He noted that some of his constituents were concerned about employing non-citizens in public safety positions. Further, the fact that the TDCJ felt compelled to do so was a reflection on the low pay that prison guards receive.

"What this shows me is that TDCJ

is so desperate in their hiring that they're taking these folks," said State Senator John Whitmire. "It raises all kinds of questions. I believe I can speak for most Texans in saying it is not what we had in mind when we discuss a proper public safety policy.

"With all due respect to those people who are legal workers, I don't think we should have foreign nationals guarding our prisoners. I've been around the prison system for years and years, and this is the first I've ever heard that the state is doing this.

"It's not what I know about the system that worries me, it's what I don't know—and this is an example of that."

Whitmire's surprise is a bit hard to believe considering he is the longstanding chairman of the Senate Criminal Justice Committee, which oversees the state's prison system. What is more likely is that politicians were perfectly willing to turn a blind eye to hiring immigrant prison guards on work visas so long as they could continue to underpay them. The current starting salary for TDCJ guards is approximately \$26,000, which is one of the lowest in the nation. The TDCJ has requested a 20% pay increase for state prison guards,

though it is unlikely to be approved due to the current economic crisis.

A number of other state prison systems, including those in New Mexico and

Arkansas, only hire U.S. citizens. ■

Sources: *Austin-American Statesman*, *Beaumont Enterprise*, personal interviews

California DOC Closes Prisoner Work/Restitution Center

The California Department of Corrections and Rehabilitation (CDCR) has closed an innovative program that placed nonviolent prisoners in a community work-release center so they could earn money to pay restitution to their victims. Although the closure was a consequence of the state's budget crisis, CDCR deputy press secretary Gordon Hinkle said he didn't know how much money would be saved.

The work-release prisoners at the California Restitution Center in Los Angeles included two women from rural Shasta County. Mary Vanatta had a three-year prison sentence for embezzling over \$200,000 from Northern Rehabilitation and Respiratory. Virginia Moye was serving two years for stealing \$85,000 from two Salvation Army thrift stores that she managed. Shasta County

District Attorney Erin Dervin called the center a "good program. ... We didn't get back a tremendous amount of money they owed, but we did get some. It's better than nothing."

One-third of the prisoners' earnings went to restitution. Another third went to the state, while the final third was paid to the work-release prisoners. The Center housed up to 100 prisoners who were employed at regular day jobs in Los Angeles but returned to the facility at night. Following the December 2008 closure of the work-release center, they were sent to minimum-security prisons. [See: *PLN*, April 2009, p.9].

The California Restitution Center was the only program of its kind in the state. ■

Source: www.reading.com

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Madoff Fraud Bankrupts JEHT Foundation, Hurts Criminal Justice Reform Efforts

by Matt Clarke

Wall Street mogul Bernard Madoff's \$50 billion Ponzi scheme has led to the closure of a New York-based charity devoted to reducing the booming prison population while maintaining public safety. The Justice, Equality, Human dignity and Tolerance (JEHT) Foundation shut down at the end of January 2009 after it lost its operating capital, which was invested with Madoff's firm.

"I'm not sure people will ever appreciate what [JEHT] did to make our streets safer and make the country safer," said Kansas Department of Corrections secretary Roger Werholz. He should know, as his department received a \$4.7 million grant from JEHT for a pilot program to help former prisoners find jobs, housing and transportation. The program is credited with reducing recidivism by 33% and allowing Kansas to delay new prison construction. All but \$700,000 of the grant had been paid to the Kansas DOC before the foundation was forced to close.

JEHT donated \$6 million to Michigan for a similar anti-recidivism program, the Michigan Prisoner Reentry Initiative, and had approved \$1.6 million in new funding that was lost as a result of Madoff's fraud. According to Dennis Schrantz, deputy director of the Michigan DOC, the loss to the state was much greater than the money. JEHT acted as a partner "in the truest sense of the word," he said, helping to plan projects and participating in their implementation instead of simply providing grant money.

The JEHT Foundation had also made a \$573,000 grant to Wisconsin for a study on improving criminal justice administration in that state's court system; \$322,000 of the funding was lost due to the foundation's abrupt closure. The primary element of JEHT's funding strategy was to give money to government agencies to do what they should be doing.

JEHT further supported programs related to juvenile justice and election reform. More controversial were the projects it funded opposing the death penalty and supporting sentencing reform. The foundation had made grants to the Death Penalty Information Center, the Sentencing Project, Families Against Mandatory Minimums, the Equal Justice Initiative, the Vera Institute of Justice, the ACLU and

the Innocence Project of Texas, among many others. Since it was formed in 2000, the foundation had given away more than \$62 million – primarily to criminal justice-related initiatives. The JEHT Foundation never funded Prison Legal News despite repeated requests though.

The worst aspect of JEHT's collapse is that there are few other major funding organizations engaged in similar work. The end of the JEHT Foundation is indeed a sad event for those interested in criminal justice policy reform.

"The issues the foundation addressed received very limited philanthropic support and the loss of the foundation's funding and leadership will cause significant pain and disruption of the work for many dedicated people and organizations," wrote JEHT Foundation president and CEO Robert Crane.

After Madoff's massive Ponzi scheme unraveled late last year, he pleaded guilty to 11 felony charges in federal court on March 12, 2009. The U.S. Court of Appeals for the Second Circuit has rejected his request to be released on bail prior to his sentencing hearing, which is scheduled for June 16.

Ironically, the JEHT Foundation funded criminal justice reform efforts that Madoff will not be able to benefit from when he is sent to prison, since his financial fraud resulted in the foundation's demise. The New York-based Rockit Fund, a smaller grant organization that supported juvenile justice and civil liberties programs, also closed due to lost investments with Madoff's firm. ■

Sources: *Stateline.org*, *www.finance-commerce.com*, *www.jehtfoundation.org*

Report Says New Mexico Prison Phone Companies Still Gouging Families

by Dave Maass

The phone is ringing; you pick it up. An operator announces it's a collect call – your spouse, sibling, child – from prison. Will you accept the charges?

Good luck finding out what those charges will be.

Family members of prisoners complain of 45-minute waits for customer service operators and billing statements that never arrive. The rates vary wildly depending on the institution – from \$2 to \$6 per 15-minute slot, plus a dollar for every finished call. Some companies charge \$6.95 surcharges for credit card transactions, others require \$50 minimum deposits into a prisoner's phone account, some charge another \$15 to get unused balances back.

All in all, rates for long-distance calls within New Mexico are "not just or reasonable," New Mexico Public Regulation Commission Utility Analyst John J Reynolds concludes in his Jan. 23, 2009 testimony in a rate case that has been going on since 2007. He also says the companies may be breaking the law.

"You hear reports of folks ending up with four or five, six, \$700 a month in phone

bills from detention facilities before they realize how big the costs are," PRC Chairman Sandy Jones, who has held three open meetings across the state on the issue, tells SFR. "Keep in mind, they don't have a choice. The inmate has to use the service."

Individual detention institutions have the authority to negotiate phone-service contracts. In New Mexico, three companies – Securus Technologies, Public Communications Services and Conversant Technologies – dominate the \$9.85 million-per-year industry, with several others bidding on federal, state, county and municipal contracts.

Despite the competition, Reynolds discovered, New Mexico's in-state long-distance rates are 65 percent higher than those in New York, 140 percent higher than in Missouri and 471 percent higher than in Rhode Island.

These states, like New Mexico, prohibit prisons from making money off prisoner calls by charging commissions.

"These phone rates were so high that families and inmates could not keep in touch with one another," state Rep. Gail Chasey,

D-Bernalillo, original sponsor of the 2001 bill banning the practice, says. "You've got somebody from Farmington whose family member is imprisoned in Hobbs. They're not going to be down there every weekend. That's just impossible, so the phone is a lifeline."

Both Jones and Chasey agree that inmate phone service is a public-safety issue: Prisoners who maintain strong relationships with their families are less likely to reoffend, they say.

Although prisoner phone service is more expensive because of the need to monitor calls, the prison-to-prison rates in New Mexico are still significantly incongruent.

Reynolds says "the only conclusion" that can be drawn from this rate disparity is that some companies and prisons are ignoring or circumventing the ban on commissions.

In 2002, the *Albuquerque Journal* reported that Public Communications Services skirted the law by offering Bernalillo County a \$950,000 incentive for "cable and wiring" in order to score a contract with the Metropolitan Detention Center.

In 2007, two companies bid for Santa Fe County's jail phone system. Conversant Technologies sued Santa Fe, alleging that bid-winner Securus Technologies had offered the county \$50,000 for an undefined "one-time technology grant." Santa Fe County countered that Conversant had acted equally improperly by offering the county \$52,000 for similar services. The county turned down both incentives and settled on Securus.

"The service [Securus] offers to us [is] considerably, considerably better," Santa Fe County Corrections Director Annabelle Romero says. "The cost to an inmate is probably a third of what it was before, so I'm pretty proud about that."

Reynolds suggests in his testimony that the PRC set a flat rate of 10 cents per minute for all in-state calls.

The PRC will have an open hearing in early April on the prison phone-rate case and, until then, phone companies and other interested parties will have an opportunity to respond with their own testimonies.

"It's a competitive bidding process with regard to correctional facilities," Jeff Albright, the attorney representing PCS, which controls more than 30 percent of the market, says. "It's a balance of being able to provide reasonable rates for customers, who are often friends and family of inmates, as well as what the needs of the individual facilities are ... we think PCS does strike a good balance between competing demands."

Prisoner families, however, currently

have no representation before the PRC or in negotiations between prisons and phone contractors. One prisoner family member, who asked not to be identified, filed a letter with New Mexico Attorney General Gary King's office, requesting his office's representation.

"What I would like is for there to be an investigation into all the contracts," the family member tells SFR. "Inmates' families are citizens, they're not incarcerated or convicts, but they're footing the bill."

King's office did not respond to the letter or to a Jan. 3, 2009 follow-up.

Spokesman Phil Sisneros says King, whose mother Alice King was an advocate for prisoners' families, is apprised of the situation. However, the Attorney General's Office cannot legally represent individuals. ■

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Michigan DOC Rehabilitation Programs Emphasize Education, Reentry Support

by Matt Clarke

In 1998, Michigan passed a law requiring most prisoners without a high school diploma to earn a GED before being released on parole. That law has since been copied by other states, but most merely purport to give enhanced parole consideration to prisoners who earn a GED. Currently, about half of the 50,000 prisoners in the Michigan Department of Corrections (MDOC) do not have a high school diploma. On an average day, 10,000 to 11,000 prisoners are taking GED classes. Many more are on a waiting list.

The MDOC spends about \$32 million (1.6%) of its \$2 billion annual budget on academic and vocational education. In studies of released prisoners, the combination of earning a GED and receiving vocational training has been proven to lower recidivism rates.

"It's one of the wisest ways we spend taxpayer money," said MDOC spokesman John Cordell. "Better-educated individuals make better choices."

National studies have shown that education is the only type of prison program that consistently reduces recidivism, with higher education positively correlated to a greater reduction in recidivism rates. Studies have also shown that prisoners who receive an education while incarcerated are more likely to maintain employment after their release.

Reducing recidivism is particularly important for Michigan, as the state has the 13th highest incarceration rate in the nation, expends 20% of its budget on corrections, and is one of only four states that spend more on prisons than on higher education for their citizens.

The MDOC's education system employs 350 staff members, including teachers and administrators, who help prisoners turn their lives around in part by changing prisoners' self-image and the perception of their families and friends.

"Before you graduated, you were the brother, the father, the grandson, the nephew that went to prison. Now you are the brother, the father, the grandson and nephew that got an education. That's something in your life that you can hold on to and be proud of," MDOC prison education manager Julie DeRose told graduating prisoners.

Cordell noted that education is only one part of the formula that leads to lower recidivism; a support network for newly-released prisoners is also important. This is why Michigan has implemented a program to assist released prisoners, the Michigan Prison ReEntry Initiative (MPRI), which provides both pre-release services and post-release support.

The MPRI, a public/private partnership that began in 2005, received matching funds from the JEHT Foundation, which was recently forced to shut down [see related article in this issue of *PLN*]. Nevertheless, the state has reached out to find new funding sources. "It's tough, but it's not going away," stated MDOC spokesman Russ Marlan. The legislature has proposed \$34.4 million in MPRI funding for fiscal year 2009-2010.

The only question is whether that is enough, and not just in monetary terms. If

society continues to measure prisoners by their most ignoble acts – a measure it does not apply to itself – then education and reentry programs alone are insufficient. In these days of instantaneous background checks, education will only benefit former prisoners if employers, landlords and other members of the public are willing to give them a chance to show they have changed for the better.

In order for prison education programs and reentry initiatives like MPRI to succeed, there must be an ebb in the rising tide of demonizing current and former prisoners, which means a sea change in the way the public – as well as politicians and prison officials – view our nation's criminal justice policies and priorities. ■

Sources: *Detroit News*, www.michpri.com, *MPRI 2008 Progress Report*, *Detroit Free Press*

California DA Says Incarceration Rate a Measure of His Success – Despite Wrongful Convictions, Prosecutorial Misconduct

by Gary Hunter

Ed Jagels, District Attorney for Kern County, California, is concerned that his ratings have slipped from first to third. Not his ratings in the polls or even his popularity rating among members of the public; rather, Jagels is upset that two other California counties are sending more people to prison than his office.

"We tend to measure our performance by the per capita prison commitment rate," he said. "We've always been at the top until the last three years." Jagels has served as the county's top prosecutor since 1983; he is also a former president and director of the California District Attorney's Association.

Kern County topped the charts from 2000 to 2004, sending 31 per 10,000 citizens to state lockups. In 2007 that number dipped to 27.5 per 10,000.

Since 1983, California's prison population has grown from 40,000 to 171,000. The estimated price tag for housing a

state prisoner is about \$46,000 per year; thus, Kern County alone costs taxpayers around \$103.5 million annually. Nor does that price tag include the cost of incarcerating county jail prisoners.

Not everyone shares Jagels' lock-em-up enthusiasm. "I certainly hope we're not measuring success by the number of individuals we ship off to the gulag," said Mark Arnold, a Kern County public defender.

Arnold observed that the get-tough imprisonment mentality has resulted in a stranglehold on state taxpayers, and questioned whether the \$46,000 per prisoner could be better spent in other ways – such as treatment programs for drug offenders. More than 5,200 state prisoners come from Kern County. Of that number, 958, or over 18 percent, are serving time for simple drug possession. That's over double the 8.3 percent average for the rest of the state.

John Savrnoch, chief assistant district attorney for Fresno County, measures

his office's success by the number of felony charges filed. "Our focus is, 'Are we filing legitimate cases?'" he said. "We seek to maximize punishment for serious criminals." Despite Savrnich's different philosophy, Fresno County surpassed Kern in 2007 and holds the number two incarceration rate with 28.2 per 10,000 citizens. Topping the list for 2007 was San Bernardino County, with 29.1 per 10,000.

Since 2000, Kern County has averaged a rate of over 30 per 10,000 every year except 2005 and 2007. The decline has Jagels concerned. "Judges are pleading cases out from under us," he complained. He also suggested that years of locking up his fellow citizens had probably shrunk the "roll of felons" available to commit more crimes.

Jagels' focus on maximizing incarceration rates has not been without controversy. Most disturbing was his prosecution of almost 50 people arrested in Bakersfield in the 1980's as part of mass child molestation hysteria. Thirty were convicted or pleaded guilty; some received hundreds of years based solely on the false testimony of children who were allegedly coerced by overzealous law enforcement officers, social workers and prosecutors.

Eventually almost all of the children admitted they had not been molested, and all but five of the convictions were overturned. One of the defendants, John Stoll, had served 20 years before being exonerated in 2004. Jagels fought every case, insisting that the defendants were guilty despite evidence to the contrary.

The California Attorney General's office investigated and accused Kern County prosecutors of misconduct, including withholding evidence. In 2005, *Rolling Stone* ran a detailed article on Jagels' role in the prosecutions, describing him as "one of America's most reckless prosecutors." A 2008 documentary about the Bakersfield sex abuse cases, titled *Witch Hunt*, was produced and narrated by actor Sean Penn.

The county has paid out over \$4 million in lawsuits stemming from the wrongful convictions. Stoll received \$704,700 from the California Victim's Compensation Board in 2006; he is also pursuing a federal lawsuit against the county. See: *Stoll v. Kern County*, USDC (ED Cal.), Case No. 1:05-cv-01059-OWW-SMS.

Evidently any convictions are good enough to boost Jagels' incarceration rate statistics – even wrongful convictions. Regardless, locking up Kern County residents, whether innocent or not, hasn't decreased Jagels' popularity among voters.

"He hasn't been in office since Henry Ford developed the Model T because voters think he has a nice smile," said Savrnich. "The people of Kern County want a hard-ass as a DA."

But as public defender Mark Arnold noted, this lock-em-up philosophy comes with "an enormous price tag." And it's a

price tag not measured solely in dollars and cents. Just ask John Stoll, or any of the dozens of other innocent people who were wrongly convicted by Jagels. ■

Sources: www.bakersfield.com, www.msnbc.com, *Rolling Stone*, www.redorbit.com, www.witchhuntmovie.com

Sheriff "Hollywood Hewett" Sentenced to 16 Months

by Mark Wilson

Like a moth to a flame, North Carolina Sheriff Ronald Hewett had a fatal attraction to television cameras and the bright spotlight. In the end, "Hollywood Hewett's" mistress betrayed him, exposing the flamboyant crime fighter as just another hypocritical, corrupt public official.

During 14 years as sheriff, Hewett routinely staged news conferences to discuss not-so-newsworthy events and he made appearances at every high profile, public Brunswick County event. When his popularity and distinctive crime fighting techniques caught the eye of a filmmaker who wanted to create a documentary about the man behind the badge, Hewett couldn't resist the temptation.

The image that developed, however, could not have been what Hewett envisioned. Dozens of subordinates described Hewett as a sheriff who ordered his officers, on county time, to do landscape and construction work on his house, campaign for him and engage in other misdeeds. Female employees reported that the self-proclaimed church-going man made sexual comments to them. Many others described a man who mixed alcohol and sleeping pills and responded to crime scenes intoxicated.

When a federal grand jury began

investigating Hewett in December, 2006, he instructed his deputies to assert their Fifth Amendment privilege or testify vaguely. As a result, Hewett was convicted of obstructing justice and sentenced to 16 months in federal prison. He also pleaded guilty to a state charge of embezzlement by a public official and received a four month concurrent sentence. On November 18, 2008, Hewett began serving his sentence at the Butner Federal Correctional Complex, a minimum security prison near Raleigh, North Carolina. ■

Source: www.starnewsonline.com

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Missouri Court Reverses \$244,636 Incarceration Cost Award Against Prisoner

by Mark Wilson

The Missouri Court of Appeals has concluded that a factual dispute as to whether the state had “good cause” to seek reimbursement of incarceration costs barred summary judgment in an action brought against a state prisoner.

Under the Missouri Incarceration Reimbursement Act (MIRA), Sections 217.825 to 217.841 R.S.Mo., the state is authorized to “seek reimbursement for incarceration costs if it has good cause to believe that an offender has sufficient assets to allow recovery of not less than 10% of the estimated costs of his care for two years.”

The appellate court held that good cause is a condition precedent to filing a MIRA petition, citing *State ex rel. Nixon v. Koonce*, 173 S.W.3d 277, 283-85 (Mo. App. 2005). If that condition is not met, “the state cannot seek reimbursement. This threshold requirement serves as a cost-effective limitation on the state’s authority to seek reimbursement only when there is an expectation of reasonable return.”

Bernie Farmer had been incarcerated in the Missouri Department of Corrections (MDOC) since 1988. On October 5, 2006, the state sought to recover incarceration costs from him, claiming that his estimated cost of imprisonment was \$14,000 per year. State officials further “alleged there was ‘good cause’ to believe that Farmer had sufficient assets from which the State could recover at least ten percent of the cost of his care for two years (i.e. \$2,800).”

Farmer challenged the good cause assertion, but the trial court granted the state’s summary judgment motion and allowed the MDOC to recover \$244,636.14 for the total cost of his incarceration since 1988. The court found that \$1,956.40 had been deposited in Farmer’s prison account between May 2006 and November 2006, and ordered that 90% of the funds in his account be used to pay his incarceration costs.

Farmer had presented evidence in the trial court that the state “regularly waives incarceration reimbursement as to any funds being used for approved college classes.” He also submitted an affidavit from a retired college professor,

who testified “that he gave Farmer \$1,225 for tuition payments, and, thus, the funds were not available for purposes of incarceration reimbursement.” Excluding those funds, Farmer had received only \$731 in his prison account.

The Court of Appeals found that “Farmer’s evidence was sufficient to show a factual dispute as to whether he would have at least \$2,800 available for incarceration reimbursement during a two-year period.” Citing *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 83-84 (Mo. En Banc 2008), the appellate court reversed the grant of summary judgment, concluding that “summary judgment was improper

because there was a genuine issue of fact as to whether the State had good cause for seeking incarceration reimbursement.”

The Court of Appeals held that “Farmer is entitled to a hearing where the circuit court can review the sufficiency of the evidence to determine whether the good cause requirement has been met.” See: *State ex rel. Nixon v. Farmer*, 268 S.W.3d 402 (Mo.Ct.App. 2008).

Of course the state has likely spent more on its own legal expenses in this case than it can ever expect to recover from a prisoner who has been incarcerated for the past two decades, but that is probably beside the point. ■

New York Jury Awards \$1,400,006 to Former Prisoner for Beating by Guards; Punitive Damages Later Reduced

by David M. Reutter

A New York federal jury awarded \$1,400,006 to a former prisoner in a lawsuit alleging two beatings by state prison guards. The U.S. District Court reduced the punitive damages award on a post-trial motion, cutting the total damages by almost half.

Upon returning from a medical callout on February 25, 2003 at New York’s Oneida Correctional Facility, prisoner Angel Martinez rang his dormitory’s doorbell several times to gain entry. Angered at being disturbed while he was using the bathroom, guard Scott Thompson decided Martinez would spend the night in solitary confinement. Martinez requested to see a sergeant to report that Thompson had pushed him during the confrontation.

Under the guise of wanting to discuss the matter, Thompson told Martinez to step outside. Once they were out of view of other prisoners, Thompson sounded a “Code 17” to indicate he was in trouble, then began beating Martinez. Guards Larry Sisco, Scott Myers, Thomas Novak and Donna Temple arrived and joined in the assault.

The beating was so severe that Martinez was knocked unconscious; he suffered

a broken rib, a herniated intervertebral disc of his spine’s lumbar region, and defecated on himself. The guards put him in restraints and took him to solitary, where he was denied medical treatment and food during his first week. He was charged with numerous disciplinary infractions and sentenced to twenty-four months confinement in the SHU.

In a separate incident, when being returned to his cell on March 5, 2003 to inspect his property, guards Michael Duvall and Ronald LaBague assaulted Martinez without provocation, exacerbating his injuries. On April 24, 2004 an Oneida County grand jury returned a “no bill” on criminal charges filed against Martinez related to the February 25 incident.

Martinez was released from solitary confinement after 240 days following an appellate division reversal of his disciplinary charges. He then sued. He was released from prison on December 1, 2006 while his case was pending, and was appointed pro bono counsel by the court.

The lawsuit progressed to trial and the jury reached a verdict on September 12, 2008. The jury found that Thompson and Sisco had used excessive force during the February 25, 2004 incident. It

also found that Duvall and LaBrague's use of force was excessive. The jurors determined that Thompson, Duvall and LaBrague's actions were in retaliation for Martinez's threat to report staff misconduct. Finally, they held that Thompson, Sisco and Meyers' attempt to have Martinez prosecuted was malicious. The court dismissed several other defendants, and the jury found in favor of defendants Temple and Novak.

After rejecting a qualified immunity defense, the jury awarded compensatory damages of \$200,000 against Thompson; \$100,000 against Duvall; \$50,000 against LaBrague and \$150,000 against Sisco, for a total of \$500,000. Nominal damages were awarded for the retaliation and malicious prosecution claims, totaling \$6.00. An award of \$900,000 in punitive damages was also entered.

The district court rejected the defendants' argument that the compensatory damages were excessive, but found the punitive damages award to be "exceedingly disproportionate." The court therefore reduced the punitive damages against Thompson, Duvall, LaBrague and Sisco to \$210,000 in a December 8, 2008 order. The compensatory, nominal and revised

punitive damages totaled \$710,006, and Martinez accepted the remittitur in lieu of a new trial on January 16, 2009.

The district court also awarded attorney fees and costs to Martinez, in the

amount of \$160,485.11. He was represented by New York City attorneys Glenn D. Miller and Edward Sivin. See: *Martinez v. Thompson*, USDC (N.D. New York), Case No. 9:04-cv-0440-DEP. ■

\$4.75 Million Settlement in Virginia Jail Construction Accident Case

On June 26, 2008, Electric Power Systems, Inc. (EPS) entered into a \$4.75 million settlement in a lawsuit brought by electrician Larry Shifflett, 53, who was seriously injured during construction of the River Regional Jail.

Shifflett was working on the jail's construction site on January 19, 2005 when he was injured while trying to connect a ground cable to a switchboard. The cable slipped, hit an energized section of the switchboard and generated a 10,000° arc flash, causing third-degree burns over Shifflett's upper torso and both arms. Shifflett's medical bills were around \$750,000 and he suffered \$165,000 in lost wages.

Shifflett filed suit in federal district court against EPS alleging the arc would

not have occurred but for improper breaker settings on the EPS switchboard. EPS claimed the settings were within code and Shifflett bore partial responsibility for not de-energizing the equipment, ignoring warning signs and not wearing protective clothing required by OSHA standards. Shifflett contested those allegations.

The jury found in Shifflett's favor on liability. EPS then settled the suit for \$4.75 million. Prior to trial, Shifflett had offered to settle for \$3.5 million and EPS had countered with a \$100,000 offer. Shifflett was represented by Charlottesville attorneys L.B. Chandler, Jr., Steven P. Hammond and Thomas H. Oxenham, III. See: *Shifflett v. Electric Power Systems, Inc.*, USDC-WD VA, Case No. 5:06-CV-127. ■



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Federal Prisoner Dies During Illicit Tryst With His Wife

Desmond A. Greene, a prisoner at the Big Sandy federal prison in Martin County, Kentucky, was in his bunk just after midnight on October 5, 2008. But at 1:12 a.m. his wife, Susan A. Witherspoon, was banging on the front door of the facility telling guards that Greene was unconscious and unresponsive in her car.

A guard and two prisoners rushed to the vehicle and applied CPR in an attempt to resuscitate Greene. Although one of the prisoners was a doctor, their efforts were unsuccessful and Greene was pronounced dead at a local hospital at 2:08 a.m.

Hospital officials attempting to

extract Greene's blood, in order to determine his cause of death, noticed what appeared to be semen on his body. Greene had been housed at the Big Sandy prison's satellite camp, a minimum-security facility with no fence where prisoners reportedly sneak out for late-night rendezvous with visiting paramours.

Witherspoon told prison officials that she and Greene had been visiting in the prison parking lot. But an investigation revealed that her first 911 call came from a nearby motel. Witherspoon made a second call from prison property at about the time she called the guards for help. Investigators interviewed another person

at the motel who heard two voices coming from Witherspoon's room during the time Greene was missing from the prison.

Witherspoon was subsequently charged with helping her husband escape; she was also charged with possession of marijuana following a search of her motel room. She pleaded guilty to the possession charge in November 2008 and was sentenced to time served plus one year of supervised release. The assisting escape charge was dropped. See: *United States v. Witherspoon*, USDC (ED Ky.), Case No. 7:08-cr-00030. ■

Source: *Lexington Herald-Leader*

Systemic Constitutional Violations at Ohio Juvenile Facilities Leads to Settlement in Class Action; Guards Attempt to Block Relief

by Brandon Sample

The Ohio Department of Youth Services (ODYS) has agreed to settle a class action lawsuit brought on behalf of all juvenile offenders incarcerated in the ODYS.

Problems with the Ohio juvenile detention system first came to light in 2003 after 14 guards at the Scioto Juvenile Correctional Facility (Scioto) were indicted for sex abuse and violence against minors at Scioto. Four guards were convicted or pled guilty to sexual abuse while another pled guilty to assault after slapping and punching a youth.

In December 2004, S.H. and other incarcerated minors at Scioto sued ODYS on behalf of all minors at Scioto. The Plaintiffs alleged that they were subjected to grossly unconstitutional conditions of confinement ranging from inadequate medical health care to endemic violence. For instance, the complaint alleged that Scioto staff physically and sexually abused minors at Scioto and arbitrarily placed them in isolation as punishment.

In March of 2005, the Civil Rights Division of the U.S. Department of Justice (DOJ) opened an investigation into the Scioto prison. On May 7, 2007, the DOJ published its findings: Scioto's juvenile prisoners suffered "significant constitutional deficiencies regarding the use of physical force, grievance investigation, processing, and use of seclusion." The report also found that the minors had suffered "harm or risk of harm from

constitutional deficiencies as to [safety]; certain discrete elements of medical care; grievances; and special education services."

The DOJ's findings reinvigorated settlement negotiations between the parties. And the case was expanded to cover all ODYS facilities.

As a predicate to final settlement negotiations, the parties agreed to commission an independent fact-finding team to conduct a comprehensive investigation of all ODYS facilities.

The investigation resulted in a report, issued some six months later, that was quite damning. The report concluded that ODYS facilities are "overcrowded, understaffed, and underserved in such vital areas as safety, education, mental health treatment, and rehabilitative programming." And the report noted that "excessive force and the excessive use of isolation, some of it extraordinarily prolonged, is endemic to the ODYS system."

The report blamed the systemic violence on Juvenile Corrections Officers (JCOs) throughout the ODYS that are poorly trained, psychologically ill-equipped for their job, and lack effective oversight. The JCOs, according to the report, acted "more like prison guards (or police officers) than trained partners in a shared rehabilitative effort."

The report recommended sweeping changes to the ODYS to correct these and other unconstitutional conditions ranging

from inadequate mental health and dental care, to the provision of educational opportunities.

For instance, the report called for the down-sizing of ODYS facilities in favor of smaller community based facilities that house up to 24 juveniles in order to provide an environment that is geared more towards rehabilitation; an overhaul of the training, responsibilities, and supervision of JCOs, including the replacement of "cops" with "counselors"; and implementation of structural reforms to ensure the provision of adequate health care, education, access to the courts, and a safe, violence free, living environment for all juveniles in ODYS facilities.

Two weeks before the parties were about to finalize a settlement in the case that adopted the sweeping reforms suggested by the report, the JCO's union, the Ohio Civil Service Employees Association (OSCEA), sought to intervene into the case arguing that the settlement, if adopted, would violate its Collective Bargaining Agreement with the State of Ohio. The court, however, rejected the OSCEA's "eleventh hour" attempt to block the settlement.

"These children are subject to physical and sexual abuse by their would-be guardians, who have inculcated the state institutions with a culture of violence," the court wrote. "These children lack adequate health care and education. ODYS staff lack adequate training and supervi-

sion. In some cases they are unqualified. The[se] dire conditions weigh against delay and against an intervention that would obstruct a solution to the systemic deprivation of constitutional rights.”

The final settlement in the case was entered May 21, 2008. The Plaintiffs were represented by Alphonse Gerhardstein, Kimberly Brooks Tandy, Jennifer Kinsley, Maria Ramiu, and David Singleton. The

court awarded the plaintiffs \$219,505.27 in fees at the Prison Litigation Reform Act rate of \$169.50 per hour. See: *S.W. v. Strickrath*, US DC SD OH, Case No. 2:04-CV-1206. ■

Supreme Court Holds Failure to Report to Prison Not a Violent Felony Under ACCA

A defendant's failure to surrender to serve a prison sentence is not a “violent felony” under the Armed Career Criminal Act (ACCA), the U.S. Supreme Court held on January 13, 2009.

Deondery Chambers pleaded guilty to a federal charge of being a felon in possession of a firearm. At sentencing, the government asked for a 15-year mandatory prison term, arguing that Chambers had three prior convictions that qualified under the ACCA as a “serious drug offense” or “violent felony.”

One of the convictions the government relied on, for “failing to report to a penal institution,” stemmed from Chambers’ failure to show up for weekend confinement at a county jail as part of a 1998 robbery and battery conviction. The U.S. Attorney’s office argued that Chambers’ failure to report to prison constituted a violent felony.

Over Chambers’ objection, the district court applied the ACCA enhancement based on his failure to report and sentenced him to 15 years. The U.S. Court of Appeals for the Seventh Circuit affirmed; however, the U.S. Supreme Court granted certiorari and reversed.

“We conclude that the crime here at issue falls outside the scope of ACCA’s definition of ‘violent felony,’” the Court wrote. Failure to report “amounts to a form of inaction, a far cry from the

‘purposeful’, ‘violent’, and ‘aggressive’ conduct” that is contemplated by the ACCA. See: *Chambers v. United States*, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009).

On April 7, 2009, the Seventh Circuit remanded Chambers’ case to the district court for resentencing, noting that he

could “raise a new argument based on statutes or judicial decisions that postdate his original sentencing, provided they are not foreclosed by the decision in his appeal from his original, vacated sentence.” See: *United States v. Chambers*, 2009 U.S. App. LEXIS 7372 (7th Cir. 2009). ■

New Texas Prison Hospital Approved

On January 16, 2009, Texas lawmakers announced that the state will convert a dormant 59-year-old federal medical center into a prison hospital for the Texas Department of Criminal Justice (TDCJ). The five-story, 100-bed Thomas T. Connally Veterans Affairs Medical Center has not been used in six years.

“We are anxious to see these doors open again and have a lot of jobs, good-paying jobs, professional jobs, to bring some stimulus back, some life back to Marlin and Falls County,” said State Senator Kip Averitt. Attempts to obtain approval to convert the hospital from an unused federal facility into a state prison hospital have been in the works for two years.

The Texas legislature approved \$3 million for the project in 2007, and another \$500,000 was appropriated in 2008. The TDCJ is seeking \$18.7 mil-

lion in 2009 to complete the funding of the conversion project; no date has been set for the opening of the new prison hospital. ■

Sources: www.news8austin.com, www.gritsforbreakfast.com

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Colorado DOC Settles Suit Over Provision of Education Programs to Learning Disabled Prisoner

The Colorado Department of Corrections (CDOC) has agreed to settle a lawsuit brought by a prisoner who was denied the right to participate in educational services due to her learning disability.

Maureen Martin, a Colorado state prisoner at the LaVista Correctional Facility, decided to turn her life around following her incarceration. Realizing that her inability to read and write was a significant impediment to her goals, she signed up for adult basic education classes.

For just over three months Martin made significant advances, receiving certificates and other acknowledgments

from her teacher. However, she was terminated from the prison school program on February 28, 2007 due to her purported "inability to progress because of learning deficiencies beyond her control." Despite Martin's academic efforts, her teacher said she was "unteachable."

Martin filed suit in U.S. District Court, alleging violations of her Fourteenth Amendment rights, the Rehabilitation Act (29 U.S.C. § 794(a)) and the Americans with Disabilities Act (42 U.S.C. § 12102). After extensive negotiations, the CDOC agreed to settle on March 31, 2009.

In exchange for Martin dismissing her lawsuit, the CDOC agreed to pay her \$18,888.16. Additionally, the

CDOC agreed to (1) create standards for evaluating all state prisoners with learning disabilities and mental health issues; (2) conduct a learning disability assessment of Martin and prepare an education plan for her; and (3) provide Martin with "Talking Books," additional class hours, meaningful individualized tutoring and the opportunity to repeat classes as needed due to her learning disability.

The CDOC further agreed to pay \$11,111.84 in attorney's fees. Martin was represented by Mari Anne Newman with the Denver law firm of Killmer, Lane & Newman, LLP. See: *Martin v. Ritter*, USDC (D.Col.), Case No. 1:07-cv-02689-REB-KLM. ■

California Lifers Housed Out-Of-State in Federal Witness Protection Program Entitled to Appear in Person at Parole Hearings

by John E. Dannenberg

The California Court of Appeal (Third District) held that California prisoners sentenced to life with the possibility of parole, who are housed in out-of-state facilities in the federal witness protection program, are entitled to appear personally at their parole hearings. To the extent that parole board regulations conflict with controlling state statutes, the regulations were disapproved as void.

J.G. is a California prisoner incarcerated out-of-state in the federal witness protection program. Although convicted in California of seven murders, three counts of conspiracy to commit murder and numerous other violent felonies, he is eligible for parole. His prison record indicated considerable rehabilitation, and he wanted to demonstrate that record, plus his aged condition, to the Board of Parole Hearings (BPH) by his personal attendance at his parole hearing. However, although J.G. was

afforded a telephonic appearance he was not allowed to attend the hearing.

In denying his request to attend, the BPH cited regulations 15 CCR §§ 2367(d) (1) and (d)(2), which limit physical attendance for "multi jurisdiction prisoners," a general category of interstate transfers that J.G. argued did not apply to him. Rather, he relied on the federal witness protection program statute that had taken him out-of-state, California Penal Code § 2911, which expressly provides that parole hearings for such prisoners "will be conducted on the same basis as if [the prisoner] were in a California institution." The relevant "same basis" is announced in BPH regulation § 2247, which provides, *inter alia*, that "[a] prisoner has the right to be present at the hearing."

At first the BPH argued that § 2367(d) controlled. Then they waffled, and agreed to drop the matter and give J.G. a hearing in accordance with controlling regulations. A suspicious Court of Appeal didn't trust the BPH's offer, noting that "a 'unilateral decision' to change 'is also unilaterally rescindable.'" The Court also rejected the BPH's mootness claim, noting that there were approximately 20 California prisoners similarly situated to J.G. for whom the issue was "capable of repetition yet evading review." The appellate court thus proceeded to resolve the question of law.

The Court first determined that California life prisoners have a limited liberty interest in being free from arbitrary parole decisions. Next, the appellate court searched the record for regulatory intent but found no evidence that the BPH had ever considered the witness protection statute when promulgating regulations §§ 2367(d)(1) and (d)(2). Therefore, as to the right to appear in person, the Court held that the conflict between the witness protection statute and the BPH regulations must be resolved in favor of the statute. The conflicting regulations were therefore declared void.

In granting J.G.'s petition, the Court of Appeal ordered the BPH to allow him to appear personally at his parole hearings by having BPH officials travel to the federal institution where he is confined, by arranging with "corresponding federal officials to meet with [him] and carry out the Board's term-fixing and parole functions," or by "otherwise designating a time and place in California where [he] may be produced by federal authorities to meet with the Board for his parole hearing."

This ruling applies to all out-of-state witness protection program California life prisoners. J.G. was represented by Bolinas, California attorney Michael Satris, under appointment by the court. See: *In re J.G.*, 159 Cal. App. 4th 1056 (Cal. App. 3d Dist. 2008). ■

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See page 53 for more information

Florida Jail Supervisor Disciplined for Using Prisoner Labor for Brother's Political Campaign

A supervisor at Florida's Broward County Jail has been disciplined for using prisoner labor and county property to assist his brother's political campaign.

Sgt. Alan Rainey was assigned to oversee the county jail farm when his brother, Jeff, was a Republican candidate for the District 1 County Commission. On June 14, 2008, Sgt. Rainey had prisoners load a jail farm trailer with containers filled with iced-down drinks.

While on his way to Sand Point Park for a fundraiser to benefit his brother's campaign, another car ran a red light and hit the trailer that Sgt. Rainey was transporting, causing minor damage. Sgt. Rainey's supervisors would not have learned about the incident if it wasn't for the accident, which resulted in a police report.

Jeff's bid for the Commission seat failed in the primary. Meanwhile, Broward County Sheriff Jeff Parker took disciplinary action against Sgt. Rainey for conduct unbecoming an officer and misuse of department equipment, and imposed a 40-hour suspension without

pay and reassignment to supervisory duty at the main jail facility.

In September 2008, Parker rejected a grievance filed by the Coastal Florida Police Benevolent Association on behalf of Sgt. Rainey.

"I know that you personally regret what has occurred," Parker stated. "However, your actions in this instance demonstrated poor judgment, and it has

damaged the credibility and reputation not only of yourself, but the other members of our Sheriff's Office."

Sgt. Rainey has since requested arbitration in an effort to overturn or reduce the disciplinary sanctions, as he is apparently unwilling to accept responsibility for his misconduct. ■

Source: *Florida Today*

Oregon Prison Manager Indicted for Misusing Prison Credit Cards

A former manager at a minimum-security prison in Salem, Oregon has been indicted for improperly using prison credit cards.

Kenneth C. Robertson, 46, began working for the Oregon Department of Corrections (ODOC) in 1988. According to prison spokeswoman Susi Hodgkin, he had been employed as a physical plant manager at the Santiam Correctional Institution since 2004.

Robertson resigned in September 2008

following an ODOC internal affairs investigation that revealed he had used prison credit and gas cards for his personal use, said Don Abar, a Marion County Deputy District Attorney. Results of the investigation were turned over to the state police.

Robertson was arraigned in Marion County Circuit Court last November on theft and official misconduct charges; he is scheduled to go to trial on June 24, 2009. ■

Source: *Statesman Journal*

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Ninth Circuit Strikes Down BOP Regulation Precluding Early Release for Prisoners Who Complete Drug Treatment

by *Brandon Sample*

The U.S. Court of Appeals for the Ninth Circuit held that the federal Bureau of Prisons (BOP) violated the Administrative Procedures Act (APA) in promulgating a regulation that precludes up to one year of early release for certain offenders who complete the BOP's Residential Drug Abuse Program.

The appellate court's decision came in a consolidated appeal from habeas corpus petitions filed by Charles Arrington and 17 other current and former prisoners at the Federal Correctional Institution in Sheridan, Oregon. The plaintiffs alleged that the BOP's promulgation of 28 C.F.R. § 550.58(a)(1)(vi)(B) was "arbitrary and capricious" because prison officials had failed to provide sufficient rationale for their decision to categorically exclude from early release those whose current offense is a felony and "involved the carrying, possession or use of a firearm."

In denying the prisoners' habeas petitions, the district court found that the BOP had provided two rational reasons to support the regulation: (1) the increased risk that offenders with convictions involving firearms might pose to the public and (2) the need for uniformity in the application of the regulation. The BOP's alleged need for uniformity stemmed from patchwork application of a prior rule that sought to exclude prisoners with offenses involving firearms from early release based on the BOP's construction of the term "crime of violence" in 18 U.S.C. § 3621(e).

Noting that courts "are limited to the explanations offered by the agency in the administrative record," the Ninth Circuit rejected the BOP's public safety rationale in support of the regulation because it was "entirely absent from the administrative record." Rather, the appellate court explained, the BOP first articulated this justification in a brief to the Supreme Court, which was "precisely the type of 'post hoc rationalization' of appellate counsel that we are forbidden to consider in conducting review under the APA."

Turning to the BOP's second rationale, the Ninth Circuit concluded that prison officials' need for uniformity in applying the regulation fared a "little better" because it was, at least, included in the administrative record. Nevertheless,

the Court of Appeals held that the district court had erred in relying on this reason to support the challenged regulation.

According to the Ninth Circuit, the BOP's "general desire for uniformity provides no explanation for why the Bureau exercised its discretion to achieve consistency through the promulgation of a categorical exclusion rule." For example, the BOP could have achieved uniformity through a rule that included prisoners with nonviolent convic-

tions involving firearms, thus making them eligible for early release. Yet the BOP chose to categorically exclude such offenders. The BOP's failure to explain why it exercised its discretion to "select one rather than the other" rendered the regulation invalid.

Accordingly, the judgment of the district court was reversed and the case was remanded with instructions to grant the habeas petitions. See: *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008). ■

Ninth Circuit: County Contractor that Counsels Bad-Check Writers Not Entitled to State Sovereign Immunity from Suit

by *John E. Dannenberg*

The Ninth Circuit U.S. Court of Appeals has ruled that a private firm hired by a California county to run a diversion program for bad-check writers was not immune from suit under a claim of state sovereign immunity.

California law authorizes District Attorneys to offer a diversion program for bad-check writers in lieu of formal criminal prosecution (CA Penal Code §§ 1001.60-67), a service that can be contracted to private companies. To this end, the Santa Clara County District Attorney (DA) hired American Corrective Counseling Services (ACCS) to operate the county's § 1001.60 bad check diversion program. To qualify for the program, an offender must cover the bad check, complete a course and pay applicable collection and administrative fees. For its efforts, ACCS collects a \$100 class fee, other costs and late charges, plus 60% of all administrative fees.

ACCS's contract with the county denominates ACCS as an "INDEPENDENT CONTRACTOR" (emphasis in original), and notes that "nothing within this agreement shall be construed as creating a relationship of employer or employee, or principal and agent, between the County of Santa Clara and ACCS." The contract further requires ACCS to indemnify the county and carry its own insurance.

When Elena M. del Campo bounced a check for \$95.02, ACCS sprung into action

by sending her a demand letter, written on the DA's letterhead, telling her that she could avoid a court proceeding if she voluntarily enrolled in their program at a cost of \$265.02. Del Campo sent payment for just her original bad check, whereupon ACCS mailed a follow-up letter warning her that failure to pay the balance could result in criminal prosecution.

Rather than pay, del Campo filed a 42 U.S.C. § 1983 complaint in U.S. District Court against the DA's office, ACCS and related companies and officials, alleging violations of the California Unfair Business Practices Act, CA Bus. & Prof. Code §§ 17200 et seq., and the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq.

Both ACCS and the DA claimed state sovereign immunity from suit, which the district court declined to extend. While the DA was ultimately dismissed from the lawsuit, the question remained as to whether ACCS, as a private contractor, was entitled to immunity. The court determined that the bad check diversion program, although authorized by state law, was in fact a county and not a state program. Hence, ACCS's involvement could not be construed as a "central function of state government" as required for state sovereign immunity.

On appeal, the Ninth Circuit first ruled that it had jurisdiction to hear the matter, prior to a final judgment in the

district court, because “whether the immunity reaches beyond ‘states and state entities’ is the substantive issue we face, which we may not prejudge by denying jurisdiction to decide it.”

Turning to the merits, the appellate court relied on *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140 (9th Cir. 2004) at 1146-48, to demonstrate why private entities’ claims of state sovereign immunity must fail. The court reviewed U.S. Supreme Court precedent, Ninth Circuit precedent and case law from all the other circuits, and found them unanimous in holding that state sovereign immunity is not shared by private entities contracted by governmental agencies to do “official” work. In fact, using the five-part test for such immunity set forth in *Ali*, it is plain that a private entity could never meet four of those tests. Thus, ACCS, as a private contractor, was not entitled to “state sovereign immunity.”

Accordingly, the Ninth Circuit affirmed the district court, permitting del Campo’s lawsuit to proceed. See: *Del Campo v. American Corrective Counseling Services, Inc.*, 517 F.3d 1070 (9th Cir. 2008). Following remand, the district court granted class action status in this case on December 3, 2008. See: *Del Campo v. American Corrective Counseling Services, Inc.*, 254 F.R.D. 585 (ND Cal. 2008); 2008 U.S. Dist. LEXIS 106004.

ACCS filed for Chapter 11 Bankruptcy on January 19, 2009, resulting in a stay; the lawsuit is ongoing against other defendants, with class notification pending. ■

South Carolina Prison Official Remained on the Job a Year After Indictment

The deputy director over medical and health services for the South Carolina Department of Corrections (SCDOC) was suspended without pay in November 2008. His suspension, however, came more than a year after he was indicted on felony fraud charges.

SCDOC deputy director Russell H. Campbell, Jr., 40, was charged on November 14, 2007 with providing false information to Auto-Owners Life Insurance Company on an insurance application, including details related to his “father’s address and health condition.” Campbell defrauded the company to obtain a \$50,000 payment on a life insurance policy for his father, who died in March 2005.

Although Campbell was initially indicted in November 2007, one of the charges was later dropped by prosecutors to obtain an indictment with slightly different language. The new indictment was issued on October 15, 2008.

The SCDOC said it was investigating why it did not learn of the initial indictment until November 18, 2008. “As soon as the Department of Corrections became aware of the indictments or any criminal charges against Russell

Campbell, he was suspended,” said SCDOC spokesman Jon Gelinas. The state Attorney General’s office is supposed to notify state agencies when employees are indicted.

Campbell was subsequently convicted on January 28, 2009 of obtaining property by false pretenses and making a false statement; he was sentenced to three years in prison and ordered to pay restitution to the insurance company. He resigned from the SCDOC prior to his conviction, and will serve his sentence at an out-of-state facility.

Campbell had been named as a defendant in a lawsuit filed in August 2008 by Linda Dunlap, SCDOC’s director of clinical services, who claimed she was subjected to a “ruthless and unrelenting campaign of retaliation” by Campbell and SCDOC Director Jon Ozmint after she informed state lawmakers about corruption in the department. ■

Sources: *www.thestate.com*, *Associated Press*

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Ninth Circuit: California Federal Habeas Petitioner Sufficiently Exhausts State Court Remedies When He Presents Facts Necessary to Support Constitutional Claim

by John E. Dannenberg

A California state prisoner challenging a prison disciplinary conviction first pursued his state habeas corpus petition through the highest state court, the California Supreme Court. However, his inartful pro se pleadings were later deemed in his federal habeas petition to have been insufficient to provide the state courts with any factual basis for relief, and his federal petition was therefore dismissed.

The Ninth Circuit reversed on appeal, finding the petition cited state law, federal constitutional authority and federal case law in support of the claim of denial of a witness in the disciplinary hearing, which put the California courts on sufficient notice of the legal theory and facts applicable to that theory.

California state prisoner Michael Davis, serving nine years for burglary, was infraacted for allegedly committing a battery on staff. The incident occurred in the kitchen where Davis worked, when he was found cooking his own food on the kitchen grill and ordered to stop. He allegedly refused, copped an attitude and sloshed a 6-inch "hotel pan" full of hot cooking oil onto the kitchen supervisor, splashing his arm and shirt. Davis was found guilty of the disciplinary charge and lost 150 days of good-time credit. He claimed his due process rights were violated in the disciplinary hearing when he was denied a witness.

In his state habeas pleadings, Davis raised the witness-denial due process claim and cited *Wolff v. McDonnell*, 418 U.S. 539 (1974), California Penal Code § 2932(A)(3), and prison regulation § 3315(E). Upon finally reaching the federal courts, his case was dismissed on the grounds that he had failed to exhaust available state court remedies.

The Ninth Circuit observed that the federal habeas statute, 28 U.S.C. § 2254(c), only requires that prisoners give state courts a fair opportunity to act on their claims. Such fair presentation requires the petitioner to present both the operative facts and the federal legal theory, so as to permit the court to apply "controlling legal principles to the facts

bearing upon the constitutional claim."

While the state conceded that Davis had fairly presented the legal basis of his claim, it faulted him for factual deficiencies. The Ninth Circuit, however, stated that § 2254(c) does not impose a duty on the petitioner to present "every piece of evidence" supporting his federal claims in order to satisfy the exhaustion requirement.

Davis' constitutional claim regarding denial of a witness only imported a duty to provide state courts with facts sufficient to give notice of that claim. Moreover, he was entitled to some slack as a pro per litigant. The appellate court found that while Davis

did not supply a clear factual narrative, he did state that he "was denied due process rights under *Wolff* ... to a witness," and cited a case, a statute and a regulation. These latter sources saved Davis' petition and amounted to "fair presentation" of his claim, thus satisfying the exhaustion requirement in the state courts below.

Accordingly, the Ninth Circuit reversed the district court and remanded for further proceedings. See: *Davis v. Silva*, 511 F.3d 1005 (9th Cir. 2008). Pro se federal habeas petitioners should study this case to learn how to avoid similar dismissals of their otherwise worthy claims. ▀

Prisoner's Free Speech Rights Violated by Legal Mail Opened Outside His Presence; Qualified Immunity Denied

by David M. Reutter

The Eleventh Circuit Court of Appeals held that prison officials who open legal mail outside of a prisoner's presence are not entitled to qualified immunity in a lawsuit alleging that such conduct violates the prisoner's free speech rights.

While incarcerated at the Georgia State Prison (GSP) from 2002 to 2007, Jamil Al-Amin received correspondence marked "legal mail" from his wife Karima, who is a licensed attorney practicing in Atlanta. In April 2002, a letter from Karima marked legal mail was accidentally opened outside Jamil's presence. The mailroom supervisor, Sanche M. Martin, informed GSP Warden Hugh Smith that Jamil had received "mail of a personal nature" from his attorney-wife.

Prison officials ordered Jamil to submit a list of his attorneys, but he did not list his wife. In August 2003, Jamil filed a grievance requesting that all mail from attorneys addressed to him be opened in his presence, including mail from Karima. Smith denied the grievance. A grievance appeal resulted in GSP staff being instructed to "treat all mail from Karima

as legal, privileged mail and to open it in [Jamil's] presence."

Despite that instruction, Jamil alleged that GSP continued to open mail from his wife outside his presence. Attached to his civil rights complaint were 13 envelopes from Karima marked "legal mail" that had been opened after the November 25, 2003 grievance appeal prohibiting such action. Jamil's lawsuit did not address the reading of his legal mail by prison officials, only the opening of such mail outside his presence.

Jamil asserted First Amendment violations for interference with access to the courts and free speech, and the U.S. District Court declined to grant qualified immunity to Smith and Martin. The Eleventh Circuit examined how those rights were impacted by the opening of Karima's letters outside Jamil's presence.

The appellate court found the defendants were aware that Karima was Jamil's attorney as a result of the November 2003 grievance appeal response. Under existing precedent, the constitutional right of access to the courts requires that incoming

mail from a prisoner's attorney, properly marked as such, may be opened only in the prisoner's presence and only to inspect for contraband.

The defendants, however, argued that that precedent was no longer good law in light of *Turner v. Safley*, 107 S.Ct. 2254 (1987). The Eleventh Circuit disagreed, aligning itself with other circuits that have held likewise while recognizing a split with the Fifth Circuit on that issue. In sum, the Court of Appeals found "no penological interest or security concern justifies opening attorney mail outside a prisoner's presence."

The Court held that Jamil "would be home free on his access-to-courts claim but for the Supreme Court's actual injury decision" in *Casey v. Lewis*, 116 S.Ct. 2174 (1996). To show such injury, "a plaintiff must provide evidence of such deterrence, such as a denial or dismissal of a direct appeal, habeas petition, or civil rights case that results from actions of prison officials." As Jamil had failed to make such a showing, the district court erred in denying the defendants qualified immunity on his court access claim.

The opposite result was reached on Jamil's free speech claim, which alleged the defendants' conduct had "inhibited, chilled, and interfered with his communication with his attorney," and consequently violated his First Amendment rights.

The Court of Appeals observed that mail is one medium of free speech. Given prisoners' incarceration and distance from their attorneys, "prisoners' use of the

mail to communicate with their attorneys about their criminal cases may frequently be a more important free speech right than the use of their tongues," the Court said.

The issue in this case was whether the defendants' pattern and practice of opening (but not reading) Jamil's clearly marked legal mail outside his presence sufficiently chilled, inhibited or interfered with his ability to speak, protest and complain openly to his attorney so as to infringe his right to free speech. The Court held that it did.

The Eleventh Circuit also found that the actual injury requirement in *Casey* does not apply to free speech claims. Further, the Court's precedent gave the defendants clear notice that their conduct violated Jamil's constitutional rights, and the Court flatly rejected the defendants' argument that they did not have "fair warning" their conduct was a free speech violation. The appellate court said the focus is on whether case law gives warning that the specific conduct violates a prisoner's rights; prison officials are not required "to cite by chapter and verse all of the constitutional bases that make [their] conduct unlawful."

The Eleventh Circuit concluded that qualified immunity applied to the access-to-courts claim, but affirmed the district court's order denying qualified immunity as to the free speech claim. See: *Al-Amin v. Smith*, 511 F.3d 1317 (11th Cir. 2008), cert. denied. This case was still pending as of May 2009; Al-Amin is represented by the Atlanta law firm of Kilpatrick Stockton, LLP. ■

\$25,000 Settlement in Washington Detainee Contracting for TB in Seattle Jail

Washington State's King County Jail has paid \$25,000 to settle a pretrial detainee's claim that he contracted tuberculosis while held at the jail.

While held at the Jail from November 2003 through January 2004, Jason Perez contracted tuberculosis from another detainee. As a result, he sustained a permanent condition, the tuberculosis bacterium resident in his system.

He brought a state negligence claim alleging jail officials failed to establish a protocol for detecting tuberculosis in prisoners, failing to maintain proper supervision of prisoner suspected of having a communicable disease such as

tuberculosis and for failing to attend to Perez's health and welfare.

Perez settled the claim on September 14, 2007 for \$25,000. He was represented by Seattle Attorney Charles S. Hamilton, III. The documents related to this case are on PLN's website.

See: *Perez v. King County*, King County Superior Court, Case No: 06-12968-T. King County Claim No: 37476 ■

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Texas Court of Criminal Appeals: Concurrent Sentences Mean Concurrent Fines

The Texas Court of Criminal Appeals (CCA) ruled that fines imposed as part of a sentence for multiple counts of an offense committed during the course of a single criminal episode must be imposed concurrently.

James Crook, a Texas criminal defendant, was convicted of thirteen counts of barratry arising out of the same criminal episode. The jury assessed punishment at 10 years incarceration and a \$10,000 fine per count, with a recommendation for community service probation for the incarceration part of the sentence. The trial court ordered the fines to run concurrently, for a total of \$10,000.

The state appealed the sentence on the grounds that under long-standing case law, all fines are consecutive; that is, Crook should pay fines totaling \$130,000. The Court of Appeals, 8th District, affirmed the trial court's decision. See: *State v. Crook*, 2005 Tex. App. LEXIS 5077 (Tex. App., June 30, 2005).

The state petitioned for discretionary review by the CCA. The CCA granted review and held that Section 3.03(a), Texas Penal Code, which sets forth the rules for punishment when multiple offenses arise in a single criminal episode, specifically requires that "sentences shall run concurrently."

The appellate court also found "that a fine is part of a sentence." Further, in cases governed by Section 3.03(a), the Legislature removed the traditional discretion of the trial judge as to whether sentences should run concurrently or consecutively. Because the Legislature did not give any indication that it intended to exclude fines from the term "sentence," it was assumed that fines were intended to run concurrently. This means that a defendant is only required to pay the highest fine in concurrent sentences. In Crook's case, one payment of \$10,000 would satisfy the fine portion of his sentence.

Because judges have discretion in cases not prosecuted under Section 3.03(a), and because Section 3.03(a) was intended to balance a benefit to the state in prosecuting fewer trials with a benefit to the defendant in receiving concurrent sentences, this rationale may not hold true for concurrent sentences not arising from a single criminal episode.

The CCA also rejected the state's

argument that because fines do not "run," they are not intended to be included in the language of Section 3.03(a). The judgment

of the Court of Appeals was affirmed. See: *State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008), rehearing denied. ■

D.C. Circuit Reverses Dismissal of Deliberate Indifference Gallstone Claim

The U.S. Court of Appeals for the D.C. Circuit reversed the dismissal of a prisoner's civil rights action alleging inadequate medical care.

Herbert Brown, a prisoner in the District of Columbia (District), was incarcerated at the notorious Lorton Correctional Facility from 1991 to 1997. While at Lorton he had numerous health problems that included headaches, constipation, loss of appetite, yellowed eyes, and pain in his chest, stomach, lower back and penis. Medical staff improperly diagnosed Brown or ignored his requests for treatment. As a result, he suffered an inflamed liver, jaundice and a "medley of other maladies."

Brown was finally diagnosed by a doctor as having gallstones; he was ordered transferred immediately to a hospital for surgery. However, for the next sixty days prison officials refused to comply with the doctor's order, even in spite of Brown's continued complaints of pain. Instead, prison officials sent him to the hospital only after he was again diagnosed with gallstones and ordered transferred immediately. At the hospital, surgeons removed 18 gallstones from Brown's urinary tract.

Upon his return to Lorton, Brown continued to complain of similar problems. Nevertheless, over the next several months medical staff refused to provide treatment or misdiagnosed him. In one instance, Brown was diagnosed with food poisoning and ordered transferred to the hospital, but prison officials refused.

In 1997, Brown was sent to the Northeast Ohio Correctional Center, a private prison owned by Corrections Corporation of America (CCA). There he continued to receive inadequate medical care. At one point, a CCA physician prescribed diabetes medication for Brown without examining him. After suffering several months from the medication's negative effects, Brown learned he did not have diabetes. He filed numerous grievances at both Lorton and Youngstown complaining about his lack

of adequate medical treatment.

In December 2004, Brown filed suit in the U.S. District Court for the District of Columbia under 42 U.S.C. § 1983 against the District, CCA and several District and CCA prison officials for failing to provide adequate medical care in violation of the Eighth Amendment.

On August 1, 2005, the district court dismissed Brown's case in its entirety. According to the court, Brown had failed to state an Eighth Amendment claim against the District because his complaint alleged only "delays" in receiving treatment, "displeasure" as to the quality of treatment, and "disagreement" about the course of treatment. The district court reasoned that because Brown had in fact received some medical care, his complaint alleged only negligence, if anything.

Further, assuming Brown's allegations did state an Eighth Amendment claim, the district court refused to find municipal liability against the District, holding that Brown's allegations, at best, were based on respondeat omissions not sufficiently harmful to evidence deliberate indifference to his serious medical needs. Brown appealed.

The D.C. Circuit Court of Appeals explained that one example of "deliberate indifference" is when a prison doctor or official "intentionally denies or delays access to medical care or interferes with the treatment once prescribed." Applying this standard to Brown's case, the appellate court did not hesitate to conclude he had alleged an Eighth Amendment violation.

First, the D.C. Circuit easily found that Brown's gallstone condition was a "serious medical need," noting the "intense and often relentless pain that accompanies" the condition and "the complications that can follow." Likewise, the appellate court found that Brown's allegations rose to the level of "deliberate indifference" based on the District's refusal to send him to a hospital for sixty

days after a doctor ordered his “immediate hospitalization.”

The D.C. Circuit also disagreed with the district court on the issue of municipal liability, finding that Brown had sufficiently alleged a custom or policy of deliberate indifference by the District. Brown’s numerous grievances put the District on notice of the alleged inadequate medical

care he was receiving, yet the District “sat by idly” while Brown’s serious medical needs were ignored.

Finally, the appellate court rejected the district court’s sua sponte dismissal of the District and CCA employees for failure to perfect service. The district court was required to give Brown notice prior to the dismissal, the D.C. Circuit held, given

Brown’s pro se status, his incarceration, and his resultant “limited ability to ensure proper service.”

Accordingly, the judgment of the district court was reversed and the case was remanded for further proceedings. The case is still pending. See: *Brown v. District of Columbia*, 379 U.S. App. D.C. 370 (D.C. Cir. 2008). ■

Sixth Circuit Upholds Conviction and Sentences for Jail Guards Accused of Abusing, Killing Prisoners

by Brandon Sample

On February 4, 2008, the U.S. Court of Appeals for the Sixth Circuit upheld the conviction and sentences of two Wilson County, Tennessee jail guards accused of conspiring to violate the civil rights of prisoners.

Patrick Marlowe was a leader at the Wilson County Jail, just not a very good one. Marlowe, the evening shift supervisor, led himself along with co-workers Tommy Shane Conatser and Gary Hale to federal prison for conspiring to sadistically abuse – and even kill – the very prisoners they were supposed to safeguard. [See: *PLN*, February 2006, p.1].

Following the beating death of a prisoner at the hands of Marlowe and Hale, an investigation revealed evidence that a group of evening shift guards, led by Marlowe, would “strike and kick” prisoners who were “loud, obnoxious or uncooperative.” To conceal their misdeeds, the guards would deny the prisoners medical care and prepare false reports regarding the incidents.

They would even go so far as to keep a tally of the prisoners Marlowe struck hard enough to render unconscious, called the “knock-out list.” That list had as many as 21 names on it. Marlowe and the other guards would also “discuss, recount, and reenact” the assaults when they were together, but not when guards who were not part of their “inner circle” were present.

In October 2001, for example, Sergio Martinez was brutally beaten after being taken to the Wilson County Jail for drunk driving. Upon his arrival at the facility, Martinez was “mouthy” with Marlowe. When he refused to answer some questions during booking, Martinez was taken to a detox cell and beaten unconscious. Both Marlowe and Conatser falsified reports related to the incident, and the assault on

Martinez was added as number 11 to the knock-out list.

On April 30, 2002, Marlowe was forced off the road by a suspected drunk driver named Paul Armes. Marlowe was off-duty at the time, but followed Armes home and called police. Armes was arrested and taken to the Wilson County Jail. Before he arrived, Marlowe called ahead and told his cohorts to “handle it”; after returning to the jail, he “beat the shit” out of Armes.

On January 13, 2003, Walter Kuntz was taken to the Wilson County Jail after fleeing the scene of a minor accident. He was placed in a detox cell and started kicking the door and screaming. Marlowe entered the cell, punched Kuntz in the left side of his head, threw him toward the wall, and “kicked, punched and kneed” him in the rib area. Kuntz quieted down for a short time, but then started screaming and banging on the cell door again.

Marlowe told Hale to “take care of the situation.” Hale took that to mean he should do whatever was necessary to get Kuntz to stop hitting the door. Hale delivered three or four “full power” punches to the right side of Kuntz’s head. With each punch, Kuntz’s head bounced off the wall and made a “cracking sound.” Hale told Marlowe that he had “taken care of it.”

A short while later, Kuntz’s mother called the jail and told a guard that her son had undergone brain surgery a year or two earlier. The message was relayed to Hale. When Hale and Marlowe checked on Kuntz, they found him passed out in his

own vomit. Kuntz remained unconscious for several hours without medical attention; when EMTs were finally called, neither Marlowe nor Hale told them about Kuntz’s head trauma. He later died from his injuries.

Doctors testified at trial that had Kuntz’s head injuries been treated sooner, he likely would have lived. Eight guards were subsequently prosecuted, including Hale, Conatser and Marlowe. Conatser was sentenced to 70 months while Marlowe received a life sentence. [See: *PLN*, April 2007, p.26].

On appeal, Conatser argued that there was insufficient evidence to support his conviction. The Sixth Circuit disagreed, finding his participation in the conspiracy was sufficiently proved through his falsification of a report related to the Martinez incident, by standing outside cells while Marlowe committed assaults, and by his membership in the group of guards who talked, joked about and reenacted the beatings. The appellate court also rejected Conatser and Marlowe’s challenges to their sentences, finding neither sentence to be procedurally or substantively unreasonable.

Accordingly, the Court of Appeals affirmed Conatser’s conviction and the sentences for both Conatser and Marlowe. See: *United States v. Conatser*, 514 F.3d 508 (6th Cir. 2008), cert. denied. ■

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News in Brief:

Arizona: On May 2, 2009, more than 2,000 protesters marched on the Maricopa County Jail in Phoenix to protest Sheriff Joe Arpaio's illegal immigration policies. The protestors were joined by musician and political activist Zack de la Rocha, formerly of the band Rage Against the Machine. The protestors were met by about 50 Arpaio supporters. Protestors and supporters yelled and waved signs at each other from across the street, but were otherwise peaceful. While protesters gathered around a stage to listen to speeches by local activists, Sheriff Arpaio, never one to pass up an opportunity to hear himself talk, made an impromptu speech in support of his policies. He said he was not intimidated by the protest and was proud of the work his department does. "We treat everybody with dignity," Arpaio said. "We have nothing to hide." Sadly, the routine beatings, brutality and murder of Maricopa County jail prisoners elicit no protests, and Arpaio remains the most popular elected official in Arizona.

California: On May 3, 2009, Luis Patino, a spokesman for the Office of the Receiver for California Prison Health Care Services, said a prisoner at the Centinela State Prison was diagnosed with a probable case of swine flu (officially known as the H1N1 virus). "The inmate and his cellmate have been isolated," Patino said. "They remain at the prison." George Kostyrko, spokesman for the state Department of Correction and Rehabilitation, said visitation at the state's 33 adult prisons, 6 youth facilities and a few community-based facilities would be suspended until further notice. *PLN* readers will note that California's inadequate prison health care system has been the subject of protracted litigation in federal district court, and has resulted in an order placing the system under receivership. Moreover, stopping visits is a meaningless gesture to prevent the spread of communicable diseases so long as staff enter and leave the prisons.

Florida: On May 2, 2009, Domingo Antonio Rodriguez, a guard at the W.T. Edwards alternative school for juvenile prisoners, was arrested for aggravated assault with a deadly weapon and related offenses. Around 3 a.m., Rodriguez became involved in a traffic dispute with another vehicle in Tampa. According to police, Rodriguez fired into the other car with a .40-caliber handgun. The bullet

struck the right rear window and became lodged in the driver's seat, but no one was injured. Rodriguez was arrested by a nearby police officer who heard the shot; he is being held at the Orient Road Jail on \$23,500 bail.

France: In early May 2009, French prison guards staged a four-day protest to challenge overcrowding in French prisons. The guards, who protested on their days off, staged "progressive blockades" at France's largest prison, Fleury-Merogis. They set barricades on fire and interfered with prisoner transfers. Police ultimately dispersed the protesting guards with tear gas, and transferred prisoners under escort to court hearings. Union officials representing the guards said they started the protests to draw attention to conditions within the country's prisons. "We need to have the resources to manage prison overcrowding," said Jean-Francois Forget, head of the guards' union. French prisons are the most overcrowded in Europe and have twice the rate of prisoner suicides.

Georgia: On May 5, 2009, the web-based publication *The Smoking Gun* reported that rapper and self-proclaimed "original gangster" Cedric "Alfamega" Zellers was a snitch for the DEA. While serving a 110-month sentence on a 1995 federal firearms charge, Zellers cooperated with authorities and testified against Ali Baaqar, who was subsequently convicted of conspiracy to distribute heroin. Zellers received an 18-month sentence reduction in 1997 for his part in securing Baaqar's conviction. The court documents filed by government lawyers detailing Zellers' snitching activities and requesting the sentence reduction are posted on www.thesmokinggun.com.

Illinois: Don Padgett, a union official for guards at the Federal Correctional Institution in Greenville, pleaded guilty to one count of mail fraud in U.S. District Court in East St. Louis on May 1, 2009. Padgett admitted that he issued unauthorized checks totaling nearly \$187,000 to himself from a union account between 2001 and 2008. He is also accused of making unauthorized purchases with a union credit card and filing falsified financial reports with the U.S. Department of Labor. Padgett will be sentenced on September 4, 2009.

Louisiana: On May 4, 2009, six Lafourche Parish deputies and five jail

prisoners were hospitalized after rescuing five police horses from burning stables near the parish jail. All five horses were uninjured and the men were hospitalized only as a precaution.

Missouri: Brian Saunders, a former guard and maintenance supervisor at the Moberly Correctional Center, pleaded guilty in U.S. District Court to charges of conspiracy to deliver marijuana and cocaine to prisoners at the facility. Sandra White and Rebecca Best, Saunders' co-conspirators, also entered guilty pleas. The guilty pleas were announced by the U.S. Attorney's office on April 30, 2009.

New Mexico: In April 2009, Bruce Langston was removed from his job as superintendent of the Youth Diagnostic and Development Center, the state's juvenile jail in Albuquerque. His removal comes on the heels of a double escape, two escape attempts and a brawl that involved dozens of prisoners. Also, four guards have been placed on administrative leave. State officials declined to give a reason for Langston's firing, saying only that the decision was made "consistent with meeting the needs of the agency." Langston, who is black, had filed a discrimination complaint with the Equal Employment Opportunity Commission following a demotion in 2005. That lawsuit is currently pending. State officials refused to comment on Langston's claims.

New York: In April 2009, Lisa A. Vaughn, a laundry supervisor at the Gouverneur Correctional Facility, pleaded guilty to felony third-degree rape for having intercourse and oral sex with four prisoners. Vaughn is also accused of sneaking the prisoners food, cigarettes and postage stamps. The plea agreement requires her to serve 10 years on probation and register as a sex offender. Two other Gouverneur employees, Rachael S. Patterson and Laura E. Douglass, also face charges of having sex with prisoners. Their cases are pending. The state police and Department of Correctional Services inspector general's office conducted the investigation. A confidential source tipped off authorities about the incidents.

Ohio: On April 28, 2009, Yuntaya Hoskins, a food service supervisor and former guard at the Lebanon Correctional Institution, was arrested on obstruction charges. Police officers arrived at Hoskins' home around 4:15 a.m. following reports of gunshots and yelling coming from

inside the house. They left after Hoskins answered the door in her prison uniform stating that no one else had been home all night. Officers returned five hours later after discovering a bullet hole in her garage and a neighbor's dining room wall. Hoskins was arrested when she used her body and arms to block the officers from entering her home. They returned with a warrant to discover approximately \$50,000 in cash, four firearms, a holster and ammunition. Hoskins shared the house with her husband, Kevin Hoskins, a former prisoner who was released from the Lebanon facility in 2004 following robbery, burglary and vandalism convictions. Officials at the facility had no idea Hoskins was married to a former prisoner and said her employment records still list her as Yuntaya Carter.

Oklahoma: On April 30, 2009, Stephen Billingslea, a chaplain at the Mabel Bassett Correctional Center who works with women prisoners at the McLoud prison, was arrested for lewd behavior by undercover Oklahoma City police along with 13 other men in a sting operation at Trosper Park. "We had a high number of complaints from citizens that 'There's men out here engaging in indecent activity right out in the open,' and that's why our guys went out there," said Master Sgt. Gary Knight. Police said they were not targeting gay men.

Rhode Island: On April 9, 2009, Providence resident Darrell D. Williams, a guard at the Pondville Correctional Center in Norfolk, Massachusetts, was charged with possession of marijuana, possession with intent to deliver and possession of a firearm while in possession of a controlled substance with intent to deliver. Investigators from the Providence office of the U.S. Postal Inspection Service intercepted a package containing 4.3 pounds of marijuana using a narcotic detection dog. Massachusetts Department of Corrections officials said Williams has been "detached without pay" from his job as a prison guard.

Sri Lanka: On April 15, 2009, at approximately 3 a.m., guards at the Kalutara prison killed six and wounded four prisoners during an attempted escape. Guards were on high alert with instructions to shoot any escapees because attempts are common during this time of year. According to Prisons Chief Major General Vajira Wijegunawardane, the prisoners tried to escape by cutting through the iron bars in their cells with a sharp tool. An inves-

tigation has been launched to determine whether the escapees received assistance from guards. "We will specially inquire as to how sharp weapons had come into the hands of prisoners," Wijegunawardane said.

Texas: On April 27, 2009, Carl Shelton, a former guard at the Moore County jail, was arrested for allegedly having sex with a female prisoner he supervised. The charge is a felony punishable by six months to two years in prison and up to a \$10,000 fine. Moore County Sheriff Bo DeArmond said Shelton is being held at another facility, which he did not disclose.

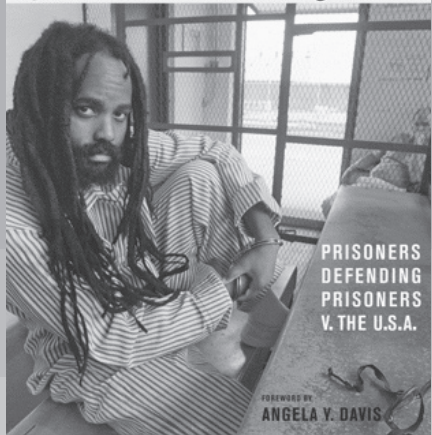
Washington: In early April 2009, a former King County jail prisoner filed suit against jail officials for failing to prevent his cellmate from raping him. The unnamed plaintiff was housed with Cionte West, a large man who outweighed him by 40 pounds. West was in custody for the brutal rape of a 17-year-old girl, and had threatened to anally rape other prisoners. On the night of the assault, the plaintiff awoke around 1:30 a.m. to find West naked on top of him. The cell window and intercom had been covered with wet paper to conceal the attack. The assault ended only when the plaintiff was able to yell for help. Guards rushed him to the hospital, where he was treated for cuts to his eye and several bruised ribs. West ultimately pleaded guilty to third-degree assault and was sentenced to an indeterminate prison term.

Wisconsin: On April 27, 2009, Joshua Walters, a prisoner at the Dodge Correctional Institution in Waupun, was charged with allegedly helping his cellmate commit suicide. The charge stems from a January 10 incident during which Walters allegedly assisted Adam C. Peterson, a former college student recently convicted of murder, in fashioning a noose from a bed sheet and placing it around his neck. Walters told another prisoner, who subsequently informed police, that he laid in his top bunk while Peterson thrashed about below him. Walters called out to guards about an hour later. In addition to the informant's statement, police found Walters' DNA on

the sheet around Peterson's neck. If convicted, Walters faces up to an additional six years in prison. He had been scheduled for release next year.

Wisconsin: On May 4, 2009, Sgt. Christopher Jackson, a guard at the Milwaukee County Women's Correctional Facility, was charged with repeatedly sexually assaulting a female prisoner. The attacks took place between February and September 2008; the victim said Jackson threatened to discipline her if she reported the attacks. If convicted, Jackson faces up to 240 years in state prison. ■

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Washington: Violation of Community Custody Conditions May Be Enforced While Offender Is Reincarcerated

The Washington State Supreme Court held that a prisoner who had been released on "community custody," but who violated his terms of release and was reincarcerated pending new criminal charges, could not have his pre-trial jail time count against his community custody term. Moreover, being incarcerated did not immunize the prisoner from sanctions for having violated conditions of his community custody release.

Amel W. Dalluge, 17, was prosecuted on two third-degree rape charges. Following his release from prison he was placed by the Washington Department of Corrections (WDOC) on one year's community custody, which included vari-

ous restrictive conditions.

Dalluge was later arrested and jailed for being involved in an altercation while on community release. Additionally, the WDOC infringed him for violating his terms of community custody and imposed an extra 60 days confinement. Dalluge filed a personal restraint petition (PRP) alleging that WDOC had lost its authority to infract him when he was re-arrested, and therefore could not punish him administratively.

The state Supreme Court accepted Dalluge's PRP under the lenient standard of a complaint alleging unlawful restraint. However, it declined to find that WDOC's power to enforce community custody terms was

somehow "suspended" while an offender was otherwise incarcerated. To do so would endorse the absurd result of permitting an offender to evade WDOC's oversight and conditions of community custody (such as a no-contact order) while incarcerated due to a new criminal offense.

Lastly, Dalluge's equal protection argument and his claim that his notice of violation did not cite a particular WDOC policy fizzled upon his failure to support those assertions. The Court held that WDOC had the statutory authority to infract and sanction Dalluge, and dismissed his PRP accordingly. See: *In re Pers. Restraint of Dalluge*, 162 Wn.2d 814 (Wash. 2008), review denied. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

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Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi; Seal Press, 295 pages. \$15.95. Best book available explaining and covering the issues of imprisoned women. Detailed account of a crisis hiding in plain sight. 1066

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$19.00. Documented first hand reporting on law enforcement's war on the poor. Covers paramilitary policing, the INS and prisons. 1002

Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Celling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$29.95. Exposes the dark side of America's 'lock-em-up' political and legal climate. 1041

The Celling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 pages. \$22.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$14.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

Deposition Handbook, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$34.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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The Citebook, by Tony Darwin, Starlite, 306 pages, \$49.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

Capital Crimes, by George Winslow, 360 pages. \$19.00. Explains how economic policies create and foster crime and how corporate and government crime is rarely pursued or punished. 1024

Everyday Letters For Busy People, by Debra Hart May, 287 pages. \$18.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters. 1048

The Perpetual Prisoner Machine: How America Profits from Crime, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

Crime and Punishment In America, by Elliott Currie, 230 pages. \$16.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

Worse Than Slavery: Parchman Farm & the Ordeal of Jim Crow Justice, by David Oshinsky, 306 pgs \$16.00. Analysis of prison labors roots in slavery. Focuses on prison plantations and self sustaining prisons. Must reading to understand prison slave labor today. 1007

States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$15.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

Marijuana Law: A Comprehensive Legal Manual, by Richard Boire, Ronin, 271pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

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Hepatitis and Liver Disease: What you Need to Know, 2004 Rev Ed, by Melissa Palmer, MD, 470 pages. **\$17.95**. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow and exercises to perform. 1031 ☐

All Things Censored: Mumia Abu-Jamal, ed. by Noelle Hanrahan, 303 pgs. **\$14.95**. Includes 75 articles by Abu-Jamal. Attacks capital punishment & critiques the dehumanizing prison system. 1040 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$16.00**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson; Lawrence Hill Books, 368 pages. **\$18.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

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No Equal Justice: Race and Class in the American Criminal Justice System, David Cole; The New Press, 218 pages. **\$19.95**. Shows how the criminal justice system perpetuates race and class inequality, creating a two tiered system of justice. 1028 ☐

Ten Men Dead: the story of the 1981 Irish hunger strike, by David Beresford, 334 pages. **\$16.95**. Relies on secret IRA documents and letters smuggled out from the IRA political prisoners during their 1981 hunger strike at Belfast's infamous Long Kesh prison. 1006 ☐

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Amnesty International Sources Given Journalistic Protection

A New York federal judge held that sources used by Amnesty International (Amnesty) in drafting a report on conditions of confinement at the Metropolitan Detention Center (MDC) in Brooklyn, New York were entitled to the same protection as journalistic sources.

The district court's ruling occurred in a lawsuit against MDC officials over the monitoring of attorney-client meetings at MDC. The suit was filed by MDC detainees who had been arrested in a sweep of "suspects" following the 9-11 attacks.

The defendants in the case had issued broad subpoenas to the *New York Times* and Amnesty seeking information, recordings and documents related to their conversations with the plaintiffs and plaintiffs' lawyers, as well as any research materials used in preparing articles and reports on conditions at MDC.

The defendants claimed they needed this information to prove that the plaintiffs knew about the monitoring of the attorney-client meetings so long ago that the three-year statute of limitations would bar their suit. The *Times* filed a motion for a protective order.

Amnesty disclosed some information with the permission of one plaintiff, but declared the rest confidential and objected to its production. The defendants filed a motion to compel testimony and production of documents.

U.S. Magistrate Judge Viktor V. Pohorelsky held that the information requested from the *Times* was not confidential because the *Times* had not guaranteed its sources confidentiality. Nonetheless, the defendants failed to show that the requested information was related to the issue of when the plaintiffs knew about the alleged monitoring.

With regard to the one issue of how *Times* reporter Nina Bernstein understood a lawyer's reference to being "under the eye of a prison video camera," the judge allowed that discovery request to stand. The court referred to the rest of the requests as an invalid "effort to sift through

press files in search of information supporting claims," which was denied.

Initially, the defendants claimed Amnesty was not entitled to journalistic source privilege. They abandoned that position after Amnesty described how it gathered information and produced and published reports. The defendants then claimed that Amnesty's partial production waived any privilege for the remainder of the requested documents. The court disagreed, holding that partial production can waive privilege for parties who partially withhold information to gain an advantage, but Amnesty was not a party and gained no advantage through partial production.

Further, all of the requested information, except that regarding the plaintiff who gave permission for disclosure, was confidential and subject to a very high standard before Amnesty could be forced to reveal its sources. The district court held

the defendants had "not even come close" to meeting that standard, which required that the information be highly material and relevant, necessary or critical to the maintenance of the claim, and unavailable from other sources. The defendants did, however, have the right to know the name and address of a lawyer who had assured the plaintiff who agreed to disclosure that the attorney-client meetings were not being audio recorded.

The defendants' motion to compel was denied and the plaintiffs' motions for protective orders were granted except as indicated above. The ruling is available on *PLN's* website; note that this case is still pending. See: *Lonegan v. Hasty*, U.S.D.C. (ED NY), Case No. CV-04-2743(NG)(VVP); 2008 U.S. Dist. LEXIS 158 (E.D.N.Y. 2008). ■

Additional source: *USA Today*

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July 2009

Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act

*by Margo Schlanger and Giovanna Shay***

Prisons and jails pose a significant challenge to the rule of law within American boundaries. As a nation, we are committed to constitutional regulation of governmental treatment of even those who have broken society's rules. And accordingly, many of our prisons and jails are run by dedicated professionals who care about prisoner welfare and constitutional compliance. At the same time, for prisons-closed institutions holding an ever-growing disempowered population-most of the methods by which we, as a polity, foster government accountability and equality among citizens are unavailable or at least not currently practiced.

In the absence of other levers by which these ordinary norms can be encouraged, lawsuits, which bring judicial scrutiny behind bars, and which promote or even compel constitutional compliance, accordingly take on an outsize importance. Unfortunately, over the past twelve years, it has become apparent that a number of provisions of the Prison Litigation Reform Act ("PLRA")¹ cast shadows of constitutional immunity, contravening our core commitment to constitutional governance. The PLRA's obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails, granting the government near-impunity to violate the rights of prisoners without fear of consequences.

This damage to the rule of law in America's prisons is occurring even as those prisons have grown in their importance-both because of the nation's increasing incarcerated population (the world's largest) and the sharpening international focus on American treatment of prisoners, both domestically and abroad. Amendment is urgently needed. In recent months numerous advocates and organizations have urged reform.² Indeed, a bill offered in the last Congress, the Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong. (2008), would offer some moderate fixes to the most pressing problems created by the PLRA. In this Article, we discuss three of these problems. First, the PLRA's ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury" has obstructed judicial remediation of reli-

gious discrimination, coerced sex, and other constitutional violations typically unaccompanied by physical injury, undermining the regulatory regime that is supposed to prevent such abuses. Second, the PLRA's provision barring federal lawsuits by prisoner plaintiffs who have failed to comply with their jails' or prisons' internal grievance procedures-no matter how difficult, futile, or dangerous such compliance might be for them-obstructs rather than promotes constitutional oversight of conditions of confinement. It strongly encourages prison and jail authorities to come up with ever-higher procedural hurdles in order to foreclose subsequent litigation. Third, the application of the PLRA's limitations to juveniles incarcerated in juvenile institutions has rendered those institutions largely immune from judicial oversight because so few young people are able to follow the complex requirements imposed by the statute, and compliance by their parents or guardians on their behalf has been deemed legally insufficient. Each of these three problems disrupts accountability and enforcement of constitutional compliance.

Below, we discuss these issues in some depth. But it is important to mention in preface what we see as the primary salutary effect of the PLRA-its lightening of the burdens imposed on jail and prison officials by frivolous litigation. Pro se prisoner lawsuits in federal court are numerous, often lack legal merit, and pose real management challenges both for courts and for correctional authorities. Congress passed the PLRA in order to deal with this problem.³ This has in fact

Inside

From the Editor	10
Texas Exonerates Dead Man	12
The ADA and Deaf Prisoners	14
Immigrant Criminality Exposed	16
USSC Rules on Supervisory Liability	18
Corrupt Oregon Food Manager Flees	20
Habeas Hints	24
New Mexico Abolishes the Death Penalty	28
Female Informant Raped by BOP Guards	36
PLN Sues Los Angeles County	39
PA Sex Offender Ordinance Enjoined	46
Texas Parole Law Upheld	48
News in Brief	51

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PLRA (cont.)

occurred, in two ways. First, the PLRA has drastically reduced the number of cases filed: prison and jail prisoners filed twenty-six federal cases per thousand prisoners in 1995; the most current statistic, for 2006, was less than eleven cases per thousand prisoners, a decline of 60%.⁴ So the PLRA has been extremely effective in keeping down the number of federal lawsuits by prisoners, even as incarcerated populations rise. Even more important than these sharply declining filing rates for understanding the decreasing burden of litigation for prison and jail officials are the statute's screening provisions, 28 U.S.C. § 1915A(a), which requires courts to dispose of legally insufficient prisoner civil rights cases without even notifying the sued officials of the suit against them and without receiving any response from those officials. Prison or jail officials no longer need to investigate or answer complaints that are frivolous or fail to state a claim under federal law.

But in addition to frivolous or legally insufficient lawsuits, there are, of course, serious cases brought by prisoners: cases involving life-threatening deliberate indifference by authorities to prisoner health and safety; sexual assaults; religious discrimination; retaliation against those who exercise their free speech rights; and so on. When the PLRA was passed, its supporters emphasized over and over: "[We] do not want to prevent prisoners from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing prisoners from abusing the Federal judicial system."⁵ Yet "prevent[ing] prisoners from raising legitimate claims" is precisely what the PLRA has done in many instances. If the PLRA were successfully "reduc[ing] the quantity and improv[ing] the quality of prisoner suits,"⁶ as its supporters intended, one would expect the dramatic decline in filings to be accompanied by a concomitant increase in plaintiffs' success rates in the cases that remain. The evidence is quite the contrary. The shrunken prisoner docket is less successful than before the PLRA's enactment; more cases are dismissed, and fewer settle.⁷ An important explanation is that constitutionally meritorious cases are now faced with new and often insurmountable obstacles. These obstacles are the topic of this Article.

I. Physical Injury

The PLRA provides that prisoner plaintiffs may not recover damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury." Given the promise by the Act's supporters that constitutionally meritorious suits would not be constrained by its provisions, perhaps the purpose of this provision was the limited one of foreclosing tort actions claiming negligent or intentional infliction of emotional distress unless they resulted in physical injury, which might have otherwise been available to federal prisoners under the Federal Tort Claims Act.⁸ Such an attempt to limit what legislators may have considered to be frivolous or inconsequential claims⁹ would echo fairly common state law limitations on tort causes of action.¹⁰

Notwithstanding what may have been the limited intent underlying the physical injury requirement, its impact has been much more sweeping. First, many courts have held that the provision covers all violations of non-physical constitutional rights.¹¹ Proven violations of prisoners' religious rights, speech rights, and due process rights have all been held non-compensable, and thus placed largely beyond the scope of judicial oversight. For example, in *Searles v. Van Bebber*, 251 F.3d 869, 872, 876 (10th Cir. 2001), the Tenth Circuit concluded that the physical injury requirement barred a suit by a Jewish prisoner who alleged a First Amendment violation based on his prison's refusal to give him kosher food. This result is particularly problematic in light of Congress's notable concern for prisoners' religious freedoms. The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), passed in 2000, states that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2).

Moreover, although the case law is far from uniform, some courts have deemed sexual assault not to constitute a "physical injury" within the meaning of the PLRA. In *Hancock v. Payne*, No. 1:03-CV-671, 2006 WL 21751 (S.D. Miss. Jan 4, 2006), a number of male prisoners alleged that over several hours, a guard sexually assaulted them. "Plaintiffs claim that they shared contraband with [the officer] and that he made sexual suggestions; fondled

their genitalia; sexually battered them by sodomy, and committed other related assaults.” The plaintiffs further complained that the officer “threatened Plaintiffs with lockdown or physical harm should the incident be reported.” The district court granted summary judgment in part to the defendants. One of the grounds for this defense victory was the physical injury requirement. The court said, “the plaintiffs do not make any claim of physical injury beyond the bare allegation of sexual assault.” In other words, in the view of this district court, not even coerced sodomy (which was alleged) constituted physical injury. Though some other courts have decided the question differently, the *Hancock* court is not alone in reaching this conclusion.¹² As with religious rights, this outcome exists in sharp tension with Congress’s recent efforts to eliminate sexual violence and coercion behind bars by passing the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609.

Finally, in case after case, courts have held even serious physical symptoms insufficient to allow the award of damages because of the PLRA’s physical injury provision.¹³ In one case, *Borrito v. McDonald*, No. 5:04-CV-165, 2006 WL 2789152 (N.D. Fla. Sept. 26, 2006), a plaintiff alleged that the defendant guard “punch[ed] Plaintiff repeatedly in his abdominal area, pushed Plaintiff’s head down and repeatedly punched Plaintiff with his right hand in the back of his head, hit Plaintiff on his left ear, placed Plaintiff’s head between his legs and grabbed Plaintiff around his waist and picked the Plaintiff up off the ground and dropped Plaintiff on his head.” The plaintiff further alleged that he “sustained bruises on [his] left ear, back of [his] head

and swelling to the abdominal area of his body.” Nonetheless, the district court held the claim insufficient under the PLRA’s physical injury provision. In another, burns to the plaintiff’s face were deemed insufficient because those burns had “healed well,” leaving “no lasting effect.” *Brown v. Simmons*, No. 6:03-CV-122, 2007 WL 654920 (S.D. Tex. Feb. 23, 2007).

Even when courts reject the defense that unconstitutional conduct did not cause a physical injury, the PLRA emboldens prison and jail officials to make objectionable arguments that must be litigated, forcing expenditure of resources and prolonging litigation, as well as further dehumanizing prisoners and promoting a culture of callousness.¹⁴ Moreover, experienced civil rights attorneys hesitate to file suits alleging many serious abuses (for example, on behalf of prisoners chained to their beds or subjected to sexual harassment by guards), because they know that corrections officials will argue-and often succeed in arguing-that compensatory damages are barred by the PLRA.¹⁵

The point is that the PLRA’s ban on awards of compensatory damages for “mental or emotional injury suffered while in custody without a prior showing of physical injury” has made it far more difficult for prisoners to enforce any non-physical rights-including freedom of religion and freedom of speech-and to seek compensation for any mental rather than physical harm, no matter how intentionally, even tortuously, inflicted. (This aspect of the law has, in fact, convinced some courts to save the provision from constitutional infirmity by reading it not to bar relief.¹⁶) The PLRA has left the availability of compensatory damages for the constitutional violation of coerced sex an open question. It has posed an obstacle to compensation even for physical violence, if the physical component of the injury is deemed insufficiently serious. It has thereby undermined the important norms that such infringements of prisoners’ rights are unacceptable. Just as it contradicts constitutional commitments, the PLRA is simultaneously obstructing Congress’s recent statutory efforts to protect prisoners’ religious liberty, as well as freedom from sexual abuse.

II. Administrative Exhaustion

The PLRA’s exhaustion provision states: “no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such

administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The provision appears harmless enough. Who could object, after all, to a regime in which corrections officials are given the first opportunity to respond to and perhaps resolve prisoners’ claims?

But in many jails and prisons, administrative remedies are, unfortunately, very difficult to access. Deadlines may be very short, for example, or the number of administrative appeals required may be very large.¹⁷ The requisite form may be repeatedly unavailable,¹⁸ or the grievance system may seem not to cover the complaint the prisoner seeks to make.¹⁹ Prisoners often fear retaliation, and, although some courts have recognized exceptions to the exhaustion requirement based on estoppel or “special circumstances,”²⁰ others have refused to excuse prisoners’ lapses.²¹ Beginning six years after the PLRA’s enactment, first some of the Courts of Appeals,²² and finally the Supreme Court, in *Woodford v. Ngo*, 548 U.S. 81 (2006), held that the PLRA forever bars even meritorious claims from court if a prisoner has failed to comply with all of the many technical requirements of the prison or jail grievance system.

This means that if prisoners miss deadlines that are often less than fifteen days and in some jurisdictions as short as two to five days,²³ a judge cannot consider valid claims of sexual assault, beatings, or racial or religious discrimination. Moreover, the PLRA’s exhaustion requirement has been held to grant constitutional immunity to prison officials based on understandable mistakes by pro se prisoners operating under rules that are often far from clear. Wardens and sheriffs routinely refuse to engage prisoners’ grievances because those prisoners commit minor technical errors, such as using the incorrect form,²⁴ sending the right documentation to the wrong official,²⁵ or failing to file separate forms for each issue, even if the interpretation of a single complaint as raising two separate issues is the prison administration’s.²⁶ Each such misstep by a prisoner bars consideration of even an otherwise meritorious civil rights action.²⁷ Although dismissals are often without prejudice, prison grievance deadlines are so short that prisoners who failed to exhaust before filing suit generally are unable return to court.²⁸

For this reason, the National Prison Rape Elimination Commission, a bipartisan commission appointed under the Prison Rape Elimination Act of 2003,

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has warned that the PLRA exhaustion requirement can “frustrate Congress’s goal of eliminating sexual abuse in U.S. prisons, jails, and detention centers.” The Commission wrote to the House Judiciary Committee that “[b]ecause of the emotional trauma and fear of retaliation or repeated abuse that many incarcerated rape victims experience, as well as the lack of confidentiality in many administrative grievance procedures, many victims find it extremely difficult-if not impossible-to meet the short timetables of administrative procedures.”²⁹ To solve this problem, the Commission has proposed (in a working draft of regulatory standards) that “Any report of sexual abuse made at any time after the abuse, which names a perpetrator and is made in writing to the agency, satisfies the exhaustion requirement of the Prison Litigation Reform Act.”³⁰

Far from encouraging correctional officials to handle the sometimes frivolous but sometimes extremely serious complaints of prisoners, the PLRA’s exhaustion rule actually provides an incentive to administrators in the state and federal prison systems and the over 3,000 county and city jail systems to fashion ever higher procedural hurdles in their grievance processes. After all, the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit.³¹ In fact, even when prison and jail administrators want to resolve a complaint on its merits, the PLRA discourages them from doing so, and therefore actually undermines the very interest in self-governance Congress intended to serve.³² Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances? The officials in question are a varied group-elected jailers and sheriffs, appointed jail superintendents, professional wardens, politically appointed commissioners. What they all have in common is an understandable interest in avoiding adverse judgments against themselves or their colleagues.

Thus, by cutting off judicial review based on an prisoner’s failure to comply with his prison’s own internal, administrative rules-regardless of the merits of the claim-the PLRA exhaustion requirement undermines external accountability. Still more perversely, it actually undermines internal accountability, as well, by encouraging prisons to come up with high procedural hurdles, and to refuse to con-

sider the merits of serious grievances, in order to best preserve a defense of non-exhaustion.

Moreover, courts have generally ignored Justice Breyer’s suggestion in his *Woodford v. Ngo* concurrence that “well established exceptions to exhaustion” from administrative law and habeas corpus doctrine be implemented in the PLRA context. 548 U.S. at 103-04. Under ordinary administrative law, exhaustion is not required where it would be futile³³-for example, if an aggrieved party seeks damages in a case where no other kind of relief is applicable, but the administrative process is not empowered to award damages. But the Supreme Court has held that the PLRA forecloses a futility exception to its exhaustion requirement. *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). Likewise, ordinary administrative law waives exhaustion requirements where delay in judicial review imposes a hardship on the plaintiff.³⁴ But most courts have held that the PLRA allows no emergency exception from the exhaustion requirement. As one court put it, “The PLRA does not excuse exhaustion for prisoners who are under imminent danger of serious physical injury, much less for those who are afraid to confront their oppressors.” *Broom v. Rubitschun*, No. 1:06-CV-350, 2006 WL 3344997 (W.D. Mich. Nov. 17, 2006).³⁵ A requirement of administrative exhaustion that punishes failure to cross every t and dot every i by conferring constitutional immunity for civil rights violations, and allows no exceptions for emergencies, is simply unsuited for the circumstances of prisons and jails, where physical harm looms so large and prisoners are so ill-equipped to comply with legalistic rules.

Ideally, grievance systems actually improve agency responsiveness and performance by helping corrections officials to identify and track complaints and to resolve problems.³⁶ Good grievance systems can indeed reduce litigation by solving prisoners’ problems.³⁷ But the PLRA’s grievance provision instead encourages prison and

jail officials to use their grievance systems in another way-not to solve problems, but to immunize themselves from future liability. Judicial oversight of prisoners’ civil rights is essential to minimize violations of those rights, but the PLRA’s exhaustion provision arbitrarily places constitutional violations beyond the purview of the courts.

It would be relatively simple to achieve the legitimate goal of allowing prison and jail authorities the first chance to solve their own problems, yet to avoid the kinds of problems the PLRA has introduced. The exhaustion provision should not be eliminated, but rather amended to require that prisoners’ claims

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be presented in some reasonable form to corrections officials prior to adjudication, even if that presentment occurs after the prisons' grievance deadline. Cases filed with claims that have not been presented to prison officials could be stayed for a limited period of time, to allow corrections officials an opportunity to address them administratively.

III. Coverage of Juveniles

The PLRA applies by its plain terms to juveniles and juvenile facilities; 18 U.S.C. § 3626(g)(5) specifies that "the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." But prisoners under age eighteen were not the sources of the problems the PLRA was intended to solve. Even before the PLRA, juveniles accounted for very little prisoner litigation.³⁸ This dearth of litigation is not surprising. As the recent investigation into alleged sexual abuse in the Texas juvenile system demonstrates, although incarcerated youth are highly vulnerable to exploitation,³⁹ they generally are not in a position to assert their legal rights.⁴⁰ Juvenile detainees are young, often undereducated, and have very high rates of psychiatric disorders.⁴¹ Moreover, youth incarcerated in juvenile facilities generally do not have access to law libraries or other sources of information about the law that might enable them to sue more often. One court has even observed, "[a]s a practical matter, juveniles between the ages of twelve and nineteen, who, on average, are three years behind their expected grade level, would not benefit in any significant respect from

a law library, and the provision of such would be a foolish expenditure of funds." *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995)⁴²

As with unincarcerated children, when juveniles do bring lawsuits, or otherwise seek to remedy any problems they face behind bars, it is very often their parents or other caretaking adults who take the lead. It is, after all, parents' ordinary role to try to protect their children. But the PLRA's exhaustion provision stymies such parental efforts, instead holding incarcerated youth to an impossibly high standard of self-reliance. The case of *Minix v. Pazera*, No. 1:04-CV-447, 2005 WL 1799538 (N.D. Ind. July 27, 2005), is a leading example of the result. In *Minix*, a young man, S.Z., and his mother, Cathy Minix, filed a civil rights suit for abuse that S.Z. endured while incarcerated as a minor in 2002 and 2003 in Indiana juvenile facilities. While in custody, S.Z. was repeatedly beaten, once with "padlock-laden socks." After one beating, he suffered a seizure, but no one helped him, and he was beaten again the next day. He was raped and witnessed another child being sexually assaulted. S.Z. was afraid to report the assaults to staff-and his fear was natural enough in light of the fact that some of the staff were involved in arranging fights between juveniles, or would even "handcuff one juvenile so other juvenile detainees could beat him."

Although S.Z. feared retaliation, Mrs. Minix made what the district court termed "heroic efforts to protect her son." She spoke with staff and wrote to the juvenile judges. She attempted to meet with the superintendent of one of the facilities, though she was prevented from doing so by staff. She contacted the Deputy Department of Corrections Commissioner and the Governor. Ultimately, because of her efforts, S.Z. was "unexpectedly released on order from the Governor's office."

Nonetheless, the district court dismissed the *Minix* family's federal claims under the PLRA's exhaustion rule because S.Z. had not himself filed a grievance in the juvenile facility. At the time, the Indiana juvenile grievance policy allowed incarcerated youths only two business days to file a grievance.⁴³

Only two months after S.Z.'s suit was dismissed, the Civil Rights Division of the U.S. Department of Justice concluded an investigation and confirmed that one of the Indiana facilities where S.Z. had been assaulted, the South Bend Juvenile

Facility, "fail[ed] to adequately protect the juveniles in its care from harm," and violated the constitutional rights of juveniles in its custody. The federal government further concluded that the grievance system that S.Z. was faulted for not using was "dysfunctional" and "contribute[d] to the State's failure to ensure a reasonably safe environment."⁴⁴

Incarcerated children and youths do not clog the courts with lawsuits, frivolous or otherwise. Though they are often incapable of complying with the tight deadlines and complex requirements of internal correctional grievance systems, their lack of capacity should not immunize abusive staff from the accountability that comes with court oversight. Those under eighteen do not file many lawsuits, and are not the source of any problem the PLRA is trying to solve. And they are particularly poorly positioned to deal with its limits. They should be exempted from its reach.

* * *

When federal courthouses are barred to constitutionally meritorious cases, the resulting harm is not merely to the affected prisoners but to our entire system of accountability that ensures that government officials comply with constitutional mandates. The erection of hurdles to accountability should not be seen as "reducing the burden" for correctional administrators-it should be recognized as weakening the rule of law. The PLRA must be amended. ■

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1 Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (Apr. 26, 1996) (codified as amended at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h). The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 that ended the 1996 federal government budget standoff.

2 See, e.g., American Bar Association, Resolution 102B (2007), available at <http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc>; COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 84-87 (2006), available at <http://prisoncommission.org/report.asp>; Letter from the Nat'l Prison Rape Elimination Comm'n to Cong. Bobby Scott and Cong. Randy Forbes, Chair and Ranking Minority Members, Subcomm. on

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3 See Margo Schlanger, Prisoner Litigation, 116 HARV. L. REV. 1555, 1555-1627 (2003) [hereinafter Schlanger, Prisoner Litigation]; see also Margo Schlanger, Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 81 N.Y.U. L. REV. 550 (2006) (discussing the PLRA's other purpose, to lessen court injunctive supervision of jails and prisons).

4 For 2007 filing statistics, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2007, at 148 tbl.C-2A (2007) (prisoner civil rights, prison conditions cases), available at <http://www.uscourts.gov/judbus2007/appendices/C02ASep07.pdf>; for 1995 filing statistics, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999, at 139 tbl.C-2A (1999), available at <http://www.uscourts.gov/judbus1999/c02asep99.pdf>; and for prison population figures, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE: CORRECTIONAL POPULATIONS, <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>.

5 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims."); see also 141 CONG. REC. S19,114 (daily ed. Dec. 21, 1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."); 141 CONG. REC. S18,136 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch); 141 CONG. REC. H1480 (daily ed. Feb. 9, 1995) (statement of Rep. Canady) ("These reasonable requirements will not impede meritorious claims by prisoners but will greatly discourage claims that are without merit.").

6 *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

7 See Schlanger, Prisoner Litigation, *supra* note 3, at 1644-64.

8 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680; see also *United States v. Muniz*, 374 U.S. 150 (1963) (allowing a Federal Tort Claims Act lawsuit by federal prisoners for personal injuries caused by the negligence of government employees).

9 See Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 BROOK. L. REV. 519, 520 (1996).

10 See, e.g., Dale Joseph Gilsinger, Annotation, Recovery Under State Law for Negligent Infliction of Emotional Distress Under Rule of *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or Refinements Thereof, 96 A.L.R.5TH 107 § 6 (2002).

11 See, e.g., *Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008) (religious freedom); *Royal v. Kautzky*, 375 F.3d 720, 722-23 (8th Cir. 2004) (free speech); *Thompson v. Carter*, 284 F.3d 411, 416-17 (2d Cir. 2002) (due process); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (religious freedom); *Allah v.*

Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) (religious freedom); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (constitutional privacy). But see *Canell v. Lightner*, 143 F.3d 1210, 1214-15 (9th Cir. 1998) (PLRA "does not preclude actions for violations of First Amendment rights").

12 See, e.g., *Smith v. Shady*, No. 3:05-CV-2663, 2006 WL 314514 (M.D. Pa. Feb. 9, 2006) ("Plaintiff's allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand do not constitute a physical injury or mental symptoms."). But see *Liner v. Goord*, 196

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F.3d 132, 135 (2d Cir. 1999) (holding that sexual assault constitutes physical injury within the meaning of the PLRA). See generally Deborah M. Golden, *It's Not All In My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37 (2004).

13 See *Jarriett v. Wilson*, 162 F. App'x 394, 396-98 (6th Cir. 2005) (prisoner confined for twelve hours in "strip cage" in which he could not sit down did not suffer physical injury even though he testified that he had a "bad leg" that swelled "like a grapefruit" and that caused severe pain and cramps); *Myers v. Valdez*, No. 3:05-CV-1799, 2005 WL 3147869 (N.D. Tex. Nov. 17, 2005) ("pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash and discomfort" did not satisfy PLRA physical injury requirement); *Mitchell v. Horn*, No. 2:98-CV-4742, 2005 WL 1060658 (E.D. Pa. May 5, 2005) (reported symptoms including "severe stomach aches, severe headaches, severe dehydration . . . and blurred vision," suffered by prisoner confined in cell allegedly "smeared with human waste and infested with flies" did not constitute physical injury for PLRA purposes).

14 See, e.g., *Pool v. Sebastian County*, 418 F.3d 934, 942-43, 943 n.2 (8th Cir. 2005) (describing the argument of the defendant jail officials that the stillbirth of a fetus of four to five months gestational age over a jail cell toilet, preceded by days of bleeding, did not satisfy PLRA physical injury requirement).

15 See Hearing, supra note 2, at 8 (statement of Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights), available at <http://www.judiciary.house.gov/hearings/pdf/Bright080422.pdf>.

16 *Siggers-El v. Barlow*, 433 F. Supp. 2d 811 (E.D. Mich. 2006), concludes that the "jury was entitled to find that the Plaintiff suffered mental or emotional damages as a result of Defendant's violation of his First Amendment rights [because any] other interpretation of § 1997e(e) would be . . . unconstitutional," id. at 816, and noting:

The Court finds the following hypothetical, set forth in Plaintiff's brief, to be persuasive:

[I]magine a sadistic prison guard who tortures prisoners by carrying out fake executions-holding an unloaded gun to a prisoner's head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable. On the other hand, if a guard intentionally pushed a prisoner without cause, and broke his finger, all emotional damages proximately caused by the incident would be permitted.

Id. (alteration in original). See also *Percival v. Rowley*, No. 1:02-CV-363, 2005 WL 2572034 (W.D. Mich. Oct. 12, 2005) ("To allow section 1997e(e) to effectively

foreclose a prisoner's First Amendment action would put that section on shaky constitutional ground.").

17 For a survey of prison and jail grievance policy deadlines, see Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as Amicus Curiae in Support of Respondent at 6-13 & A1-A7, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 304573 [hereinafter LSO Amicus Brief].

18 See, e.g., *Latham v. Pate*, No. 1:06-CV-150, 2007 WL 171792 (W.D. Mich. Jan. 18, 2007) (dismissing suit due to tardy exhaustion in case in which the prisoner who alleged that he had been beaten maintained that he was placed in segregation and administrative segregation immediately following assault and that "officers did not provide him with the grievance forms").

19 See, e.g., *Benfield v. Rushton*, No. 8:06-CV-2609, 2007 WL 30287 (D.S.C. Jan. 4, 2007) (dismissing suit due to untimely filing of grievance brought by prisoner who alleged that he was repeatedly raped by other prisoners; prisoner had explained that he "didn't think rape was a grievable issue"); *Marshall v. Knight*, No. 3:03-CV-460, 2006 WL 3714713 (N.D. Ind. Dec. 14, 2006) (dismissing, for failure to exhaust, plaintiff's claim that prison officials retaliated against him in classification and disciplinary decisions, even though prison policy dictated that no grievance would be allowed to challenge classification and disciplinary decisions).

20 See *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004).

21 See, e.g., *Garcia v. Glover*, 197 F. App'x 866, 867 (11th Cir. 2006) (refusing to excuse non-exhaustion in case in which prisoner alleged that he had been beaten by five guards, despite the fact that prisoner alleged that he feared he would be "killed or shipped out" if he filed an administrative grievance); *Umstead v. McKee*, No. 1:05-CV-263, 2005 WL 1189605 (W.D. Mich. May 19, 2005) ("[I]t is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies.").

22 See, e.g., *Pozo v. McCaughtry*, 286 F.3d 1022, 1023 (7th Cir. 2002).

23 *Woodford*, 548 U.S. at 118 (Stevens, J., dissenting) ("[T]ime requirements . . . are generally no more than 15 days, and . . . , in nine States, are between 2 and 5 days."); see also LSO Amicus Brief, supra note 17.

24 See, e.g., *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001).

25 See, e.g., *Keys v. Craig*, 160 F. App'x 125 (3d Cir. 2005).

26 *Harper v. Laufenberg*, No. 3:04-CV-699, 2005 WL 79009 (W.D. Wis. Jan. 6, 2005).

27 See Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act*, 29 CARDOZO L. REV. 291, 321 (2007) ("In a survey of reported cases citing *Woodford* in the first seven months after it was decided, the majority

[of cases in which the exhaustion issue was resolved] were dismissed entirely for failure to exhaust. All claims raised in the complaint survived the exhaustion analysis in fewer than fifteen percent of reported cases." (footnotes omitted)).

28 See, e.g., *Rohn v. Beard*, No. 2:07-CV-783, 2007 WL 4454417 (W.D. Pa. 2007) (dismissing case because prisoner had filed an untimely grievance after his case was initially dismissed for incomplete exhaustion); *Regan v. Frank*, No. 06-CV-66, 2007 WL 106537 (D. Haw. 2007) ("Even though [the court] dismissed Plaintiff's claims without prejudice to the filing of a new action following proper exhaustion, Ngo makes proper exhaustion of these claims impossible.").

29 Letter from the Nat'l Prison Rape Elimination Comm'n, supra note 2.

30 National Prison Rape Elimination Commission, [Draft] Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails 33 (2008), http://www.nprec.us/UpcomingEvents/5.1_MasterAdultPrison_and-Jail_andImmigrationStandardsClean.pdf. At the time this Article went to press, this draft standard had not yet been submitted to the U.S. Attorney General for approval as a final rule. See National Prison Rape Elimination Commission, Standards and Comments, <http://www.nprec.us/standards.htm>.

31 There is evidence that prisons and jails have headed in this direction. For example, in July 2002, in *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002), the Seventh Circuit reversed the district court's dismissal of a case for failure to exhaust; in rejecting the defendants' argument that the plaintiff's grievances were insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

The grievance shall contain factual details regarding each aspect of the offender's complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

ILL. ADMIN. CODE tit. 20, § 504.810(b); see 26 ILL. REG. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).

32 In fact, if an agency chooses to entertain an untimely grievance that merits examination, the agency is barred from asserting a failure-to-exhaust defense at later time. *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004).

33 *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); *Weinberger v. Salfi*, 422 U.S. 749 (1975).

34 See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (noting that determination of ripeness requires a consideration of the "hardship to the parties").

35 See also, e.g., *Williams v. CDCR*, No. 2:06-CV-1373, 2007 WL 2384510 (E.D. Cal. Aug. 17, 2007) ("The presence of exigent circumstances does

not relieve a plaintiff from fulfilling this requirement.”), report and recommendation adopted, 2007 WL 2793117 (E.D. Cal. Sept. 26, 2007); *Ford v. Smith*, No. 1:06-CV-710, 2007 WL 1192298 (E.D. Tex. Apr. 23, 2007) (dismissing where plaintiff said his safety was in danger and he sought a continuance until exhaustion was completed); *Rendelman v. Galley*, No. 1:06-CV-1999, 2007 WL 2900460 (D. Md. Feb. 15, 2007) (dismissing despite plaintiff’s claim of imminent danger and request for a “protective order” pending exhaustion), *aff’d*, 230 F. App’x 314 (4th Cir. 2007), cert. denied, 128 S. Ct. 378 (2007); *Aburomi v. United States*, No. 1:06-CV-3682, 2006 WL 2990362 (D.N.J. Oct. 17, 2006) (“It is understandable that Plaintiff would want immediate treatment for a perceived recurrence of cancer, but the administrative remedy program is mandatory regardless of the nature of the relief sought.”).

36 See LYNN S. BRANHAM ET AL., AM. BAR ASSOC. CRIMINAL JUSTICE SECTION, LIMITING THE BURDENS OF PRO SE PRISONER LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL (1997).

37 Dora Schriro, Correcting Corrections: Missouri’s Parallel Universe, in SENTENCING AND CORRECTIONS: ISSUES FOR THE 21ST CENTURY (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181414.pdf>; Dora Schriro, Director

of the Ariz. Dep’t of Corrections, Correcting Corrections: The Arizona Plan: Creating Conditions for Positive Change in Corrections, Statement Before the Commission on Safety and Abuse in America’s Prisons (Feb. 9, 2006), available at http://www.prisoncommission.org/statements/schriro_dora.pdf.

38 Michael J. Dale, Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers, 32 U.S.F. L. REV. 675, 681 (1998) (reporting that as of 1998, “[t]here [were] less than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers”).

39 Ralph Blumenthal, Investigations Multiplying in Juvenile Abuse Scandal, N.Y. TIMES, Mar. 4, 2007, at A24; Ralph Blumenthal, One Account of Abuse and Fear in Texas Youth Detention, N.Y. TIMES, Mar. 8, 2007, at A19; see also HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK’S JUVENILE PRISONS FOR GIRLS (2006), available at <http://hrw.org/reports/2006/us0906/us0906webwcover.pdf> (detailing abuse in the New York girls’ juvenile prisons).

40 Staci Semrad, Texas Ranger Tells of Prosecutor’s “Lack of Interest,” N.Y. TIMES, Mar. 9, 2007, at A20, describes a sergeant in the Texas Rangers who investigated abuses at the West Texas State School in Pyote, and told a legislative committee that he “saw

kids with fear in their eyes—kids who knew they were trapped in an institution that would never respond to their cries for help.” The sergeant said he was unable to convince a local prosecutor to take action.

41 Lourdes M. Rosado & Riya S. Shah, Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System 5 (2007), available at <http://jlc.org/files/publications/protectingyouth.pdf> (“[S]ome large scale studies suggest that as many as 65%-75% of the youth involved in the juvenile justice system have one or more diagnosable psychiatric disorders.”).

42 See also Anna Rapa, Comment, One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits, 23 T.M. COOLEY L. REV. 263, 279 (2006).

43 Epilogue: The Minix family re-filed in state court, where the suit avoided exhaustion analysis because S.Z. was no longer incarcerated; the defendants once again removed the case to federal court, and this time the suit was permitted to go forward. *Minix v. Pazera*, No. 3:06-CV-398, 2007 WL 4233455 (N.D. Ind. Nov. 28, 2007).

44 Letter from Bradley J. Schlozman, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Mitch Daniels, Governor of the State of Ind. 3, 7 (Sept. 9, 2005), available at http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf.



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From the Editor

by Paul Wright

The past few months have been very busy at PLN. In addition to publishing our first book, the *Prisoners Guerrilla Handbook Guide to Correspondence Programs in the US and Canada*, we have also been making significant administrative changes. We have changed the name of our non profit organization from Prisoners' Legal News to the Human Rights Defense Center (HRDC). The HRDC will be our umbrella organization which will continue publishing *Prison Legal News* the magazine, Prison Legal News book publishing and any other publishing projects we may add in the future.

Most significantly, the HRDC is adding a litigation component to our organization which will be HRDC litigation. Thanks to the generosity of an individual donor, we have been able to hire a staff attorney to represent PLN in censorship litigation and also handle other select cases on behalf of other plaintiffs. Dan Manville, best known as the co author of the *Prisoners Self Help Litigation Manual* is one of the top prisoner rights attorney in the United States and he has agreed to be the first HRDC staff attorney. We welcome Dan on board. Dan was one of PLN's earliest subscribers and represented us in our 1998 lawsuit against the Michigan Department of Corrections involving the censorship of *The Celling of America*.

We will be creating a new HRDC website and making other administrative changes as we move forward with these different projects. We will announce the changes as they occur. For PLN magazine subscribers nothing will change. Among the prison and jail court cases we will be seeking to assist plaintiffs on, as well as providing referrals, will be death and catastrophic injury cases and jail strip searches of misdemeanor arrestees. We hope to expand our litigation capability if we receive additional funding to do so.

I would like to thank all those who responded to PLN's survey in the March issue of PLN. As this issue goes to press, we have received 514 responses to the survey. 485 of the respondents were men and 502 are currently imprisoned, 413 in state prisons and 83 in the Bureau of Prisons. 499 of the survey respondents think that PLN is a good value for their money and 481 would recommend it to others. 221

think our topic range is "excellent" and 295 say the same about our writing quality. The numbers are 239 and 193, respectively, for those who rate those as "good". Pretty much all our readers loan their copies of PLN to others with 163 stating they loan them to more than 8 other people. Majorities of 377 voted to keep the cover story size the same and for more in depth stories. 292 readers want a longer news in brief section. 393 want more medical coverage.

Interestingly, 263 readers responded that they did not want graphics in PLN and 302 did not want artwork. It looks like this is the triumph of content over graphics but by a close margin. Basically, the readers who responded to the survey are pretty happy with *Prison Legal News* the way

we are as far as content and appearance goes. I will be reading all the comments on the survey responses over the summer. Thank you for everyone who took the time to respond. The survey responses are an important means for us to know how we can better serve our readers. I am always surprised at how positive and encouraging our readers are. I was very surprised that not a single respondent thought our topic range or writing quality was "bad". And only two thought PLN is not useful. Those are pretty good numbers. I think people are more likely to complain when they are unhappy about something than when they are happy so the high positive responses are all the more significant.

Enjoy this issue of PLN and please encourage others to subscribe. ■

Ninth Circuit Flip-Flops: Denial of Washington Sex Offender's Community Custody Release Held Unconstitutional, Then Constitutional

by Mark Wilson

Illustrating the axiom that the law means whatever a judge decides it means, in a 2-to-1 decision, a panel of the Ninth Circuit Court of Appeals held that Washington state law creates a liberty interest in a prisoner's early release to community custody. Two weeks later, however, one of the majority opinion judges died, a new judge was assigned to the panel, and the opinion was withdrawn. The new judge joined the previously dissenting judge to form a new majority, which held that Washington law does *not* create a liberty interest in community custody release.

In August 1999, 20-year-old Joseph Dale Carver was sentenced to 54 months in prison for his third child molestation conviction. He committed his first sex offense when he was 14 years old. While serving his current prison term he committed 15 disciplinary infractions, including sexual harassment of a prison employee.

Washington Revised Code (RCW) § 9.94A.728(1)(b)(ii)(B)(I) bars early release for sex offenders, but § 9.94A.728(2)(a) allows sex offenders to be placed in community custody – i.e., intense monitoring in the community for at least one year after release or transfer from confinement

(aka parole). Community custody eligibility is contingent upon an acceptable release plan. RCW § 9.94A.728(2)(c).

Carver submitted a release plan in March 2002, but it was denied pursuant to a Department of Corrections (DOC) policy that categorically barred community custody eligibility to offenders like Carver, who were deemed sexually violent predators and had been referred for civil commitment. That policy was subsequently invalidated as violating state law. See: *In re Dutcher*, 60 P.3d 635 (Wa. Ct. App. 2002) [PLN, Feb. 2004, p.26].

As a result of the denial of his community custody release plan, Carver served his full term of confinement. After his release in September 2004, he sued in federal court alleging that DOC officials had improperly denied his release plan without affording him due process of law. The district court granted summary judgment to the defendants, holding that Washington law did not create a liberty interest in early release to community custody, and that the defendants were entitled to qualified immunity.

On June 9, 2008 a panel of the Ninth Circuit reversed in part, with Judges Ferguson and Reinhardt issuing a majority

opinion “holding that Washington law creates a liberty interest in an inmate’s early release into community custody.” However, since that liberty interest was “not sufficiently clearly established” at the time, the Court of Appeals affirmed the grant of qualified immunity. Circuit Judge Milan Smith entered an opinion that concurred with the judgment but dissented as to the existence of a liberty interest in community custody release. See: *Carver v. Lehman*, 528 F.3d 659 (9th Cir. 2008).

Several weeks later, on June 23, 2008, the parties sought reconsideration. Two days after that Judge Ferguson unexpectedly died. Judge Tallman was drawn as a replacement, and on August 26, 2008 the panel voted to amend its previous opinion, withdrawing it and denying the rehearing petitions as moot.

On December 22, 2008, Judges Smith and Tallman formed a new majority, holding that Washington law does *not* create a liberty interest in a prisoner’s release to community custody. This time Judge Reinhardt issued a strongly-worded opinion that concurred in the judgment but criticized the new majority for reversing the panel’s prior ruling.

“[I]t is indisputable that the law did not change and the Constitution did not change between the time of the original panel’s decision and the time of the new majority’s opinion,” Judge Reinhardt wrote. “All that changed is the composition of the three-judge panel. To those who question whether the results in constitutional and other cases depend on the membership of the panel ... the result in the case currently before our panel is merely a minor illustration of how the judicial system currently operates.”

Judge Reinhardt suggested that the more appropriate course would have been to take the issue up on *en banc* rehearing. Proceeding in that manner “would help to secure the legitimacy of court decisions and, necessarily, to maintain public confidence in the judicial system,” he argued.

“This is simply a case in which Judge Ferguson and I [on the original panel] tried our best to do our job, including the mundane task of seeing that prisoners, like all other persons, are afforded the rights to which they are entitled under the law,” Reinhardt remarked.

As a side note, the new majority endorsed citing and considering unpublished opinions “so long as they do not conflict with binding precedential decisions.” Judge Reinhardt, however, took issue with “the majority’s lengthy disquisition on memorandum dispositions and published opinions,” saying “it should not be necessary for me to restate the obvious: The law is established in published opinions and published opinions only.”

Were the majority’s view accepted, “the law in this circuit would no longer be declared in opinions; ‘existing’ circuit law could be found in whatever sources suited anyone’s whim or fancy, including the *Sewanee Law Review*,” said Reinhardt. “What an odd legal system we would be adopt-

ing for the Ninth Circuit – one that would be operative in this court only. Surely my colleagues cannot mean what their opinion states. Say it ain’t so, my friends,” he concluded in the amended opinion entered on December 22, 2008, which also included a sharp retort by the majority. See: *Carver v. Lehman*, 550 F.3d 883 (9th Cir. 2008).

The unusual procedural stance of this case didn’t end there. The December 2008 ruling was itself amended on March 3, 2009, and the new amended ruling entirely avoids the controversy regarding the endorsement of unpublished opinions. Judge Reinhardt’s comments are abridged in the amended opinion, and his “say it ain’t so” remark is no longer included. The majority’s ruling, however, which held there is no liberty interest in community custody release under Washington law, remains unchanged. See: *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009). ■

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Texas Posthumously Exonerates Man Who Died in Prison

by Matt Clarke

On February 6, 2009, Travis County District Judge Charlie Baird did what no other Texas judge had done before – he exonerated a dead man. Timothy Brian Cole, who died of asthma due to medical neglect while incarcerated in 1999, was declared innocent of the rape charges that sent him to prison.

On March 24, 1985, Michele Mallin, a Texas Tech University student, was raped by a chain-smoking black man when she was walking to her car at night. A series of similar rapes had occurred, and there was great pressure on the police to solve the case. Cole worked several blocks from the crime scene and looked similar to a composite sketch of the suspect; he was arrested and Mallin identified him as her rapist.

Cole, who had only a misdemeanor arrest record and was not identified as the perpetrator by any of the other rape victims, steadfastly proclaimed his innocence and wept over his misfortune while sitting in jail.

Listening to Cole's suffering was another prisoner, Jerry Wayne Johnson, a chain-smoking black man who had been arrested for, and was later convicted of, two other sex crimes. He also had a history of similar offenses.

Cole was convicted in September 1986 and sentenced to 25 years. He had declined a plea bargain that would have resulted in probation, maintaining that he was not guilty. Cole's years in prison were not easy. Accused of rape and sent to the Coffield Unit, one of the worst facilities in the Texas Dept. of Criminal Justice, Cole suffered the scorn and abuse of other prisoners. The appeals of his criminal conviction were denied.

Johnson waited until the statute of limitations had expired, then in 1995 wrote to the Lubbock district attorney and judge who had convicted Cole, confessing to the crime. No one was interested. Cole later died in prison on December 2, 1999 due to health problems related to his asthma. He was 39 years old. What ultimately cost Cole his life was systemic medical neglect, which is all too common in the Texas prison system. [See: *PLN*, May 2008, p.34; June 2003, p.18; Dec. 2002, p.1].

Years later Johnson managed to contact Cole's mother, who got the Innocence Project involved. Subsequent

DNA testing proved that Johnson, not Cole, had committed the rape. By then Cole was long dead, but Mallin, contrite over her faulty identification, along with Cole's family and the Innocence Project, decided to attempt what had never previously been done in Texas – a posthumous exoneration.

Their efforts led to Judge Baird's declaration that there was "a 100 percent moral, factual and legal certainty" of Cole's innocence. Members of Cole's family testified as "to the devastating impact of his wrongful conviction on their lives," and Mallin described the "emotional impact of discovering that she had identified the wrong man." See: *In the Matter of a Court of Inquiry*, 299th District Court for Travis County, Texas, Case No. D1-DC 08-100-051.

Lubbock officials had ignored strong evidence of Cole's innocence to make the case against him. His family testified that he was at home with them at the time of the rape, but prosecutors insinuated they were lying to get their relative off. Most strikingly was the fact that Cole's serious asthma would have incapacitated him had he attempted to smoke, and thus he could not have been the chain-smoker described by the victim. None of that mattered to prosecutors, who were anxious to secure a conviction. Other evidence was ignored, including a fingerprint found at one of the rape scenes that didn't match Cole, and police photo and lineup identification protocols were flawed.

In a formal opinion issued on April 7, 2009, Judge Baird said "It is no secret that our current system for resolving claims of actual innocence by prisoners is bureaucratic and hypertechnical. Such claims are lost, ignored, or denied on procedural grounds that have nothing to do with whether the petitioner is innocent. The death of Tim Cole in prison four years after Johnson tried to clear him is a tragic example of how broken our post-conviction system has become." Baird declared that Cole's case was the "most important decision" of his career.

According to the Innocence Project, 35 current or former Texas prisoners have been exonerated by DNA testing since 1994. State Senator Rodney Ellis has in-

troduced a bill to require reforms in police lineup procedures (SB 117). Lineups would have to be video recorded, and the officer conducting the lineup would have to be unfamiliar with the case and not know which participant was the suspect. An improper lineup was blamed, in part, for the false identification in Cole's case. The legislation did not pass during this session.

Another bill, called the Tim Cole Act (HB 1736), increases the compensation for wrongfully convicted prisoners to a lump sum payment of \$80,000 per year they were incarcerated. Payments would be made to surviving family members for prisoners who die prior to being exonerated. The bill also provides monthly annuity payments, health insurance, and assistance to obtain a college education for wrongfully convicted prisoners. Exonerees who accept these benefits, however, must agree not to file suit.

The Texas legislature approved the Tim Cole Act on May 11, 2009; it is now awaiting the signature of Governor Rick Perry. "The Tim Cole case should serve as a wake-up call to Texas," said Senator Ellis. "It is time to get our house in order and enact reforms that, wherever possible, can help avert miscarriages of justice before they happen." Although a worthy goal, 16 state representatives apparently disagreed, as they either voted against the legislation or said they had intended to vote no.

On April 25, 2009, Elliott Blackburn, a reporter for the *Lubbock Avalanche-Journal*, won an award in the Texas Associated Press Managing Editors journalism contest for his reporting on Cole's exoneration. "This is what newspapers are supposed to do ... right the wrongs," stated *Avalanche-Journal* Editor Terry Greenberg.

This was somewhat ironic, as Judge Baird noted in his ruling that Cole's 1986 trial was "sensationalized" by the *Avalanche-Journal*, which "ran articles suggesting that Mr. Cole was guilty of all of the Tech [University] rapes."

In any event, Mr. Greenberg is incorrect. Righting judicial wrongs are what the courts and the district attorney's office are supposed to do when presented with evidence of wrongful convictions, as in Cole's case when they were contacted by Jerry Johnson who confessed to Cole's crime. Yet it was an independent organization, the Innocence Project, that fought to

obtain DNA testing and clear his name. The state only supplied belated official recognition of Cole's innocence, fully a decade after his death. ■

Sources: *Austin American-Statesman*, *Radio Station KFFT Local News*, *Avalanche-Journal*, *CNN*, *www.mysanantonio.com*

\$226,000 Workers' Comp Settlement for Pennsylvania Guard Scarred by MRSA

A Pennsylvania prison guard who contracted a staph infection that caused facial scarring has settled a workers' compensation claim for \$226,000.

While employed at the Graterford Prison in 2003, guard Carol Snyder contracted an infection. She awoke on the morning of December 30, 2003 with facial swelling and went to see her primary health care provider. She was referred to another doctor, who drained the swelling in her face.

Her attorney, Gerald K. Schrom, said Snyder experienced "probably 40 infections" over the next few years, which resulted in "40 separate outbreaks" on her skin. She was diagnosed with MRSA by an open wound specialist on June 28, 2005.

That same doctor stated there was "no question in my mind that Ms. Snyder acquired this bacterial strain while working at the prison." Pennsylvania prison officials, however, were reluctant to accept that conclusion despite the fact that MRSA is a well-known problem in correctional facilities. [See, e.g.: *PLN*, May 2008, p.12; Dec. 2007, p.1].

In fact, prison officials were in total denial, according to Schrom. They insisted that Snyder did not have MRSA, claiming her facial scarring was due to acne. "And then they were saying, 'Okay, you have MRSA, but you can work,'" said Schrom.

"She's brave and she took a stand against the State of Pennsylvania that took the position, at least initially, that she doesn't have MRSA and if she does she didn't get it at the prison and if she did

get it, she could go back to the prison and work tomorrow," Schrom stated. "They fought her all along the way."

The facial scarring suffered by Snyder was so bad that it requires reconstructive surgery estimated to cost \$100,000. The experience left her afraid to go out in public, as people were repulsed by her appearance.

"When we were going to our very first hearing ... the defense counsel stepped back and he wouldn't even touch her with his gloves," said Schrom. "So she walks around often with gloves and goes out at night. She's had a complete change of lifestyle."

While Snyder tried to put her life back together, prison officials still refused to admit to a MRSA problem. Jennifer Daneker, a public information officer for Graterford Prison, insisted the facility was clean and "all of the institutions in Pennsylvania are accredited by the ACA." Which, of course, has little to do with whether there are MRSA outbreaks at state prisons.

Snyder's workers' compensation claim settled for \$226,000 on December 8, 2008. See: Penn. Dept. of Labor & Industry, Bureau of Workers' Compensation, Claim No. 3100315 (Bureau No. 219295).

PLN has previously reported on rampant MRSA infections in prisons and jails nationwide, and specifically on MRSA problems in Pennsylvania county prisons. [See: *PLN*, Feb. 2009, p.48; July 2005, p.20]. ■

Sources: *www.pottsmmerc.com*, *www.nb-philadelphia.com*



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ADA Routinely Violated by Prisons in the case of Deaf Prisoners

by McCay Vernon, Ph.D.

Over the last forty years, Congress has enacted numerous laws specifically designed to assure disabled individuals access to the programs, activities, services, public facilities and other resources available to the general population. This access was originally stipulated in the Bill of Rights, but made more specific by these newer laws and regulations. The most well-known of these are the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). Together, this legislation plus state statutes combine to embody the some of the best legislation for the disabled of any country in the world.

The tragedy is that federal, state and local officials, including law enforcement, blatantly ignore and fail to enforce these laws effectively, especially in three major areas. These are prisons (Musumerci, 2006; Terhue, 2004-2005; and Tucker, 1988), mental health facilities (Geer, 2003; Vernon & Leigh, 2007) and schools (Geer, 2003).

Recently the U.S. Supreme Court has held that states could be liable under Title II of the ADA for this kind of unconstitutional conduct (Musumerci, 2006). The cases involved were *United States v. Georgia* and *Goodman v. Georgia*, 126 S. Ct. 877 (2006).

In another case the court found that the state prison system violated ADA by *inter alia* failing to notify deaf prisoners about accommodations available under ADA, failing to give deaf prisoners the opportunity to access TDDs (deaf telephones) and visual alarms as well as the failure to provide interpreter services for educational and vocational classes, alcohol and drug counseling, medical and mental health treatment and disciplinary, grievance and parole hearings (Musumerci, 2006). Because these services were available to other prisoners and the prison failed to provide the accommodations necessary to make them available to deaf prisoners, the prison was liable. (For other cases involving deaf people and laws relevant to them, see Musumerci, 2006).

This article will focus primarily on prisons and their deaf prisoners. However, much of the information has generality to all disabilities and to many other types of public facilities. The reason for the focus on deafness is because it is one of the least understood of all disabilities and the most

neglected in prisons. This is due primarily to its invisibility. Other disabilities, such as cerebral palsy, amputations, crippling disorders, etc. are instantly identified and reacted to. In addition, partly because it is not visible, deafness is not seen as being as serious as other handicaps. However, in a prison environment, it is one of the most debilitating.

For readers of *Prison Legal News*, the reason deaf prisoners are of special interest is that they provide attorneys representing them not only the opportunity to help of group of prisoners in a desperate situation, but also a chance to sue for sizeable damages, including attorney's fees, due to the rights that have been denied as a result of a failure of prisons to obey ADA regulations. In many cases these deaf prisoners' rights were also violated during their arrests, interrogations, pleadings, sentencing, and/or trials (King & Vernon, 1999; Miller, 2001; Miller & Vernon, 2001; Vernon & Miller, 2005; Vernon, Raifman & Greenberg, 1006). [Editor's Note: *PLN* has reported extensively on the rights of deaf and disabled prisoners in the past. A key issue is that the ADA and RA both have their own attorney fee provisions which are not capped by the Prison Litigation Reform Act, thus attorneys who prevail on ADA and RA claims for prisoners can bill their normal market rates.]

Prelingual Deafness and Prison

For any person who is deaf, prison is a horror. For example, even with hearing prisoners, their number one fear is that they will be raped; the second is that they will be killed (Ross & Richards, 2003). That both of these fears are justified is confirmed by the data on prison murder, rape and suicide (Human Right's Watch, 2001). In a prison's hostile, isolating and threatening environment, the possibility of psychological breakdown greatly increases. Some prisoners commit suicide. The problem is compounded by the paucity of mental health services in prisons and jails and the lack of training for correctional officers as to how to handle such cases.

While information supplied by the Human Rights Watch is not specific to the deaf population, these data and common sense would dictate the situation is much

worse for prisoners who are deaf because they are far more vulnerable and subject to attack than hearing prisoners. One reason for this is that they are viewed as being unable to report instances in which they are victimized due to their communications limitations as outlined below (Miller, 2001; Vernon & Miller, 2005).

To understand why this is true, it is important to become familiar with some basic facts about prelingual deafness, i.e., deafness which has its onset at three years of age or younger. Because these individuals never heard language spoken or do not remember it if they heard it, most never learn to speak intelligibly. Just as you and I cannot speak Russian because we have not heard it spoken, prelingually deaf individuals cannot speak English (Vernon & Andrews, 1990). For the same reason, most deaf people fail to master the syntax and the vocabulary of English.

Consequently, as a group they are extremely poor readers and have low educational levels. For deaf prisoners, the problem is even worse because many come from poor homes, attended inferior schools, and have a general history of deprivation. The consequences are exemplified by a study of 99 deaf prison prisoners conducted by Miller (2001). It is the largest in-depth study ever done of this kind of population.

Of these 99 prisoners, 76 lost their hearing before learning to speak or use language. Their mean educational achievement level when they entered prison as adults was second grade, seventh month. By federal government standards, this means they were functionally illiterate. That is despite the fact that their IQ as measured by a performance IQ test was well within the average range (Miller, 2001). In fact, the IQs of deaf people in general are equal to those of hearing people even though their educational achievement levels are significantly lower (Vernon, 2005). This is because of the limitations deafness places on the acquisition of information.

The Burden of Being Deaf in Prison

In prison, the low educational levels of most deaf prisoners coupled with their restricted communication creates major problems. For example, they have severe limitations in understanding what people

say to them. They have to depend on lipreading, which is greatly overestimated as a means of communication. Even under ideal conditions, for example, good lighting, face-to-face contact with the speaker, a speaker who articulates clearly, etc., good lipreaders can understand only about five percent of what is said to them (Vernon & Andrews, 1990).

In addition, the overwhelming majority of prelingually deaf people have speech that is unintelligible. Also, because their educational level is that of a second grader, they can communicate only simple messages by writing and understand equally simple messages by reading.

As a result of these limitations, their communication with detention facility employees, fellow prisoners, medical staff, and others is primitive at best. They cannot understand disciplinary hearings or present effectively their side of the story, nor do they understand the printed material on prison rules and regulations.

In sum, they are in an almost totally compromised position in the dangerous, treacherous environment of rape, abuse and violence that characterizes most prisons.

Sign Language and Access

If introduced to the prison setting, American Sign Language (ASL) and interpreters who know ASL could provide deaf prisoners with access to much of what their deafness otherwise denies them. Most people who acquired their deafness in the first 15 or 16 years of their life learn sign language. They use it to communicate with each other, just as hearing people use English.

Sign Language interpreters, plus assistive devices such as vibrating alarm clocks, hearing aids, special telephones, video phones, flashing alarm devices, etc. can give deaf people basically the same access to information, basic human rights, educational services, mental health counseling, hospital care, drug therapy, prison rules and regulations, religious services, etc. that hearing prisoners have. It is this access that is promised disabled prisoners in the Bill of Rights, ADA, IDEA, and other civil rights legislation that is being so blatantly denied them in state, federal and local prisons and jails. By bringing to the attention of the court this failure to implement these laws in the case of deaf prisoners, damages can be obtained for deaf prisoners and fees will be awarded to their attorneys. Of equal importance, these cases can be costly to the prison and will result in their correcting the injustices, which is far less damaging than ignoring them as is now the case. ■

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The Illusion of Immigrant Criminality: Getting the Numbers Wrong

by David L. Wilson

Immigrants aren't a crime problem. "The foreign-born commit considerably fewer crimes than the native-born," as President Herbert Hoover's National Commission on Law Observation and Enforcement concluded in 1931 (*National Lawyers Guild Quarterly*, 10/39; *Immigration Policy Center*, Spring/07). While noncitizens now make up more than 8 percent of the U.S. population, the available evidence indicates that they account for no more than 6 or 7 percent of the people incarcerated for crimes in the United States, less than 170,000 of the 2.3 million prisoners currently in our federal, state and local penal systems—not including some 30,000 immigrants in administrative detention on any given day awaiting deportation. (Politics of Immigration, 4/2/08, 5/7/08).

Why, then, do so many people believe in the myth of immigrant criminality?

One reason is the mainstream media's habit of giving inflated estimates for the number of immigrants in prison. Ten percent of U.S. prisoners are "immigrant criminals eligible for deportation," the *New York Times* told us (3/28/08), citing a "top federal immigration official." An Indiana University economist has calculated that undocumented immigrants "commit 21 percent of all crime in the United States, costing the country more than \$84 billion," *Time.com* reported (2/27/08). Our prisons are "bulging" with immigrants, correspondent Christine Romans said on CNN's *Lou Dobbs Tonight* (4/1/06); they account for 30 percent of all federal prisoners, she added.

These numbers simply don't hold up under scrutiny. The 10 percent number in the *New York Times* came from a March 27, 2008 interview reporter Julia Preston did with Julie L. Myers, assistant secretary of Homeland Security for U.S. Immigration and Customs Enforcement (ICE). Myers put the number of deportable convicts now behind bars nationwide at 304,000 or more, Preston reported, noting that this is the "first official estimate" for these prisoners. Myers told Preston that deportable convicts would be about 10 percent of the overall prison population for the next few years.

Myers' 304,000 figure is almost twice the number we get by extrapolating from published government reports. It doesn't

even match the 10 percent figure Myers gave in the same interview: One-tenth of the current prison population would be about 230,000, not 304,000.

The number also doesn't seem to match ICE's own handouts from the next day, March 28, when the agency said it "estimates that about 300,000 to 450,000 criminal aliens who are potentially removable are detained each year in federal, state and local prisons and jails." The number of noncitizens held in U.S. prisons on criminal charges during the course of "each year" would of course be much larger than the number of these prisoners behind bars on any one day, the number that Myers seems to be giving in the *Times* article. (The government usually gives statistics for prison populations for a specific day, such as June 30 or December 31.)

A month's efforts failed to get the ICE press office to explain how the agency came up with these estimates.

Of course, the government itself can influence the statistics through its policies, and right now immigration and Justice Department personnel are working overtime to increase the number of "criminal aliens." Under a program called "Operation Streamline," the government has been bringing criminal charges for misdemeanor immigration offenses that it used to treat as civil violations; the result is a surge of criminal immigration convictions that reached 9,350 in March 2008. At this rate, the number of immigrant convicts would increase by more than 100,000 for the year. But the typical sentence is just one month, so the increase at any given time would be less than 10,000 prisoners—a fraction of a percent of the overall U.S. prison population (*New York Times*, 6/18/08; Transactional Records Access Clearinghouse, 6/17/08).

The case is simpler with *Time's* 21 percent figure: It's wrong, and it's been abandoned by the person who came up with it. In an otherwise excellent report on recent studies indicating that "increased immigration makes the United States safer," reporter Kathleen Kingsbury provided "balance" by citing dubious calculations from a June 2007 blog by Indiana University professor Eric Rasmusen (6/29/07) that claimed to show that low crime rates for authorized immigrants (who are "by definition unusually law-abiding," wrote

Rasmusen) mask extraordinarily high crime rates for undocumented immigrants. After being shown that he'd made a series of mistakes in handling the statistics, Rasmusen posted a correction (4/30/08) saying that a more accurate estimate would be 6.1 percent. *Time*, however, failed to respond to three requests to run a clarification noting that Rasmusen had withdrawn his earlier numbers.

While Preston and Kingsbury failed to question doubtful numbers others gave them, the Lou Dobbs program distorted federal prison statistics to imply that immigrants are disproportionately criminal.

It is true that a large percentage of federal prisoners are noncitizens (although the current figure is 25 to 26 percent, not 30 percent, as Dobbs' program claimed—4/1/06). But Dobbs and his staff had to know that this statistic doesn't mean immigrants are an important factor in crime. The federal prison population is less than 10 percent of the national total, and federal prisoners are far less likely than state prisoners to be incarcerated for violent crimes. Noncitizens are overrepresented in the federal system because of the sorts of crimes—such as cross-border smuggling and immigration offenses—that fall within federal jurisdiction. More than 10 percent of the 200,000 federal convicts are imprisoned for immigration offenses (Politics of Immigration, 5/7/08).

Dobbs has had several chances to correct the misrepresentation. *New York Times* business columnist David Leonhardt pointed it out on May 30, 2007. Instead of retracting the misleading number, Dobbs responded angrily (CNN, 5/30/07) that he was being attacked by "the left wing." He remained unapologetic when he was confronted over his statistical games on the *Democracy Now!* radio program on December 4, 2007. Hosts Amy Goodman and Juan Gonzalez played clips of Dobbs magnifying his original distortion by saying that one-third of all prisoners were undocumented immigrants. He finally conceded that he "misspoke."

The Lou Dobbs show—which highlighted the alleged connection between undocumented workers and crime in a whopping 94 episodes in 2007 (*Media Matters*, 5/21/08)—continues its policy of "misspeaking" about prison statistics.

On the March 28, 2008 program, CNN correspondent Louise Schiavone seemed to go out of her way to muddle a report on ICE's already dubious numbers for deportable immigrants in prison. The agency "believes that up to 450,000 criminal aliens, both legal and illegal, will be behind bars in the U.S. and in queue for deportation at any one time this year," Schiavone said. As noted before, when ICE cited its "300,000 to 450,000" figures, the agency was referring to the number of noncitizens held in U.S. prisons over the course of each year--not on any given day.

Erroneous numbers from the mainstream media on immigrant prisoners are quickly circulated across the Internet, providing ammunition for people who want to believe that a wave of foreign criminals is invading the country. *Lou Dobbs Tonight* is a favorite source for misinformation among anti-immigrant groups, but more respectable media are also used for this purpose.

Preston's article on the 304,000 deportable inmates was quickly picked up by websites with names like *Outraged Patriots.com* (3/28/08) and *AmericanPatrol.com* (3/29/08), and was run under headlines like "Our Dumb A\$\$ed Politicians Do It Again" (*Gather Community Press*, 3/29/08).

In an environment "where Latinos are racially profiled and immigrants are dehumanized and persecuted as 'illegals' and 'criminal aliens,'" writes Justin Akers Chacon, co-author, with Mike Davis, of *No One Is Illegal*, "the hate-filled and

the weak-minded will rally to the cause in their own violent way." He notes that attacks on Latinos have risen "in tandem with the intensification of the immigration debate," rising 35 percent between 2003 and 2006 (*Ventura County Star*, 3/27/08). Fictitious numbers on immigrant crime in the media have undoubtedly done their

part in fueling these real crimes. ■

David L. Wilson is co-author, with Jane Guskin, of The Politics of Immigration: Questions and Answers (Monthly Review Press). Information is available at ThePoliticsofImmigration.org. This article originally appeared in FAIR and is reprinted with permission.

Florida Guard Convicted of Assaulting Prisoner

On January 16, 2009, a federal jury in Jacksonville, Florida found a former state prison guard guilty of a federal felony civil rights violation for assaulting a prisoner in August 2005.

The prisoner, who was not named, allegedly feigned illness by lying on the floor of his cell at Florida State Prison in Raiford. Guard Paul G. Tillis responded by filling a bottle with near-boiling water and pouring it on the prisoner's chest. Tillis then denied medical treatment to the prisoner, who suffered second-degree burns as a result of the assault.

"It is important that corrections officers realize they may not use their positions of authority to inflict physical harm on inmates as punishment," said Acting Assistant Attorney General Loretta King. "While the vast majority of law enforcement officers carry out their difficult duties in a lawful and professional manner,

the Department of Justice will continue to vigorously prosecute those who cross the line and commit this type of unlawful act."

In fiscal year 2008, the Criminal Section of the Department of Justice's Civil Rights Division filed the largest-ever number of federal criminal civil rights cases in a single year, and had the second-highest number of official misconduct prosecutions.

Tillis faces up to ten years in prison and a \$250,000 fine. He was ordered taken into custody pending his sentencing hearing, which is set for July 6, 2009. ■

Sources: U.S. Dept. of Justice press release, www.jacksonville.com

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Supreme Court Holds Supervisory Officials Not Liable for Abuse of 9-11 Detainees

by Matt Clarke

On June 14, 2007, the Second Circuit Court of Appeals affirmed in part and reversed in part a district court's denial of the government's motion to dismiss a lawsuit alleging abuse of pre-trial detainees at the Brooklyn Metropolitan Detention Center (MDC) following the September 11, 2001 attacks. However, the Supreme Court reversed that ruling on May 18, 2009, and remanded the case for further proceedings.

Javaid Iqbal, a Pakistani national, was detained in a roundup of foreign Muslim males in the New York area shortly after 9/11. He had false identity papers and was arrested and placed in MDC. There, he alleged, solely due to his religion and national origin, he was held in a newly-created Administrative Segregation Maximum Security Special Housing Unit (ADMAX SHU), which was created for prisoners "of high interest."

According to Iqbal, to be designated "high interest" a detainee merely had to be a Muslim male of Arab, North African or West Asian origin. Conditions in ADMAX SHU were much harsher than those in the MDC's general population, or in the "normal" SHU. Prisoners were only released from ADMAX SHU after the FBI cleared them of any ties to terrorist groups. For Iqbal, this process took from January 8, 2002 until the end of July 2002.

While in ADMAX SHU, Iqbal claimed he was severely abused both physically and verbally; subjected to repetitive, unnecessary and abusive strip and body cavity searches; kept in solitary confinement with no review of his classification status; subjected to interference with the exercise of his religious beliefs; denied adequate food, exercise, basic medical care, bedding and personal hygiene items; deliberately exposed to excessive heat, excessive cold and continuous bright lighting; only allowed out his cell one hour a day, in handcuffs and shackles; and prevented from having confidential, direct and rapid communication with his attorney.

Iqbal alleged severe physical injuries from brutal beatings as well as emotional distress and humiliation. He also claimed that his mistreatment was a direct result of discriminatory policies promulgated by

high-level officials in the federal government, which caused him to be classified as a "high interest" prisoner based solely upon his race, religion and national origin. Iqbal pleaded guilty to having false identity papers, served his prison sentence, and was deported to Pakistan. He then brought a *Bivens* action against federal officials.

The government defendants filed a motion to dismiss, claiming inadequate factual pleading and a defense of qualified immunity. The district court denied the motion except with regard to claims brought under the Religious Freedom Restoration Act and the Alien Tort Statute. See: *Elmaghraby v. Ashcroft*, U.S.D.C. (E.D. NY), Case No. 04-cv-1409; 2005 U.S. Dist. LEXIS 21434 (Sept. 27, 2005).

The defendants appealed the district court's ruling, and the government arranged a \$300,000 settlement with Iqbal's co-plaintiff, Ehab Elmaghraby, an Egyptian national who was too ill to return to the U.S. for trial. [See: *PLN*, Sept. 2006, p.30].

The defendants' main issues on appeal were that Iqbal had not pleaded sufficient facts showing the involvement of high-level government officials such as former U.S. Attorney General John Ashcroft and FBI Director Robert Mueller, and that the emergency situation following the 9/11 attacks presented "exigent circumstances" for which there was no settled law, thereby entitling the defendants to qualified immunity.

The Second Circuit engaged in a lengthy analysis of Supreme Court decisions regarding a heightened pleading standard. The appellate court concluded that such a standard could not be required in a civil rights suit. The Court of Appeals observed that district courts may need to permit "some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct" before ruling on the issue of qualified immunity.

The Second Circuit held that "exigent circumstances" or "special factors"

following the 9/11 attacks might excuse the inadvertent search and/or arrest of the wrong individuals. However, they could not excuse the violation of clearly-established constitutional rights of a pre-trial detainee once the detainee was in custody.

The Second Circuit held that "officials of reasonable competence could have disagreed" about whether some procedural due process beyond waiting for the FBI to clear Iqbal was required to keep him in ADMAX SHU. Therefore, the defendants were entitled to qualified immunity on that issue. However, the law was clearly established in 2002 as to the claims related to conditions of confinement, excessive use of force, unreasonable searches, and racial and religious discrimination.

Furthermore, it was plausible at the current stage of the pleadings that high-level government officials were directly involved in enacting the policies that led to Iqbal's mistreatment. This could be pursued under 42 U.S.C. § 1985(3) as a claim alleging conspiracy.

The order of the district court denying the defendants' motion to dismiss was therefore affirmed as to all issues except procedural due process. Iqbal was represented by attorneys Alexander A. Reinert, Keith M. Donoghue, Elizabeth L. Koob, Joan Magoolahgan, Haeyoung Yoon, Mamoni Bhattacharyya and David Ball, all of New York. See: *Iqbal v. Hasty*, 490 F.3d 143 (2nd Cir. 2007).

Subsequently, however, the U.S. Supreme Court granted certiorari to review the appellate court's ruling. In an opinion issued May 18, 2009, the Court first held that the Second Circuit had jurisdiction to hear an interlocutory appeal on the issues raised by the defendants. The Court also assumed, without deciding, that a First Amendment claim was actionable in a *Bivens* action.

Because vicarious liability does not apply in *Bivens* and § 1983 cases, the plaintiff must plead that each government defendant, through his individual actions, has violated the Constitution. The Court held that Iqbal had not presented sufficient facts to subject the high-level government defendants to supervisory liability.

Further, under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” The Supreme Court applied its recent ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), and determined that Iqbal had failed to plead sufficient facts to state a claim for purposeful discrimination.

Purposeful discrimination requires more than “intent as volition or intent as awareness of consequences”; rather, it involves a decisionmaker taking a course of action “‘because of,’ not merely ‘in spite of,’ the action’s adverse effects upon an identifiable group.”

The Court held that Iqbal’s allegations that the defendants “had agreed to subject him to harsh conditions as a matter of policy, solely on account of discriminatory factors and for no legitimate penological interest; that Ashcroft was that policy’s ‘principal architect’; and that Mueller was ‘instrumental’ in its adoption and execution” were conclusory and “not entitled to be assumed true.”

“It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [9/11] attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims,” the Supreme Court stated.

The Court concluded that Iqbal’s complaint did not contain facts (as opposed to mere conclusory allegations) that indicated the government defendants

had intentionally adopted a discriminatory policy of classifying post 9/11 MDC detainees as “high interest.” The case was remanded to the Second Circuit to “decide in the first instance whether to remand to the District Court to allow Iqbal to seek leave to amend his deficient complaint.” See: *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented

from “the rejection of supervisory liability as a cognizable claim ... and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure.” The dissenting justices noted that the issue related to supervisory liability had not been briefed for the Court, resulting in a risk of error that was “palpable.” Apparently, however, that risk was acceptable for the justices who issued the majority ruling. ■

\$30,000 Settlement in Milwaukee Jail Death

The City of Milwaukee and other city officials settled a case involving a man who died in jail for \$30,000. The case was published in April 2008. Felix Hopgood, 38, was arrested for shoplifting in July 2003. About 2½ hours after his arrest, while awaiting processing in the “bullpen” section of the Milwaukee Police Administration Building, Hopgood suffered a heart attack caused by a cocaine overdose. Guards gave first aid which was continued by Milwaukee Fire Department personnel while Hopgood was transported to Sinai Samaritan Hospital. Nonetheless, Hopgood died about two hours after he collapsed.

Hopgood’s estate filed a civil rights suit in federal district court alleging jail overcrowding and a lack of medical screening led to his death. It was implied that jail personnel failed to obtain prompt medical attention for Hopgood, although they knew of his need for it. The defendants denied the allegations and alleged that the death was caused when Hopgood obtained cocaine from another prisoner

at the jail or smuggled it into the jail and later used it. City politicians were told that it would cost \$30,000 to try the case. They offered the \$30,000 to the estate as a settlement and the estate accepted. The estate was represented by attorney Willie Nunnery of Madison.

See: *Estate of Hopgood v. City of Milwaukee*, U.S.D.C. E.D.Wis., Case No. 06-C-786. ■

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Former Oregon DOC Food Manager Abandons Wife to Federal Prosecution; Herding Sheep in Iran While on the Lam

by Mark Wilson

Oregon Department of Corrections (ODOC) Food Services Administrator Farhad “Fred” Monem and his wife, Karen, accepted over \$1.3 million in bribes and kickbacks in the worst public corruption scandal in Oregon’s history. [See: *PLN*, Aug. 2008, p.1].

While contemplating a plea bargain that required significant prison time, Fred fled on July 1, 2007, abandoning his teenage son and wife of 25 years – a wife who would then be forced to suffer the consequences of their crimes alone.

On November 19, 2008, Karen Monem pleaded guilty to one count of money laundering for setting up three bank accounts in her mother’s name to launder the bribery payments. She hid \$163,000 in the accounts, making deposits under \$10,000 to avoid triggering bank reporting requirements.

As part of her plea, Karen agreed to cooperate with prosecutors in their continuing investigation. She also agreed to forfeit \$700,000 to the federal government that was seized from the Monems’ home and bank accounts, plus three vehicles. Oregon received half of that amount, another \$163,000 from the sale of two vacation homes, and half of Fred’s ODOC retirement account.

Additionally, a Los Angeles food broker and three of its employees who had supplied the kickbacks agreed to pay Oregon \$540,000. The state also won a \$4.5 million default judgment against Fred. The judgment included \$386,000 which constituted all of Monem’s ODOC salary during the time the bribery scheme was ongoing. It is unlikely that any of that judgment will be collected.

Fred was born in Iran but his father snuck him out of the country in 1979, when he faced execution for deserting from mandatory military service in the Shah’s army. He spent the next 28 years in the United States.

During Karen’s November 29, 2008 plea hearing, Assistant U.S. Attorney Chris Cardani revealed that Fred had “hopped the border” into Canada with the assistance of a brother who lived in Montreal. From there, he made his way back

to Iran for an inglorious homecoming. “It is the understanding of the FBI that Fred Monem has been herding sheep in Iran,” Cardani revealed. “We are confident he is there. He refuses to return voluntarily to face the charges.”

The United States broke diplomatic relations with Iran in 1980 and has no extradition treaty. “By the standards of the judicial system he is a fugitive. Does that mean we’re done with him because he’s somewhere we can’t get a hold of him, right now?” asked Special Agent in Charge Kenneth Hines. “No, we’re not done with him. ... If he winds up in a place where we can get a hold of him, he’ll come back and he’ll face justice.”

Cardani refused to provide specifics about Monem’s whereabouts or the nature of any contact U.S. authorities have had with him. Yet he is optimistic about Monem’s return. “He has allowed his wife to suffer through her case alone. Five of the six defendants have now reached plea agreements with the government,” Cardani said. “Fred is the only defendant left out there. I’m hopeful that Mr. Monem will do the right thing and come back to face the charges.”

But Fred had not done “the right thing” by the time his wife was sentenced to one year in federal prison on February 13, 2009. “Essentially, your husband, the coward, is throwing you and your son under the proverbial bus,” said U.S. District Court Judge Ann Aiken during Karen’s sentencing hearing.

Karen wept as she told the judge that after Fred fled, their son began suffering from psychiatric problems linked to the onset of schizophrenia. He was hospitalized for nine days and was scheduled to enter a long-term treatment program. “I’m just afraid if he loses me, he’ll have a total relapse. That is my biggest concern because he’s lost everything,” Karen stated.

Judge Aiken acknowledged that the scandal had created many victims, including the state, the Monems’ son and Karen herself. Even so, Karen bore responsibility for “a huge violation of trust,” said Aiken. “You need to be held accountable because you know what? You know better.”

Cardani recommended a 12-18 month prison sentence because Karen “indulged herself in the proceeds of the kickback scheme. ... She took full advantage of these proceeds by enjoying vacations, driving in high-end vehicles, boating and attending sporting events, all paid for with kickback monies.” He accused the Monems of living “a very lavish lifestyle.” Yet Cardani also acknowledged that Karen had “been behaving well since the time this was found out.”

Karen’s attorney, Paul Ferder, asked the judge to impose probation rather than prison time, characterizing her as a “minimal participant” in the bribery scheme. She was under the domination and control of her husband, who expected her to behave in the tradition of Middle Eastern women, Ferder argued. She was “a kept woman” who “did what she was told to do.”

Aiken sentenced Karen to one year in prison but delayed a decision about when she must surrender to authorities until September 2009. The delay suggests the possibility that Karen’s prison sentence could change if Fred voluntarily returns to the U.S. from Iran. “I hope, for your son’s sake, he will do the right thing,” said Aiken. Thus far, however, the prospect of serving time in federal prison has not enticed Fred to turn himself in.

The four food brokers who paid the kickbacks, Douglas Levene, Michael Levin, William Lawrence and Howard Roth, all pleaded guilty and began cooperating with prosecutors in 2007. Each faces a maximum of 13 years in prison and a \$500,000 fine, but are likely to receive less severe penalties. Their sentencing hearings are scheduled for June 18 and July 1, 2009.

Meanwhile, Monem has been featured on *America’s Most Wanted* and is included on the FBI’s wanted fugitives list. A \$20,000 reward has been offered for information leading to his arrest and conviction – which amounts to 196,310,000 in Iranian rials. ■

Sources: *The Oregonian*, *Statesman Journal*, *Associated Press*, www.fbi.gov

UNICOR Robs Jobs from Private Sector; Prisoners Sue Over Working Conditions

by *Brandon Sample*

It is already hard enough for free world workers to hold down a job without having to compete with UNICOR, the prison labor arm of the federal Bureau of Prisons. But that is exactly what a group of more than 300 Pennsylvania employees are going through. The workers, employed by private defense contractors, face layoffs as UNICOR expands its market share of helmet production for the Department of Defense (DOD).

Created in 1934 with the aim of rehabilitating federal prisoners through work opportunities, UNICOR uses cut-rate prison slave labor to provide services and manufacture furniture, clothing and other assorted goods for the federal government. Prisoners are paid as little as \$.23 an hour and sometimes work twelve- to fourteen-hour shifts.

In late 2007, UNICOR upped its market share of producing military helmets to 50 percent by invoking the mandatory source rule, which requires federal agencies to first turn to UNICOR when making contracting decisions. As a result, more than 300 workers who make helmets for private defense contractors like BAE Systems in Pennsylvania may lose their jobs.

"I'm outraged," said U.S. Rep. Paul Kanjorski, who represents the 11th District of Pennsylvania. "BAE Systems is being forced to cut back its workforce during a time when families are already strapped for money. We must ensure that better-qualified, law abiding citizens continue to produce these needed helmets for our troops abroad."

Rep. Kanjorski and several other federal lawmakers are trying to force the DOD to procure competitive bids for any product when at least five percent of that product is provided by UNICOR. It is often possible for private businesses to offer lower bids for products and services even though UNICOR pays its prisoner employees pennies an hour due to UNICOR's bloated bureaucracy.

Congress came close to raising the wages for UNICOR workers to mini-

mum wage in 2004, with the passage of the Federal Prison Industries Competition in Contracting Act in the House, but the bill failed to pass in the Senate.

More recently, on October 8, 2008, UNICOR was sued by a group of federal prisoners who worked at a factory in a medium-security facility in Beaumont, Texas, producing military helmets. The prison was evacuated after it was struck by Hurricane Rita in 2005. The lawsuit alleges that the UNICOR workers were returned to the facility two weeks later before it was ready for occupancy; the walls were covered with black mold, and food and water were scarce.

They were returned early, according to the complaint, because UNICOR was falling behind on its helmet contract. The suit alleges that the prisoners were "constantly ridiculed, tormented, and yelled at because of deadlines on million-dollar contracts." They worked 14-hour days during the first week, which then dropped to 12-hour days.

"At the end of the work day, [UNICOR workers] would come back to their cells with sore and aching feet, blisters on their hands ... feeling totally exhausted and in many cases, traumatized by the ordeal," the lawsuit states. None however appear to have quit or otherwise refused to produce war material for the Pentagon even under these conditions.

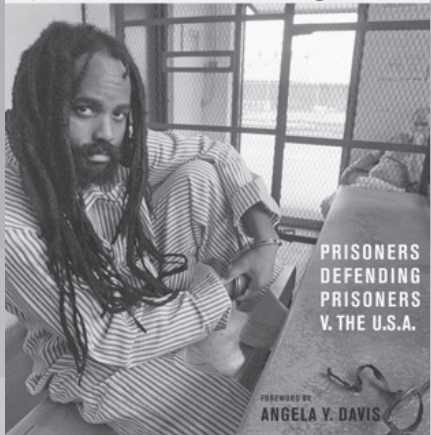
The plaintiffs are seeking damages for negligence, coercion, malice, and cruel and unusual punishment. The litigation is ongoing. See: *Trojcek v. United States*, U.S.D.C. (E.D. Tex.), Case No. 1:08-cv-00593-MAC-KFG.

PLN has previously reported on other onerous aspects of UNICOR, including the exposure of both prisoners and staff to toxic materials in electronics recycling programs. [See: *PLN*, Jan. 2009, p.1]. A federal lawsuit

filed over the toxic exposure is still pending, and on April 23, 2009, six additional plaintiffs sought leave to join the suit. See: *Smith v. United States*, U.S.D.C. (N.D. Fla.), Case No. 5:08-cv-00084-RS/AK. ■

Sources: *www.industry.bnet.com*, *citizensvoice.com*, *Houston Press*

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FOREWORD BY
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Prisoner's Right to Mail Announcement of Peaceful Demonstration Trumps Purported Prison Security Claims

by Marvin Mentor

On October 21, 2008, the U.S. District Court for the Eastern District of California upheld a state prisoner's First Amendment right to send mail after his letters to several media agencies were blocked by prison authorities. The letters asked the media to announce a peaceful demonstration by prisoners against California's Three Strikes law and double-celling at Corcoran State Prison.

The then-California Dept. of Corrections (CDC) argued that such an announcement would encourage unrest at Corcoran and other facilities, and that CDC staff had a legitimate security interest in censoring the letters. Prison officials argued the letters promoted an unlawful association, which trumped any right to send mail. The district court disagreed, finding the unlawful association claim was speculative since the demonstration was to be peaceful, and holding the emphasis on the association issue was misplaced. Thus, censoring the prisoner's mail violated his First Amendment rights.

In 2003, Corcoran prisoner Bryan E. Ransom, representing a grassroots organization called the Black Nationalist Prison/Community, sent a press-release letter to KMPH-TV in Fresno (near Corcoran) and to Berkeley radio station KPFA, announcing his position as the Founding President/Minister of the "National Plantation Psychosis Awareness Committee" (NPPAC). He also announced a planned protest, which was described as "a statewide 3-Strike Back Lash demonstration start[ing] February 26, 2003, call[ing] for all CDC inmates to resist CDC's illegal practice of the forced double celling of unwilling inmates into cells designed for one man occupancy. Thus creating a lethal and barbaric gladiator environment for inmates throughout the State of California...."

Not surprisingly, CDC staff confiscated Ransom's letters to the media (for over a year), on the grounds that they violated prison rules prohibiting inciting unrest. Ransom, who was written up for a rules violation, later brought suit in federal court asserting his First Amendment right to mail the letters had been violated. The district court held that CDC's argument, which attacked Ransom's claim

under freedom-of-association restrictions, missed the point. The feared "association" was on its face purportedly peaceful, and thus did not threaten prison security.

Further, the court noted that the "problem with Defendants' argument is that the claim arises not out of the right of association but out of the right to send mail. Plaintiff is not premising his claim on an unconstitutional disallowance of an inmate demonstration or from an unconstitutional interference with his right to redress his grievance over double celling."

Censoring Ransom's mail violated his First Amendment right to communicate with others, including media agencies. Without a demonstrated connection between the mailings themselves and prison security concerns, CDC was not allowed to censor Ransom's letters. In granting partial summary judgment to Ransom, the district court also held that CDC was not entitled to qualified immunity on the mail censorship issue. See: *Ransom v. Johnson*, 2008 U.S. Dist. LEXIS 89293 (E.D. Cal., Oct. 21, 2008). ■

University of Arizona Releases Report on Women Immigration Prisoners

by Matt Clarke

In January 2009, the Southwest Institute for Research on Women (SWIRW) and the Bacon Immigration Law and Policy Program of the University of Arizona published a report on women held in Arizona immigration prisons. It dealt with three locations: Central Arizona Detention Center (CADC) and Pinal County Jail (PCJ), both of which are in Florence, and Eloy Detention Center (EDC) in Eloy. CADC and EDC are privately operated by Corrections Corporation of America under contract to Immigration and Customs Enforcement (ICE). All three are in small, remote desert towns far from the cities of Phoenix or Tucson.

The research was conducted by SWIRW researchers and trained law students who interviewed current and former prisoners and attorneys, paralegals and social workers who work with the immigration prisoners. ICE, PCJ and CCA refused to allow their personnel to be interviewed.

Immigration prisoners are awaiting completion of an administrative process, not awaiting trial on criminal charges. Nonetheless, they are often treated worse than prisoners being held for felonies in the same prison.

"Few people realize that we are locking up huge numbers of immigrants every day and holding them for months and, in some cases, years at a time. They are not being punished for a crime, and yet they are held in facilities that are identical to, and often

double as, prisons or jails." SWIRW lead research and report author Nina Rabin said. "Women immigration detainees in particular are an invisible population. We hope this report will raise awareness about women locked up just an hour away from here in conditions that would shock most Americans. We also hope to raise awareness about the U.S. citizen children separated from their mothers right now because of immigration detention. In our small sample...we encountered pregnant and nursing mothers, domestic violence victims, low-wage workers swept up in worksite raids, and asylum-seekers fleeing persecution and sexual violence."

Immigration prisoners are covered by ICE National Detention Standards. These standards are deficient, especially for the imprisonment of women. However, even the inadequate ICE standards are not codified as laws and have no enforcement mechanism and are apparently largely ignored by the prisons.

Key findings in the report include a lack of adequate medical care--especially for gender-related problems such as pregnancy, miscarriage, ovarian cysts and cervical cancer. A lack of mental health care was also noted which was especially profound due to the large number of women who had suffered domestic and/or sexual violence and were prime candidates for PTSD. Further traumatizing the prisoners was the forced separation from families

that lived hundreds to thousands of miles away. Many of the women had underage children and some were even nursing babies they were forcibly separated from.

The report also noted inadequate access to telephones, legal materials and legal assistance. Unlike prisoners awaiting a criminal trial, immigration prisoners are not entitled to court-appointed attorneys. However, ICE standards require that they be given free phone access to legal representatives and consulates. This was rarely done. In fact, prisoners were at mercy of an expensive phone system and those with no money often were unable to contact their families, consulates or legal counselors.

The necessity of separating immigration prisoners from prisoners incarcerated on criminal charges and women prisoners from men often results in worse conditions for the women immigration prisoners. For instance, criminal prisoners might be allowed to move about the prison to the library, recreation yards and dining facility while women immigration prisoners are served meals in their wing, brought books on a cart and allowed only very limited recreational opportunities. Similarly, few educational or other programs are offered immigration prisoners. This makes it difficult for immigration prisoners to prove rehabilitation, one of the factors an immigration court takes into account when deciding whether to issue an order of deportation or not. Immigration prisoners are also often transported in shackles and leg irons, even though they are nominally not criminals.

They also complained of low-quality food and small portions. ICE routinely resists and appeals decisions by courts to grant bonds or release pregnant women. ICE rejects or ignores applications for humanitarian parole of refugees, prisoners with serious medical conditions and victims of domestic violence--all classes of prisoners allowed by law to be released on bond. ICE also resists attempts to reduce bonds when families are unable to post the initial bond.

The report contained numerous suggestions on how Congress, ICE and the prisons could improve conditions for women immigration prisoners. Chief among these are changing policies so as not to incarcerate immigration prisoners who pose no flight or security risk and passing laws which make ICE detention standards enforceable. See: *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*, available online on PLN's website. 📖

\$500,000 Awarded to New York Prisoner Raped by Jail Guard; Vacated on Post-Trial Motion

A New York federal jury awarded a woman \$500,000 in a lawsuit claiming that her constitutional rights were violated when a guard forcibly raped her. The verdict, however, found the sheriff was not guilty of negligence, and the award was later vacated by the district court.

On December 17, 2002, while held at the Erie County Correctional Center, Vikki Cash was raped by guard Marchon C. Hamilton. Hamilton admitted to the sexual assault and pleaded guilty to third-degree rape. Cash then filed a state court lawsuit against Hamilton, Erie County, the Erie County Sheriff's Department and Sheriff Patrick Gallivan. The suit was later removed to federal district court.

The court determined that the Sheriff's Department and County were one entity. When the case went to trial in September 2008, Hamilton did not appear and a default judgment was entered against him.

At trial, Cash argued that her injuries occurred due to the County's policy, practice and custom of allowing a lone, unsupervised male guard to supervise female prisoners. The jury agreed, and on Sept. 26, 2008 entered a verdict of liability against the county on that claim, awarding Cash \$500,000.

However, the jury rejected the claim that Sheriff Gallivan was negligent for failing to ensure the personal safety and welfare of jail prisoners. Gallivan contended that the rape was not foreseeable and was the result of a rogue guard who had been properly supervised and had shown no signs of that type of behavior prior to the incident.

In a March 10, 2009 post-trial order, the district court granted the defendants' motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). The court found that Cash had proved that the jail had a policy or practice of allowing unsupervised male guards to oversee female prisoners. However, she failed to show deliberate indifference by the defendants, as she did not present proof that they were aware of "prior incidents of similar violations" resulting from that policy, which would have placed them on notice that "the policy of allowing male guards to be alone and unsupervised with female inmates presented a substantial risk of harm to the plaintiff."

Consequently, final judgment was entered in favor of the County and Sheriff Gallivan. Both parties have since appealed to the Second Circuit. Cash is represented by Buffalo attorney Robert H. Perk and New York City attorney Derek S. Sells. See: *Cash v. County of Erie*, U.S.D.C. (W.D. New York), Case No. 1:04-cv-00182(M). 📖



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Habeas Hints: Traverse Motion Responses

by Kent A. Russell

This column is intended to provide “Habeas Hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is on habeas corpus practice under AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

POINTS AND AUTHORITIES IN SUPPORT OF THE TRAVERSE

Short of an Evidentiary Hearing, which is granted in very, very few habeas corpus cases, by far the most critical stage for the Petitioner on federal habeas corpus case is the filing of the Traverse and supporting documents, the most important of which is the “Points and Authorities (hereafter “Ps&As”) in Support of the Traverse”.

Ironically, the Habeas Corpus Rules do not even mention the word “Traverse”, referring to it instead as the “Reply”, and suggesting that it is optional rather than required. (See Habeas Rule 5(e) [“The petitioner *may* submit a reply to the respondent’s answer or other pleading within a time fixed by the judge.”].) Nevertheless, the local rules of almost every District Court use the phrase “Traverse”, and in the vast majority of cases, the Petition does make it to the Traverse stage, but no further, before it is dismissed. Therefore, the Traverse is absolutely essential to staying alive on habeas corpus, because it is only through the Traverse and supporting documents that the Petitioner can persuade the judge that his or her case is one of those few that should be granted an Evidentiary Hearing instead of being dismissed outright.

Procedurally speaking, the Traverse responds to the Attorney General’s Answer, and comes into play when: (1) The court determines that the Petition is in the proper format, does not contain any obviously unexhausted claims, and orders the Attorney General to file a response to the Petition; and (2) The Attorney General (“AG”) concludes that the Petition is not subject to a Motion to Dismiss based on some potentially fatal procedural defect (the most common being a statute of limitations violation or failure to exhaust all federal habeas corpus claims in the state’s highest court). Where both of these criteria have been met, the AG will

file an Answer and supporting Ps&As, and will use the latter to try and convince the District Court to dismiss the case on the basis that the petitioner has failed to comply with AEDPA, which requires a showing that the state court’s previous rejection of the petitioner’s habeas corpus claim(s) was either contrary to, or resulted from an unreasonable application of, U.S. Supreme Court law.

Simply stated, is the Petitioner’s job at the Traverse stage to rebut the showing made by the AG in the Answer, and to persuade the federal judge that the petitioner’s habeas case has enough merit that it is one of those few (less than 1%, statistically) that merits an Evidentiary Hearing rather than an outright dismissal. If the petitioner succeeds in doing so, counsel will be appointed, and the petitioner will get a chance at the hearing to prove, by a preponderance of the evidence (51% or more), that a violation of the Constitution occurred, and that this fundamental rights violation, more likely than not, affected the jury’s verdict. On the other hand, if the Traverse is unsuccessful, the Petition will be “dismissed with prejudice”, which means – barring the *very* unlikely prospect of a successful appeal – the end of the road on habeas corpus.

The actual “Answer” and “Traverse” themselves are nothing more than pleadings of a couple of pages in length, which use legal jargon to set forth the general contentions of the parties. Although it’s necessary to file the “Traverse” to respond to the contentions in the Answer, this is relatively easy to do (see, e.g., the sample form in my *California Habeas Handbook*), and there’s not much strategy involved in doing it. Here, instead, the focus is on the supporting Ps&As, which is where the parties lay out the legal and factual arguments that are either going to persuade the judge to order an Evidentiary Hearing or to permanently dismiss the case without any hearing.

Typically, the Ps&As which the AG files in support of the Answer will run around 20-25 pages in length, and will contain the following sections: (a) a Procedural History of the case (aka “Statement of the Case”, which summarizes the decisions made in all previous courts, starting with the trial court), (b)

a Statement of Facts (summarizing the facts which led to the conviction and sentence in the state court), (c) a Legal Argument section, and (d) a “Conclusion”. The Legal Argument section is the guts of the Ps&As, and it will usually start with a “Standard of Review” sub-section summarizing the general legal standards which guide the court in ruling on the Petition. This section will then go on to attack each of the petitioner’s habeas corpus claims on the merits, usually in separate sections bearing roman numerals, one for each claim. The Conclusion will wind up with a very brief statement of the relief that the AG is seeking, which in almost all cases is that the Petition be dismissed with prejudice because of the failure to state a claim that complies with AEDPA’s requirements.

In responding to the AG’s Ps&As with a Ps&As in support of the Traverse, I draw on briefing skills that I have honed over 35+ years of habeas and appellate practice in hundreds of cases. There are, however, some basic strategies which I use, and for you pro-pers who have already taken on the challenge of representing yourselves on habeas corpus, consider the following “Habeas Hints” as you draft your own documents.

Habeas Hints:

Remember, and keep reminding the court, that the purpose of the Traverse is merely to obtain an Evidentiary Hearing, not to win the case outright.

In modern times, virtually no habeas corpus Petition is ever successful unless the court first grants an Evidentiary Hearing. Under AEDPA, a hearing is required if: (1) the petitioner alleges facts which, *if true*, would entitle him to relief on habeas corpus; (2) the state court has not, after a full and fair hearing, reliably found the facts, and (3) the Petition does not consist solely of conclusory, unsworn statements unsupported by any proof. See, e.g., *Phillips v. Woodford*, 267 F. 3d 966, 973 (9th Cir. 2001); *Earp v. Oronski*, 431 F. 3d 1148, 1167 (9th Cir. 2005).

Working backward, #3 is satisfied so long as the Petition is supported by sworn declarations and/or admissible evidence – something that is not terribly hard to do, so long as the Petition and declarations are in the proper form. #2 is met when the

petitioner has requested a hearing in state court but the Petition was denied without one, which is what almost always happens nowadays.

That leaves #1, which is admittedly a demanding requirement. Note, however, that the italicized words require that, in deciding whether or not to grant an Evidentiary Hearing, the court must accept as “true” the facts that the petitioner has alleged. That means that, where there is a factual dispute which needs to be resolved in order for the court to rule on the validity of a habeas claim, the court *must* accept Petitioner’s version of the facts and cannot reject them, no matter how loudly the AG argues that they are “not credible”. This is a *much* easier standard to satisfy than the one which a petitioner would face if an Evidentiary Hearing had been granted, where the petitioner would have to actually convince the court, by the preponderance standard, that the facts *s/he* has alleged are *actually* true. Therefore, it is important to remind the court early and often that this lower standard is the *only* one the petitioner needs to meet on the Traverse. There are several times when that can and should be done: First, when the AG sets forth the “Standard of Re-

view”, normally at the start of the Legal Argument section of the AG’s Ps&As, the AG will always stress how hard it is to satisfy the AEDPA requirements, but will often gloss over or entirely omit the much more forgiving standard of review that governs whether or not to grant an Evidentiary Hearing. Hence, the petitioner should always emphasize that the much lesser standard applies at the Traverse stage, where the court must accept the Petitioner’s facts as true. Second, in the body of the Legal Argument section, whenever the AG has argued that the Petition has alleged facts which are “not credible”, or that witnesses declarations supporting the Petition are “unworthy of belief”, cite contrary facts from the habeas record, and then remind the court that, because credibility disputes can only be resolved at an Evidentiary Hearing, the AG’s arguments attacking the “credibility” of the Petition or the supporting witnesses are, in effect, arguments *against* granting the summary dismissal that the AG is seeking. Finally, in your Conclusion section, do not request simply that the court grant the Petition, but rather that the court grant an Evidentiary Hearing on the Petition and *then* grant the Petition.

Use rebuttal evidence to support the Traverse Ps&As.

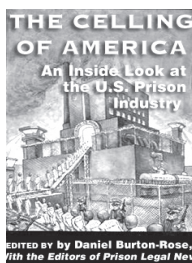
Although there is no specific rule allowing rebuttal evidence at the Traverse stage, there is no rule against it, and it is a basic principle of the Anglo-American legal system that a party is permitted a fair opportunity to challenge or rebut the contentions made by one’s opponent. Furthermore, the petitioner has the burden of proof on habeas corpus, and the party having that burden traditionally gets to go “first and last” (the Petition being first and the Traverse last). Therefore, I strongly recommend using rebuttal in support of the Traverse, which can be accomplished by submitting a set of counter-declarations entitled “Rebuttal Declarations in Support of Traverse”, which are then stapled, indexed, and filed as a separate document. Common examples of rebuttal declarations are the following: (a) a declaration from a lay witness whose original declaration was attacked in by the AG in the Answer Ps&As, or from an expert witness whose opinions or methodology were challenged by the AG; and (b) a declaration by the petitioner explaining or fleshing out trial testimony or statements

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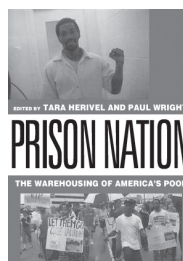
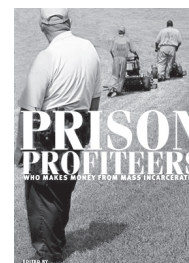
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Habeas Hints (cont.)

from a previous habeas declaration which the AG has attacked.

Be forewarned, however, about using rebuttal at the Traverse stage: As valuable as it can be, the AG may file a Motion to Strike some or all of it on the basis that it was not presented in the first instance to the state court, which is normally required by the exhaustion doctrine. If the AG does move to strike, respond by filing a timely Opposition (usually due within 10 days of the Motion to Strike unless an extension is timely requested) and consider one or more of the following counter-arguments: (a) The exhaustion principle is not violated by rebuttal evidence which merely "supplements" a habeas corpus claim that was previously exhausted, rather than altering the "fundamental nature" of that claim. See *Anderson v. Johnson*, 338 F. 3d 382, 388 (5th Cir. 2003), citing *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) [supplemental evidence that does not fundamentally alter the legal claim already considered by the state courts can be considered for the first time on federal habeas corpus]. (b) The Petition was summarily denied in the state court without the AG having to respond, so the need for the rebuttal evidence first arose in federal court, when the original evidence was challenged in the Answer. (c) The rebuttal is being offered to "expand the record", which is expressly permitted by the Habeas Corpus Rules. (See Habeas Rule 7, "Expanding the Record".)

Rebut every single argument that the AG makes in its Ps&As.

The Traverse is like "crunch time" in a playoff game: You have to step up now and block your opponent's moves, or you won't get another chance before the game is over. Therefore, do the best you can to rebut every single argument that the AG has made in its Ps&As. Factual arguments are rebutted by bringing forth contrary facts from the appellate record, the habeas record, and/or your rebuttal exhibits, and by then arguing that any factual disputes can only be resolved at an Evidentiary Hearing. Legal arguments are rebutted by first setting forth the most favorable law that you can find to support your position, and by then taking each contrary case the AG has cited and either demonstrating that the case is no longer good law, or that it is distinguishable factually from

your case (something that you can do with almost any case). ■

Kent A. Russell specializes in habeas corpus and post-conviction cases. He is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus and AEDPA. The latest printing of the 5th Edition (completely revised in

September, 2006, with seasonal revisions since then) can be purchased for \$39.99 (cost is all-inclusive for prisoners; others pay \$10 extra for postage and handling). Use the order form available on the website -- russellhabeas.com - or just send your address and check or money order to: Kent Russell, "Cal. Habeas Handbook", 2299 Sutter Street, San Francisco, CA 94115.

Sentencing Project Releases Report on Sentencing Policy and Practice

by Matt Clarke

In February 2009, The Sentencing Project released a report on developments in sentencing policies and practices in 2008. The report notes that, with 2.3 million prisoners, 5 million citizens on parole or probation and a worldwide economic crisis, sentencing reforms to reduce the prison population have gained in importance. This is easily understood: "since 1990, state corrections expenditures have grown by an average of 7.5% per year" making it "a substantial contributor to the budget problems faced in many states."

Arizona enacted SB 1476, allowing the Adult Probation Services of a county to retain up to 40% of the savings associated with a reduction in probation revocations. Kentucky, with HB 406, permitted certain prisoners within 180 days of release to be incarcerated at home, allowed persons incarcerated due to technical parole violations to receive credit for time spent on parole and made prisoners completing drug or education programs eligible for a 90-day earned discharge credit. With SB 2136, Mississippi reduced the percentage of a sentence a prisoner convicted of certain nonviolent crimes had to serve and, with HB 494, allowed compassionate parole for terminally-ill prisoners convicted of nonviolent crimes regardless of amount of time served.

Local initiatives passed in Fayetteville, Arkansas and Hawaii County, Hawaii declaring marijuana the lowest law enforcement priority. Louisiana's HB 292 allowed a drug conviction to be set aside and prosecution dismissed upon completion of a drug courts diversion program. Massachusetts voters overwhelmingly passed Question 2, decriminalizing possession of one ounce or less of marijuana and making it subject to a \$100 civil fine. New Jersey passed AB 1770, allowing special proba-

tion for some drug defendants otherwise ineligible for probation and permitting the reduction of fines for financial hardship and reduction of special probation times for exemplary progress. Vermont passed HB 859, expanding the Intensive Substance Abuse Program, community-based substance abuse services for persons under supervision and a authorizing a feasibility study of expanding drug courts statewide. It also allows the prison system to petition a court to reduce a prison sentence to probation for successful progress and limits probation officers' caseloads.

Connecticut (HB 5933), Iowa (HF 2393) and Illinois (SB 2476) passed legislation establishing methods to study the potential impact of legislation and policy changes on ethnic and racial minorities. Iowa also required grant applications to state agencies to include an impact assessment. Wisconsin's governor issued Executive Order 251 creating a Racial Disparities Oversight Commission, establishing methods to monitor criminal justice practices for disparate impact and directing the Office of Justice Administration to study the role of prosecutorial discretion in creating racial and ethnic disproportionalities.

Kentucky passed SJR 80 creating a subcommittee to study the efforts of other states in reforming their penal codes with the intent of reducing prison overcrowding by modifying the penal code's sentencing scheme for nonviolent crimes. South Carolina passed a similar act, S 144. With HB 4, Pennsylvania authorized sentencing courts to allow a conditional minimum sentence, accelerating the release of certain prisoners convicted of nonviolent crimes upon completion of certain programs.

Kentucky's governor rescinded essay submission, three character reference and

application fee requirements for citizens seeking voting rights restoration following a felony conviction. Colorado passed SB 66 allowing juveniles facing prosecution for certain crimes formerly requiring prosecution as an adult to plead guilty to a Class 2 felony and be incarcerated in the Youthful Offender System. Utah's HB 86 appropriated \$150,000 to be used for postsecondary education in prisons.

The report recommended that states reconsider overly harsh sentencing policies--including mandatory minimums, "truth-in-sentencing" and life without parole. It suggested the expansion of incarceration alternatives and sentencing diversion programs, including community-based treatment and training programs. It recommended the revision of parole and probation revocation procedures to include intermediate sanctions and other alternatives to incarceration. It said that parole eligibility criteria should be revised to reduce unnecessarily lengthy times served and provide incentives for program participation. It stated that states should expand eligibility for proven diversion and treatment programs and should especially reconsider restrictions excluding persons with violent, repeat or non-drug crimes. However these haphazard and piecemeal efforts are unlikely to change the steady exponential growth of the nation's prison population which require significant sentencing reform to put a dent in the prison and jail population. See: *The State of Sentencing 2008* by Ryan S. King, The Sentencing Project - February 2009. ■

Oregon Jail Guards Lose Access to Porn Sites

by Mark Wilson

Guards at the Multnomah County Detention Center (MCDC) couldn't be trusted to stay off Internet porn sites during work hours, so Sheriff Bob Skipper pulled the plug effective December 1, 2008.

Rampant, improper use of the Internet at the jail came to light in 2007 when a guard boasted on an online gaming site that he beat a prisoner without provocation, breaking his eye socket. An investigation revealed that the guard, David B. Thompson, had accessed the gaming website from his work computer more than 1,700 times during the previous eight months. [See: *PLN*, March 2009, p.25].

While examining a computer hard drive during an unrelated investigation, MCDC officials discovered that three guards had separately used the computer more than a year earlier to look at pornographic images, said Chief Deputy Ron Bishop, who manages the jail. An investigation is pending.

MCDC administrators recently began using new software to track Internet use by sheriff's department employees. According to Bishop, the software showed some people were spending far more time surfing the Internet for personal reasons than previously suspected. "Is it potentially impacting productivity? The answer is yes," he admitted.

Under a new policy that took effect last December, employees at the county's two jails will no longer be able to surf the Internet from work computers unless they submit a written request detailing why they need online access. Computers in most of the jail's monitoring stations and cell blocks will be disconnected.

Since taking office in July 2008 after his predecessor, Bernie Giusto, resigned under fire for ethics violations, Sheriff Skipper has vowed to crack down on employee misconduct that went unchecked on Giusto's watch. [See: *PLN*, Jan. 2008, p.12].

Sgt. Phil Anderchuk, president of the union that represents jail deputies, said that while misuse of the Internet had not been a widespread problem, he did not object to the new restrictions. "We've worked for decades without the Internet; it's not the end of the world," he stated. "There are times it's useful, but it's not necessary." ■

Source: *The Oregonian*

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Arkansas Sends Toxic Tech Trash to UNICOR Recycling Program

by Matt Clarke

A number of counties in Arkansas have been sending their toxic electronics waste, including broken computers and televisions, to Federal Prison Industries, Inc. (UNICOR), the industry program for the U.S. Bureau of Prisons (BOP).

UNICOR uses prisoners at a federal facility in Texarkana, Texas to process the electronics trash, which contains toxic materials such as mercury, cadmium and lead. The Pulaski County Solid Waste Management District (PCSWMD), which also collects electronics waste from Jefferson, Perry, Prairie, Saline and Wodruff counties, sent 217 tons to the UNICOR program last year. The nine-county Upper Southwest Solid Waste Management District sends 15 tons a year. Fayetteville sent its 17 tons of electronics waste to Washington County, which in turn shipped it to Texarkana.

Questions arose after a November 9, 2008 *60 Minutes* report revealed that some American companies had illegally exported electronics trash overseas, which was linked to soil pollution in Guiyu, China. Terry Whiteside, a UNICOR factory manager in Texarkana, refused to answer questions about whether UNICOR exported electronics waste, referring all inquiries to the BOP.

However, BOP spokesperson Felicia Ponce declined to answer questions on the subject. PCSWMD deputy director Carol Bevis said Whiteside had told her that UNICOR did not export electronics waste. UNICOR officials in Washington, D.C. also assured the Arkansas Department of Environmental Quality that the recycling program did not export waste to third-world countries. But if that's true, why won't UNICOR and the BOP answer questions from the media?

Jim Puckett, founder of Basel Action Network, a Seattle-based nonprofit watchdog group that works to prevent affluent nations from dumping their toxic waste in poor countries, said it was discomfiting that UNICOR may be involved in that practice. According to Puckett, even if UNICOR is not directly dumping toxic trash overseas, it is contributing to the problem.

UNICOR's use of cut-rate prisoner slave labor forces private waste management companies to seek radical

cost-cutting measures to remain competitive. This includes dumping waste overseas, which is less expensive. "We're trying to build up an industry to deal with it properly, but if they use cheap prison labor, it lowers the competition," said Puckett. "It lowers the whole bar for everyone." Further, UNICOR recycling programs have exposed both prisoners and prison employees to toxic materials. [See: *PLN*, Jan. 2009, p.1].

A large increase in electronics waste is expected in the near future as the nation transitions to digital television broadcasting and people discard their old T.V.s. [See: *PLN*, May 2009, p.37]. A 2007 Arkansas state law will prohibit landfills from accepting electronics trash beginning in

2010; unfortunately, this may result in a rush to dump electronics before that deadline. Some waste management facilities are already refusing to accept electronics trash while others are charging per-item fees.

Since 2006, Illinois, Michigan, Minnesota, New Jersey, Rhode Island and Washington have prohibited the use of prisoner labor in recycling programs in most cases, according to Barbara Kyle with the San Francisco-based Electronics TakeBack Coalition. UNICOR, however, still relies on prison recycling programs, which may or may not be dumping toxic electronics waste overseas. ■

Sources: *Arkansas Democrat-Gazette*, *Associated Press*

New Mexico Abolishes Death Penalty; Similar Efforts Fail in Other States

by David M. Reutter

"Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime," said New Mexico Gov. Bill Richardson, upon signing a bill to repeal the state's death penalty.

The repeal becomes effective July 1, 2009, but will not affect the two prisoners currently sitting on New Mexico's death row. For crimes committed after July 1, the maximum sentence will be life without the possibility of parole.

Gov. Richardson, who formerly supported capital punishment, said that signing the bill was the "most difficult decision" of his political life, but that "the potential for ... execution of an innocent person stands as anathema to our very sensibilities as human beings."

After visiting the state prison that houses the death chamber and touring the maximum security unit where life-sentenced prisoners will be housed under the new law, Richardson said, "My conclusion was those cells are something that may be worse than death. I believe this is a just punishment."

As of the day he signed the bill, Richardson's office had received 10,847

phone calls, e-mails and walk-in comments from people voicing their opinion on the legislation to abolish the death penalty, which passed with a Senate vote of 24-18 after clearing the House. Of those comments, 8,102 were in support of repealing the death penalty and 2,745 were against.

The American Civil Liberties Union applauded the governor's actions. "Gov. Richardson's decision today to sign the bill abolishing the death penalty in New Mexico is a historic step and a clear sign that the United States continues to make significant progress toward eradicating capital punishment once and for all," the ACLU said in a written statement. It continued by saying Richardson's "courageous and enlightened decision" sends a powerful message that Americans "need to take a hard look at our error-prone, discriminatory, and bankrupting system of capital punishment."

In addition to his concern that minorities are "over-represented in the prison population and on death row," Richardson said the death penalty "did not seem to me to be good moral leadership and good foreign policy."

Capital punishment is not used in 91 countries, and according to Amnesty International, 95% of all reported execu-

tions in 2008 occurred in just six nations: China, Iran, Pakistan, Iraq, Saudi Arabia and the United States. The U.N. has called for a worldwide moratorium on capital punishment. [See: *PLN*, Nov. 2008, p.27].

New Mexico joins 14 other states that do not impose the death penalty; it is only the second state to abolish executions since capital punishment was reinstated by the U.S. Supreme Court in 1976. New Jersey repealed its death penalty in December 2007. [See: *PLN*, June 2008, p.16].

Connecticut came close to being the third state in recent years to do away with capital punishment, when the House and Senate voted to repeal the death penalty. Governor M. Jodi Rell immediately vetoed the bill, on May 22, 2009.

"I appreciate the passionate beliefs of people on both sides of the death penalty debate. I fully understand the concerns and deeply held convictions of those who would like to see the death penalty abolished in Connecticut," Rell stated. "However, I also fully understand the anguish and outrage of the families of victims who believe, as I do, that there are certain crimes so heinous – so fundamentally revolting to our humanity – that the

death penalty is warranted."

State Rep. Michael Lawlor called Connecticut's death penalty "a false promise" and criticized Rell's immediate veto. The bill would have imposed life-without-parole sentences, and would not have applied to prisoners currently sentenced to death.

Several states, including Kansas, Maryland and Montana, are also considering abolishing capital punishment, partly due to financial reasons. The ACLU of Northern California, for example, estimates that California could save \$1 billion over five years by repealing the death penalty.

A Colorado bill to do away with capital punishment and use the savings to pay for cold-case investigations passed the state House by one vote last April, but was killed in the Senate on an 18-17 vote on May 6, 2009. Four Democrats crossed party lines to oppose the legislation.

Some critics contend that imposing life-without-parole sentences is simply trading one form of the death penalty for another, with lifers eventually dying in prison. On May 20, 2009, the Other Death Penalty Project (ODPP), a Lansing,

California-based group, mailed over 900 organizing kits to prisons nationwide. The ODPP "aims to end the sentence of life without the possibility of parole, which currently affects more than 33,000 prisoners in this country," and "plans to challenge those in the anti-death penalty movement who advocate for life without the possibility of parole as an alternative to the more obvious, traditional forms of execution." ■

Sources: *CNN, Associated Press, Hartford Courant, www.theotherdeathpenalty.org*

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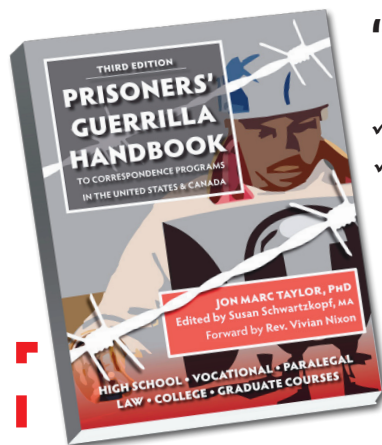
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\$4.6 Million Settlements in Death of Quadriplegic D.C. Prisoner

by David M. Reutter

When 27-year-old Jonathan Magbie entered the District of Columbia Jail to serve a 10-day sentence, he was a quadriplegic confined to a mouth-operated wheelchair. Four days later he was dead.

D.C. Superior Court Judge Judith E. Retchin sentenced Magbie to jail after he pleaded guilty to possession of marijuana. He had been arrested when D.C. police pulled his cousin's car over in April 2003, finding a gun and marijuana in Magbie's pockets. He had no prior criminal record.

Magbie, who was paralyzed from the neck down since being hit by a drunk driver at the age of 4, admitted he had bought the marijuana. Judge Retchin said she imposed the 10-day jail sentence, rather than the typical first-time offender sentence of probation, because Magbie stated he would continue smoking marijuana to alleviate the pain from his medical condition.

After Magbie was sentenced on September 20, 2004, he was taken to the D.C. Jail. While incarcerated at that facility his medical care was provided by a private contractor, Center for Correctional Health and Policy Studies, Inc. (CCHP).

When Magbie experienced respiratory problems, he was sent to the Greater Southeast Community Hospital (GSCH). At the request of CCHP, he was then transferred to the Correctional Treatment Facility (CTF), where CCHP's infirmary was located. Over the next two days Magbie "was denied access to food and water, locked in a room where he could not call for help and otherwise mistreated and neglected," according to a subsequent federal lawsuit filed by his estate.

The main problem was that Magbie required a ventilator to breathe at night, and CCHP did not have one available. When he again experienced respiratory problems on September 24, 2004, paramedics were called. They found him to be "unresponsive and very sweaty" and his underwear "was saturated with urine," according to a D.C. inspector's report.

A trip to the hospital was delayed by about 30 minutes because jail staff insisted on proper paperwork and a blood sugar test. Upon his arrival at the hospital, Magbie was found to be "acutely ill." He died later that night. An autopsy revealed the cause of

death was a "displaced tracheotomy tube, which resulted in oxygen failure."

The defendants in the federal lawsuit blamed each other – the hospital blamed the jail staff, while the jail blamed the hospital. In addition to the District of Columbia, the defendants included GSHP, CCHP, Corrections Corp. of America (which operated the CTF), and two doctors.

On April 25, 2007, D.C. officials agreed to pay \$1 million to Magbie's estate, which was represented by his mother, Mary Scott. The District also made changes in how the jail handles prisoners with disabilities or medical issues.

"The family's concern was to make certain that, to the extent anyone can

prevent it, that this terrible type of event never happens again," said Elizabeth Alexander, an ACLU attorney who represented Scott. "A series of people dealt with this young man and every single place where something could go wrong, it did go wrong."

Additional, undisclosed settlements were reached with CCHP, GSHP and the other defendants, with the last settlements occurring in November 2008. The combined settlements, including the payment from the District of Columbia, totaled \$4.6 million. See: *Scott v. District of Columbia*, U.S.D.C. (D. DC), Case No. 1:05-cv-01853-RWR. ■

Additional source: *Washington Post*

FBI Arrests Former Prisoner Indicted for Hacking Massachusetts Jail Computer

On November 5, 2008, the FBI arrested Francis G. Janosko, 42, for hacking into a computer at the Plymouth County Correctional Facility (PCCF) while he was incarcerated at the Massachusetts jail.

A previously-sealed indictment was handed down a week before the arrest; however, the FBI was unable to apprehend Janosko because he had been on the run since his release on bond in May 2008. He was caught after the FBI traced an e-mail Janosko sent to a jail employee, which led to his capture in North Carolina.

The federal indictment charged Janosko with one count of aggravated identity theft and one count of intentional damage to a protected computer. He was accused of exploiting "a previously unknown idiosyncrasy" in legal research software that jail prisoners were allowed to use.

The software was supposed to limit prisoners' computer access to legal research only, but Janosko was able to access the Internet and other programs on the jail's network from October 1, 2006 through February 7, 2007. He was caught when he attempted to access "an important jail management program" using a bogus username and password.

Janosko allegedly downloaded two short video clips, digital photographs of two jail employees and two prisoners,

and an aerial photo of the jail. He also accessed a directory that contained data on 1,100 jail employees, using it to obtain information about six PCCF workers. According to the indictment, the directory included the names, home addresses, home phone numbers, dates of birth, past employment histories and Social Security numbers of the employees.

Janosko reportedly shared this information with other jail prisoners. However, Plymouth County Sheriff Joseph McDonald stated the directory did not contain the employees' Social Security numbers.

Janosko faces up to 10 years in prison and a \$250,000 fine. He was being held at PCCF following his arrest by Plymouth police for using his cell phone to take pictures of a girl in the local library. This was a violation of his probation on child pornography charges, which stemmed from a December 2005 arrest after authorities found nude pictures of children on his cell phone. Further, as a condition of his probation he was ordered not to use computers.

Janosko has not yet gone to trial on the computer hacking and identity theft charges. See: *United States v. Janosko*, U.S.D.C. (D. Mass.), Case No. 1:08-cr-10323-GAO. ■

Sources: *Boston Globe*, www.wickedlocal.com, www.pcworld.com

Strip-Searches Iowa Bush Protesters Awarded Damages at Trial, Re-Trial

by Matt Clarke

On June 4, 2008, a federal jury in Iowa awarded \$750,000 to two political protesters who were arrested at the direction of the Secret Service, taken to jail and unlawfully strip-searched. After the court ordered another trial, a second jury awarded damages in the reduced amount of \$55,804.

Alice McCabe and Christine Nelson, both retired school teachers, arrived at Noelridge Park in Cedar Rapids, Iowa on September 3, 2004 to attend a protest. The Republicans had rented the park for the day for a campaign event featuring President Bush. Access was strictly controlled and limited to invited ticket holders.

McCabe and Nelson were wearing anti-Bush buttons and carrying a small sign; they wandered around the perimeter of the event, looking for the protest. There they encountered Secret Service Agent Bruce Macaulay. Macaulay told them to leave the park, and had them arrested when they started to comply. McCabe and Nelson claimed they were singled out for their political opinions because there were many unticketed Republican supporters milling about the perimeter of the park who were not arrested.

McCabe and Nelson were taken to the Linn County Jail. Although they were only charged with misdemeanor trespass, deputy jailer Michelle Mais subjected them to a strip search with visual body cavity inspection. The charges were later dropped.

They filed a civil rights suit in federal court alleging their constitutional rights were violated when they were arrested for their political beliefs and strip searched at the jail. Prior to trial, the court held that the strip search was unconstitutional.

At trial, Macaulay testified that he had arrested McCabe and Nelson because they were being unruly and had refused multiple orders to leave the park. The jury found in favor of Macaulay, but awarded \$250,000 to McCabe and \$500,000 to Nelson in damages against Mais on the unlawful strip search claim.

Judgment was entered for the remaining defendants, including the United States and the Secret Service. On July 22, 2008 the district court awarded \$13,314.85 in costs for the defendants who prevailed at trial, against McCabe and Nelson.

On October 2, 2008, the court granted

the defendants' motion for a new trial and vacated the \$750,000 jury award. The plaintiffs were ordered to accept a remittitur in the amount of \$75,000 (\$25,000 for McCabe and \$50,000 for Nelson) or retry the case. The plaintiffs rejected the remittitur and another trial was held in late October 2008.

The second jury awarded damages against Mais in the amount of \$10,002 for McCabe and \$45,802 for Nelson, for a total of \$55,804. On March 16, 2009, the district court granted attorney fees and costs to the plaintiffs in the total amount of \$34,025.03, though their attorneys had requested \$117,249.37. See: *McCabe v. Mais*, 2009 U.S. Dist. LEXIS 20717 (N.D. Iowa, Mar. 16, 2009)

McCabe and Nelson have since appealed the court's rulings, including the order granting a new trial and the order on attorney fees. They are represented by Cedar Rapids attorneys David O'Brien and Matthew J. Reilly. See: *McCabe v. Mais*, U.S.D.C. (N.D. Iowa), Case No. 1:05-cv-00073-LRR.

Separately, it was reported in August 2008 that McCabe and Nelson received a \$50,000 settlement from the state. The Iowa State Appeal Board approved the settlement, which involved claims against two state troopers who participated in their arrest. ■

Additional sources: *Federal Jury Verdict Reporter*, www.rawstory.com

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Positive Correlation between Mental Illness and Prison Victimization

by Jimmy Franks

In September 2008, the Center for Behavioral Health Services & Criminal Justice Research (the Center) published its Policy Brief regarding a recent survey conducted to determine the quality of life for prisoners in New Jersey's Department of Corrections (DOC). The survey was funded by the Prison Rape Elimination Act of 2003 and authored by Rutgers University Professors Nancy Wolf, Ph.D., and Jane Seigal, Ph.D., along with Center statistician, Jing Shi, M.S. A random sample of approximately 7,500 male and female adult prisoners was selected from 13 male institutions and one female institution. The purpose of the survey was to determine the prevalence of physical and sexual victimization in New Jersey prisons and their correlation with mental illness. Although there is an across-the-board correlation between mental illness and abuse, the survey concluded "physical victimization was more common than sexual victimization among both male and female inmates."

One disturbing trend uncovered in this study was the increased prevalence of victimization among prisoner who reported a history of sexual or physical abuse prior to age 18. In point of fact, both male and female prisoners who reported a pre-adult history of sexual victimization were shown to have a two to four times greater likelihood of being similarly victimized in prison compared to prisoners without the history of abuse.

Specific mental illnesses were also found to predict specific types of victimization. For instance, male prisoners previously treated for depression, Post Traumatic Stress Disorder or anxiety were shown to be at a greater risk of being sexually assaulted by other prisoners. On the other hand, those previously treated for schizophrenia or bipolar disorder may experience inappropriate sexual contact but not sexual assault.

Overall, this study succeeded in shining a much-needed light on the plight of many mentally ill prisoners in New Jersey and, by inference, all other states. It really should come as no surprise that people who are victims of abuse in their pre-adult years are more likely to be victimized in prison. What some may consider a weakness in this study may be found in the relatively small number of female prison-

ers surveyed and whether they provide an accurate random sample representative of the total female prison population.

However, even if the results are slightly skewed, there should be no doubt as to the positive correlation between mental illness and victimization in prison. In light of this study, New Jersey's DOC enhanced its guard training to include new curricula on victimization. Additionally, a "zero tolerance policy" regarding prison rape was instituted, as well as a prisoner education program geared toward preventing, reporting and treating sexual

victimization. If similar programs and initiatives were to be mandated in prisons nationwide, it would certainly lessen the incidence of victimization for our prisons' most vulnerable residents, the mentally ill. Allowing current abusive trends to continue and even worsen will negatively impact not only the prison environment but society at large as the predators who commit the violence are set free. ■

Source: *Center for Behavioral Health Services & Criminal Justice Research, Policy Brief - Victimization Inside Prisons.*

Santa Cruz County, Arizona Pays \$3 Million in Strip Search Suit

by Jimmy Franks

On November 25, 2008, following two days of negotiation mediated by retired Pima County, Arizona Superior Court Judge, Honorable Lawrence Fleishman, the parties involved in a Class Action complaint regarding unconstitutional strip searches reached a satisfactory settlement, which now is subject to approval by an Arizona district court.

The complaint was filed pursuant to 42 U.S.C. §1983 on February 25, 2008 by George Victor Garcia against Santa Cruz County, Santa Cruz County Sheriff Tony Estrada and a number of Sheriff's Deputies. At issue was the alleged Fourth Amendment violations in connection with the County's practice of strip searching pre-arraignment arrestees "for whom there was no reasonable suspicion that they may be attempting to conceal contraband or weapons, and the strip searches were conducted in an area where others, not participating in the searches, could observe the person being strip searched and who included members of the opposite sex." The Class Members represented in this action include all arrestees who were booked into any Santa Cruz County detention facility between February 25, 2006 and August 26, 2008 that were strip searched prior to arraignment.

The terms of the settlement leave Santa Cruz County responsible for a maximum payment of \$3,187,300. Of

that amount, \$725,000 is allocated for attorney's fees and costs to be paid to Class Counsel Mark E. Merin and the Law Office of Mark E. Merin of Sacramento, California, Andrew Schwartz of Casper, Meadows, Schwartz, & Cook in Walnut Springs, California and Robert Rothstein of Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg, & Bivenvenu, LLP in Santa Fe, New Mexico. An additional \$250,000 is allotted for costs of claims administration, including Class notifications and processing of claims. George Garcia, the Representative Plaintiff, is to be compensated with \$50,000, and the balance of the settlement, \$2,162,300, is to pay verified claims to Class Members.

The individual Class Member payments will vary depending on a number of factors. For instance, although some Class Members, depending on their crime and specific circumstances at the time of their booking and strip search, will be entitled to receive \$15. Others may receive up to \$70. And still others, as much as \$3,500. Added to this amount, comes what are referred to as "Enhancements," which consist of an additional \$250 payment for EACH of three possible conditions: (1) they were under 21 or over 60 at the time of the qualifying strip search; (2) they had a physical or mental disability at the time of the strip search; (3) they were pregnant at the time of the strip search. Lastly, Class Members who are able to

provide records or reports from a licensed professional establishing that he sustained and received treatment for a physical, emotional or psychological injury caused by the strip search, will be entitled to an additional award of not less than \$1000 and not more than \$5000.

All these terms are subject to court approval, and the specific amounts will be adjusted as necessary in order to provide proportional payments to each verified Class Member and to insure the total amount does not exceed \$2,162,300. The bar date for anyone wishing to join the action was May 16, 2009. All claim forms must be post-marked by May 16, 2009 in order to qualify for any possible payment. Anyone who believes he is a Class Member and wishes to obtain a claim form is urged to write *Garcia v. County of Santa Cruz Strip Search Class Action*, c/o Claims Administrators, P.O. Box 8060, San Rafael, California 94912-8060. Or contact the Law Office of Mark E. Merin, 2001 P Street, Ste. 100, Sacramento, California 95811, (916) 443-6911, email: office@markmerin.com.

See: *Garcia v. Santa Cruz County*, U.S.D.C.-AZ, Tucson, #cv-08-00139-TUC-RCC. Stipulation of Settlement

\$10,000 Verdict in Sexual Assault by Virginia Guard

On October 20, 2008, a Virginia federal jury awarded a former Pittsylvania County Jail prisoner \$10,000 in a lawsuit that claimed a guard had "sexually molested, harassed, and assaulted" her. The suit alleged that jail guard Hank Hazelwood violated Sheril Ann Carr's Eighth and Fourteenth Amendment rights while she was a prisoner in 2006.

Carr testified that there were other incidents, but they were dropped from the lawsuit due to the statute of limitations. The issue at trial concerned how Hazelwood, a sergeant, took Carr into an office to make a telephone call. As she used the phone, Hazelwood groped her so forcefully that she later urinated blood. Another woman's videotaped deposition was admitted at trial. She testified to a similar incident involving Hazelwood.

Both women's complaints were dismissed by Sheriff's investigators because they could not be substantiated. Carr studied the law and filed her § 1983 com-

plaint pro se; she was later helped by a new program launched by the federal courts and the University of Virginia School of Law. The program uses law students to assist attorneys who agree to take cases pro bono.

Prior to trial, the district court had adopted a magistrate's recommendation to deny Hazelwood's motion for summary judgment, finding the defendants had waived the affirmative defense of failure to exhaust and Carr had in fact exhausted her available administrative remedies. See: *Carr v. Hazelwood*, 2008 U.S. Dist. LEXIS 88672 (W.D. Va., Nov. 3, 2008).

Taking only 40 minutes, the jury found for Carr despite Hazelwood's testimony that he did not molest her. Following the jury's \$10,000 verdict, Carr's counsel moved for attorney fees and was awarded \$15,000 on December 8, 2008. Carr was represented by George P. Sibley III and Harry M. Johnson III of the Hunton & Williams, LLP law firm. See: *Carr v. Hazelwood*, U.S.D.C. (W.D. Va.), Case No. 7:07-cv-00001.

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Bureau of Justice Publishes Report on Sexual Misconduct at Juvenile Facilities

The Bureau of Justice Statistics (BJS) released a report on the prevalence of sexual misconduct and violence at juvenile residential facilities. The report, entitled *Sexual Violence Reported by Juvenile Correctional Authorities 2005-06*, is in accordance with the Prison Rape Elimination Act of 2003 (PREA). The PREA requires the BJS to collect data on the incidence and prevalence of sexual violence and misconduct in adult and juvenile correctional facilities nationwide.

The BJS conducted the 2005 Survey of Sexual Violence (SSV) between January 1 and June 15, 2006 and the 2006 SSV between January 1 and June 31, 2007. The surveys included state juvenile correctional systems and local or private juvenile facilities and were designed to measure the number of youth-on-youth (YOY) sexual violence as well as staff-on-youth (SOY) sexual misconduct and harassment. All fifty states plus the District of Columbia reported for state facilities and a representative sample was drawn from the local and privately operated facilities. Only three states – Montana, New Hampshire and Wyoming – reported no allegations at all.

Each year, more than 2,000 allegations are recorded at juvenile facilities. About 57% of reported allegations were YOY and the remaining 43% were SOY. For both 2005 and 2006 there were approximately 4,072 allegations, 732 of which were eventually substantiated. All allegations were classified as one of the following four categories: substantiated, unsubstantiated, unfounded or investigation ongoing. Substantiated incidents are generally higher in juvenile facilities than in adult prisons and jails. According to the report, the youth rate was 3 substantiated incidents per 1,000 juveniles and adults were less than one per 1,000.

Victims of YOY incidents were more likely to be males while victims of SOYs were mostly females. According to the report, around 55% of SOY perpetrators were males between the ages of 25 and 290. Among staff perpetrators 44% were black and 37% were white while only 19% were Hispanic. More than a quarter of male SOY perpetrators had less than 6 months tenure. While nearly half of female staff perpetrators had less than 6 months on the job.

Most youth perpetrators received punishment for their actions with 63% facing legal ramifications. Others were punished internally by the individual facility. While local and private facilities fired 87% of staff involved outright, state-run programs only fired 35%. A total of 99% of staff in local and private and 75% in state facilities lost their jobs due to individuals resigning in lieu of being discharged.

According to the report, the BJS has developed a new system to gather information about youth sexual misconduct

directly from the juvenile victims. The new method, called the National Survey of Youth in Custody, will utilize anonymous, self-administered surveys using audio computer-assisted interview procedures. The BJS hopes youths will feel more comfortable using the new system, thereby allowing for more accurate reporting on this sensitive subject.

Sources: *Sexual Violence Reported by Juvenile Correctional Authorities, 2005 – 2006*, Bureau of Justice Statistics. This report is available on PLN's website. 📄

Report Says Unfinished Prison Project Is Single Greatest Iraq Reconstruction Failure

by Matt Clarke

On February 2, 2009, Stuart W. Bowen, Special Inspector General for Iraq Reconstruction, released a report on the United States' appropriation of \$50 billion for rebuilding efforts in Iraq. The report, titled *Hard Lessons: The Iraq Reconstruction Experience*, blamed many of the problems encountered in reconstruction projects on pre-war planning that was "blinker and disjointed," and on poor security in the post-war phase.

"Why was an extensive rebuilding plan carried out in a gravely unstable security environment?" asked Bowen, who served under former President George W. Bush in various capacities. "This question underscores an overarching hard lesson from Iraq: Beware of pursuing large-scale reconstruction programs while significant conflict continues."

Although there was a fragile improvement in the security environment in Iraq, the report criticized the U.S. occupation forces for having "neither the established structure nor the necessary resources to carry out the reconstruction mission it took on in mid-2003." The report also noted that "U.S. reconstruction managers were overwhelmed by the challenges of building in a war zone" and hampered by "weak unity of command and inconsistent unity of effort," which resulted in a high rate of personnel turnover and lack of co-operation among government agencies.

Another costly error was the disbanding of the Iraqi police force and military,

and the de-Baathification of the Iraqi government. This meant that the U.S. occupation "had to build entirely new Iraqi security forces, a task that would ultimately consume more than half of all U.S.-appropriated reconstruction dollars."

While noting that incidents of out-and-out fraud constituted a relatively low percentage of the funds spent on reconstruction, there were some "egregious examples of fraud" which, along with other waste, "grossly overburdened" rebuilding efforts.

The report especially criticized the "overuse of cost-plus contracts, high contractor overhead expenses, excessive contractor award fees and unacceptable program and project delays," which "contributed to a significant waste of taxpayers' dollars." An estimated \$4 billion in Iraq reconstruction funds was deemed "waste."

The report singled out a prison project in Khan Bani Saad as "perhaps the single greatest project failure in the U.S. reconstruction program." The U.S. spent \$40 million on the maximum-security prison, but has nothing to show for it except a "skeletal, half-built" shell that "will probably never house an inmate."

According to the report, "poor security and weak subcontractor performance" resulted in suspension of the prison construction project, which is unlikely to ever be completed. "It's a bit of a monument in the desert right now because it's not going to be used as a prison," Bowen stated.

The 1,800-bed prison project began in March 2004 when the U.S. Army Corps of Engineers awarded the contract to Pasadena, California-based Parsons, a construction and engineering company. The prison was supposed to be finished in November 2005. After numerous delays, work was suspended in June 2006 due to "continued schedule slips ... and massive cost overruns." Parsons said the project was too dangerous to complete due to high levels of violence in the region.

Subsequent efforts to restart the project were unsuccessful, and the unfinished prison was eventually turned over to Iraq's Justice Ministry. Due to substandard construction, including crumbling concrete and the improper use of reinforcement bars, some parts of the facility will have to be demolished.

Sayyed Rasoul al-Husseini, head of the Khan Bani Saad municipal council, described the failed prison project – which would have created 1,200 jobs – as "a big monster that's swallowed money and hopes." Which, ironically, is also an apt description of the penal system in the United States. ■

Sources: *www.cnn.com*, *Associated Press*

Ohio Limits Electronic Monitoring to Only Those Who Can Pay

If you're convicted in Ohio and can afford to pay, you may be able to obtain release on electronic monitoring. If not, you can serve your time in the Corrections Center of Northwest Ohio (CCNO). That is the new policy adopted by CCNO to deal with a projected \$200,000 budget shortfall.

"We formalized that we need only paying customers to get through this financial crisis," said Jim Dennis, CCNO's executive director. "The judges cooperated with us and started giving us people that could pay, which severely limited the debt we were going to have."

The electronic monitoring program allows people convicted of misdemeanors and minor felonies to work while they serve their sentences. The program had 1,203 participants enrolled in 2008. The problem cited by CCNO is that about one-quarter of those persons were unable to pay the \$10 per day cost for electronic monitoring or the \$15.50 per day cost for GPS monitoring.

The program has a 2009 budget of

\$460,000, of which \$228,000 is from state grants and \$232,000 is projected to be paid by the participants. That budget is predicated on a monthly average of 100 to 120 people enrolled in the program. Currently 87 people are in the electronic monitoring program, and of those only three are unable to pay.

With fewer people in the program than expected, the revenue will be less. "We realize that this clientele is traditionally in dire economic straits," said Dennis. "We need to increase the numbers of paying customers to be able to make budget."

Aside from the obvious injustice of only allowing those who can afford to pay to participate in the release program, the decision to incarcerate people who can't pay, at a cost of about \$70 per day, makes no fiscal sense in light of the much lower cost of electronic monitoring. ■

Source: *Toledo Blade*



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Miami's Sex Offender Bridge Encampment Continues to Grow

by David M. Reutter

Population: 52. That's how many sex offenders have been forced to live under the Julia Tuttle Causeway in Miami, Florida as of March 2009. In late 2007, the population was only 19. [See: *PLN*, June 2008, p.1].

With city and county laws creating restricted residency zones, the number of sex offenders who reside under the causeway bridge is bound to continue growing. The strict laws forbid sex offenders from living within 2,000 or 2,500 feet of schools, day cares, parks, playgrounds and school bus stops. The bridge is the only place available for many released sex offenders in Dade county.

"We have talked to them, they demonstrate that they're looking, but they just haven't been able to find anything. There's so many restrictions in that area of Florida," remarked Jo Ellyn Rackleff, a Florida Dept. of Corrections spokeswoman. "It's just a situation that's unsolvable at this point."

Officially, the state of Florida does not require sex offenders who have completed their sentences to live in such squalid conditions, but parole officers tell them they can either stay under the bridge or return to prison. "They check us here every evening. We've got to be here or we go back to prison," said a sex offender identified as M.C., who has been living under the Julia Tuttle Causeway for two years.

There are 15 tents, three mobile homes, two shacks, a van and a few cars jammed under the bridge as makeshift homes. The residents have a toilet made of scrap wood, a plastic bucket and a tattered sheet. To keep their electronic monitoring bracelets charged, they pooled their money to buy a \$300 generator. "They throw us under here and just hope that we can do something ourselves," said resident Patrick Wiese, 47.

With the bridge encampment becoming crowded, the offenders who live there have begun to spill out onto the grassy areas where they can be seen by passing traffic. As a result, five Miami cops arrived on January 29, 2009 and told them to remove the shanty homes that extend beyond the causeway or face trespassing charges.

One public health advocate said the failure to provide the bridge residents with a dumpster, sanitary toilet or running

water, while exposing them to the weather, creates a haven for communicable diseases. "It's horrible. It makes no sense," stated Dr. Joe Greer. "Not only does that camp endanger the public, but it's inhumane."

The makeshift camp may endanger the public in other ways, too. Without a stable living situation and an opportunity to reintegrate into society, homeless sex offenders who are forced to live under the bridge may be at higher risk of re-

offending. On March 2, 2009, a former bridge resident who had left the camp was charged with molesting a 7-year-old child while visiting a friend's house.

Ironically, the harsh residency restrictions imposed on sex offenders may, in this case, have created another sex abuse victim. ■

Sources: *Miami Herald*, *Miami New Times*

BOP Failed to Protect Female Prisoner Informant from Rape, Sexual Abuse by Guards

by Brandon Sample

The federal Bureau of Prisons (BOP) was "woefully deficient" in failing to protect a female prisoner from sexual abuse by BOP guards, U.S. District Court Judge Cecilia M. Altonaga concluded in November 2008, following a bench trial in a suit filed under the Federal Tort Claims Act (FTCA). Ultimately, though, the BOP escaped liability as the prisoner's claims were barred by the statute of limitations.

A 34-year-old lesbian prisoner informant, identified in court documents as "S.R.," made multiple trips from the Federal Correctional Institution in Danbury, Connecticut to the Federal Detention Center (FDC) in Miami, Florida between 2002 and 2005 to testify on behalf of the government at drug-trafficking trials. Her stays at FDC-Miami were less than pleasant: S.R. claimed she was sexually assaulted and raped by four BOP guards—Damion Cole, Charles Jenkins, Antonio Echeverria and Isiah Pollock III.

Jenkins, Echeverria and Pollock, for example, would not let S.R. use the telephone, obtain clean clothes or read the newspaper until she masturbated for them, placed objects inside her vagina and allowed them to digitally penetrate her. Cole, on the other hand, reportedly raped and sodomized S.R. over a dozen times.

In December 2003, a year after the abuse began, S.R. notified the BOP of the sexual assaults. Additionally, she wrote a letter to Assistant U.S. Attorney Karen Rochlin, stating that the sexual assaults were "embarrassing, degrading and I don't want to go through this anymore."

S.R. requested to leave FDC-Miami "as soon as possible," and indicated her desire to "press charges" against the guards who had "violated" her.

Not much came of S.R.'s complaints, though. The BOP wrote S.R. off as being "mentally ill," as she had a history of mental health issues and was on medication. A Supervisory Deputy U.S. Marshal called her allegations "fabricated." The Justice Department's Office of the Inspector General closed its investigation into S.R.'s complaints in 2005 after it could not substantiate her accusations. All the while she was testifying against other criminal defendants on behalf of the same government that found her not to be a credible witness!

Amazingly, just one month after being interviewed by the Inspector General's Office, S.R. was again transferred to FDC Miami. This time her testimony was requested in the criminal prosecution of Cole for sexually abusing a different prisoner. After Cole learned that S.R. was prepared to testify against him, he pled guilty. In a deposition, FBI agent James Kaelin stated he had enough evidence to charge Cole with sexually assaulting S.R., too.

"The system took advantage of me," S.R. told the *Miami Herald* in a phone interview. "They knew when to pull me to testify. I was a very credible witness. I was competent. But then when I needed them, I was mentally ill. I was incompetent."

After her release from federal custody in June 2006, S.R. obtained counsel and sued the federal government along with

Echeverria, Pollock, Cole and Jenkins. She settled with three of the guards but her remaining claims against the United States went to trial.

Following a bench trial in July 2008, Judge Altonaga concluded that "S.R. was sexually abused on numerous occasions by the individual defendants. The BOP and FDC-Miami did have notice of the illegal conduct taking place, and were woefully deficient in addressing it and giving S.R. protection."

However, because S.R. had failed to file a tort claim within two years of the sexual abuse, her negligence claims against the government were barred by the statute of limitations; further, she was not entitled to equitable tolling of the limitations period. "[R]egrettably, S.R. has not shown that extraordinary circumstances both beyond her control and unavoidable even with diligence existed, entitling her to an equitable tolling of the jurisdictional requirements of the FTCA," the court stated. See: *S.R. v. United States*, U.S.D.C. (S.D. Fla.), Case No. 1:07-cv-20648-CMA; 2008 U.S. Dist. LEXIS 89741 (S.D. Fla., Nov. 5, 2008).

"On one hand, the federal prison system doesn't have the proper mechanisms to report and investigate sexual assaults by corrections officers against inmates," said Matthew Sarelson, S.R.'s attorney. "Then you have the U.S. Attorney's Office dropping the ball. You had assistant federal prosecutors who knew what was going on yet did nothing. That is troubling."

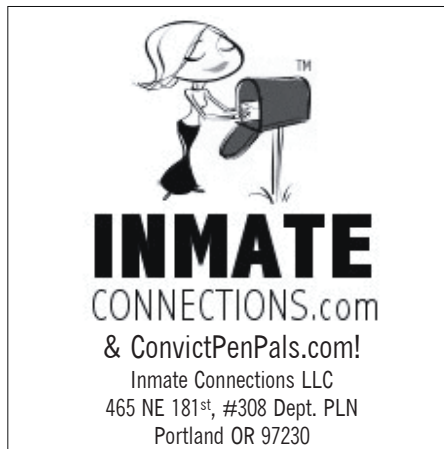
Cole was sentenced to one year in prison and one year supervised release on the sexual assault charge involving another female prisoner. The U.S. Attorney's Office did not prosecute him for raping S.R. Echeverria continues to deny

sexually abusing S.R. In 2006, he lost his job and was sent to federal prison after pleading guilty to selling a gun to a convicted felon who was a police informant. Pollock resigned from the BOP in 2003, citing personal reasons; he was under investigation for misconduct at the time. Jenkins is still employed with the BOP.

"Closure for me is seeing all four of those men who sexually abused me punished or dead," said S.R., who has been slowly rebuilding her life after her release.

This is just one prisoner's experience with rape and sexual assault by prison employees, and unfortunately it is neither unusual nor uncommon. According to a report by the U.S. Dept. of Justice released last year, an estimated 38,600 state and federal prisoners self-reported being sexually victimized by prison staff in 2007. Sexual abuse by prison and jail officials was the subject of *PLN's* May 2009 cover story. ■

Sources: *Miami New Times*, *Miami Herald*



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\$3,200 Awarded to Indiana Jail Prisoner for Negligent Medical Care

On December 2, 2008, a federal jury awarded Richard Petrig, a former prisoner, \$3,200 for negligent medical care.

Petrig was attacked by his cellmate while incarcerated at the Posey County Jail in Indiana. After the attack, Petrig told jail officials that he needed help. He was seen by a nurse who gave him ice and Tylenol. The pain continued, and Petrig continued to request medical care. He was given more ice and Tylenol. Some twenty-seven hours after the attack,

Petrig was finally taken to a hospital where he was diagnosed as having a lacerated spleen. Emergency surgery was performed and his condition improved.

Petrig sued jail officials alleging negligence and Eighth Amendment violations. He argued that the defendants were deliberately indifferent to his medical needs and had acted negligently in failing to timely treat his condition. He also cited evidence of a custom of indifference at the jail. The defendants contended they were responsive to Petrig's medical complaints,

and denied the existence of a custom of indifference.

The jury found for Petrig on his negligence claims and awarded him \$3,200, but concluded the defendants did not violate the Eighth Amendment. On January 8, 2009, the district court taxed costs against the defendants in the amount of \$1,574.64. Petrig was represented by William D. Nesmith of Dunlap & Nesmith LLP, an Evansville, Indiana law firm. See: *Petrig v. Folz*, U.S.D.C. (S.D. Ind.), Case No. 3:07-cv-00080-WGH-RLY. ■

New York Prisoner Awarded \$5,000 for Assault by Cellmate

A New York Claims Court awarded a prisoner \$5,000 for being assaulted by his cellmate. The Court found that prison officials knew or should have known that a threat existed and they failed to act to prevent it.

While incarcerated at the Upstate Correctional Facility, prisoner Michael Gonzalez was assaulted by his cellmate, Carlos Gonzales. The men are not related. The August 3, 2001 assault resulted in Michael receiving a scar on his chin.

Shortly after he was received in July 2001 at Upstate, Michael was double-bunked in a cell with Carlos. From the start, there were problems. Michael testified at the May 8, 2008 videoconference trial that Carlos "came in aggressive. He had a set way of how things were going to be as far as shower schedules, cleaning schedules. And if there was any disagreement between us, he got upset, argumentative, and aggressive. He would berate me verbally – a lot of belittlement – we argued a lot."

In mid-July, Michael wrote a letter to Upstate's superintendent, asserting Carlos tried to start fights with him and requesting another cellmate. That letter was referred to Captain Racette, who responded on August 10 that a sergeant had investigated the matter and that it appeared Carlos and Michael were getting along, so a change was not necessary. Ironically, that reply came a week after Michael was assaulted.

On the day of the assault, Carlos had a misbehavior report for writing a letter that threatened the superintendent. That letter advised that Carlos had a bad temper, could not be double-bunked with other prisoners and that if he was not moved to a single cell, he was "going to

do what I have to do."

When Carlos came in from the hearing, Michael could see that Carlos was "anxious and irate and carrying on, and I felt the problem was reaching a head." Michael asked guard Jonathon Price to take action to move him. Later that evening, Michael was talking to Price about the matter when Carlos came up and hit him in the back of the head. After Michael fell to the ground, Carlos continued to punch him.

It was later learned that Carlos had numerous prior assault and violence vio-

lations in prison. Just a month before his assault of Michael, Carlos received one SHU confinement for assaulting his previous cellmate. Carlos had been involved in five cell fights and moved six times because "he feels he can't be double-bunked."

On October 2, 2008, the Court entered an order holding the state of New York liable for the assault and it awarded Michael \$5,000.

See: *Gonzalez v. The State of New York*, New York Court of claims, Claim No. 10507. ■

Postal Service Panics Over Sex Offender Participant in Christmas Program

by Matt Clarke

On December 18, 2008, just a week before Christmas, the U.S. Postal Service abruptly suspended its decades-old Operation Santa Claus, a holiday program in which volunteers sift through children's letters addressed to Santa, "adopt" one or more letters, and then provide gifts to needy children.

The reason for the suspension? A Maryland postal worker recognized a registered sex offender who was participating in the program. Postal Service employees confronted Carl Elmer Ranger, 68, who said he was genuinely trying to do a good deed. Ranger had pleaded guilty to a charge of sexual abuse of a minor in 2000.

Postal authorities confiscated the letter, which contained the child's name and address, and informed the child's family of the incident. They then canceled Operation Santa Claus nationwide, including the New York program which receives 500,000

letters a year.

The Postal Service acknowledged that there had never been a problem with the program before. Nonetheless, in 2006, it began requiring participants to fill out a form and provide identification.

Initially no explanation was given to people who appeared at post offices wanting to take part in the program. A sign merely stated that, for the remainder of the holiday, the Santa letters would be handled by postal employees.

The Postal Service later announced that it intends to reinstate the program with changes to ensure the anonymity of the children who write letters. Their names and addresses will be blacked out and the letters assigned a number. Operation Santa Claus participants will give gift-wrapped presents to Postal Service employees instead of delivering them in person, and postal workers will then deliver the gifts.

Unfortunately, removing the personal contact between benefactors and families deprives the program of much of its warmth and appeal. It regresses the program to the 1920s, when Operation Santa Claus first began and postal workers were the only persons involved. Members of the public have participated since the 1940s.

The Postal Service's panicked response to a possibly nonexistent problem was highly questionable. Program participants have never had unsupervised meetings with the children receiving the gifts, but sex offender paranoia prevailed.

If the Postal Service wanted to exclude registered sex offenders from taking part in the program, it could have

added that prohibition to the forms it was already using and checked participants against the sex offender registry, rather than imposing restrictions on everyone. No, Virginia, Operation Santa Claus will never be the same again. ■

Sources: *The News Source*, www.reason.com, www.abcnews.go.com

PLN Files Suit Against Los Angeles County for Failure to Comply with Public Records Act

As part of ongoing research, *PLN* submitted a public records request to the Los Angeles County Sheriff's Department on January 29, 2008, seeking records related to settlements and verdicts resulting from tort, overdetection and civil rights claims involving both jail prisoners and employees. Until 2007 the county posted such settlement and verdict information on its website, but it now does so only sporadically. The decision to shroud the outcome of these cases in secrecy by not making them publicly available online was decried at the time by the media and government watchdog groups.

The Office of County Counsel, which represents the Sheriff's Department, initially argued that some of the documents requested by *PLN* may be exempt from disclosure, and that it was not "reasonably possible" to conduct a search for the records. Despite a November 2008 follow-up letter from *PLN* expressing a willingness to work with the county, none of the requested records were produced.

PLN filed suit on March 3, 2009 against Los Angeles County, the Office of County Counsel and the Sheriff's Department, to ensure that county officials comply with California's public records act. The lawsuit notes that pursuant to state law, "public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record." California Gov't. Code § 6253(a).

PLN contends that the release of the requested records is in the public interest, would shed light on the operations of the Sheriff's Department, would provide the public with a better understanding of how the county's jail system is managed, and would reveal how much money jail-related claims have cost the taxpayers. "We have a client

that's a public-interest publication that's just trying to access information to which it has a right and we've pretty much been stonewalled by the defendants, so hopefully this will get them moving," stated *PLN* attorney Elizabeth H. Eng. In addition to Ms. Eng, *PLN* is ably represented by Sanford Jay Rosen and Kenneth M. Walczak of Rosen, Bien & Galvan LLP, a San Francisco law firm, and Najeeb N. Khoury and Padraic Glaspy of Howarth & Smith, a Los Angeles law firm. See: *PLN v. Los Angeles County*, Superior Court, County of Los Angeles, CA, Case No. BS119336. ■

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***Survivor Manual*, compiled and edited by Bonnie Kerness, illustrated by Todd Tarselli and other talented artists, 90 pgs.**

Book review by Sundiata Acoli

This is a *Survivor Manual* by survivors—so it can't get much more real than that. Most of its contributors have spent many years in Control Units, some are still there while others have been back and forth multiple times.

A Control Unit, Control Prison, Supermax or SHU is by whatever name a Long-term Lock-down Unit designed to isolate, punish and preferably to break prisoners, sometimes maiming or killing them in the process. Control Units are serious business and are not to be taken lightly so that any valid information on how to survive them is valuable indeed. This small booklet provides that.

Each contributing man, woman or child tell in their own words how they survived or how to survive Control Units: the domestic Abu Ghraibs and Guantánamos that dot American soil. Their stories tell not so much of the day to day atrocities of the Control Unit, though enough of its horrors are adequately described and artistically illustrated therein, but mainly they tell how to survive, how to come out perhaps bruised and definitely changed but with one's core intact, oftentimes stronger than when one first entered or maybe even weaker - because horrors and deprivations do take their toll - but either way still able to look yourself in the eye, knowing you survived without selling your soul. There are many who don't.

And that's the value of this booklet. It tells how to keep alive, how to keep one's sanity, body and soul intact - in other words, how to survive. Many of the contributors I know personally or am familiar with them through their works. They know what they are talking about. The booklet is a gold mine of survival tips and guidelines that are worth the cost. Read it. Heed it...

That is, except for a slight error by the Editor, a most cherished comrade of mine, in her proclamation that the permanent lock down at USP Marion, IL, created the first Control Unit in 1983... which was long after the creation of Marion's infamous H-Unit: the Control Unit made up of cruel Box car cells...and was also after Trenton State Prison's creation of its Management Control Unit in 1976... which was copied from the Management

Control Unit of San Quentin's "O" Wing of the early '70 and perhaps the '60. Other than that slight miscue the work is excellent and the Editor has done a magnificent job of putting together a much needed

book that can save lives, sanities, bodies and souls. Cost is \$2.50. Available from: American Friends Service Committee, 1501 Cherry St., Philadelphia, PA 19102-1403. ■

Causal Link Established by Prison Officials' Failure to Protect Prisoner from Specific Threats

The Eleventh Circuit Court of Appeals held that two Florida prison officials could be held liable under 42 U.S.C. § 1983 for failure to act upon a prisoner's request for protection when he specified the nature of the threat.

Before the Court was the appeal of Everglades Correctional Institution (ECI) prisoner Miguel V. Rodriguez, who was stabbed in the back and chest by Latin Kings "enforcer" Arnold Cleveland. Rodriguez's Eighth Amendment claim hinged upon the failure of Assistant Warden Raymond Kugler and Colonel Charles Johnson to act on his request to protect him from gang members.

While on Close Management (CM) at ECI in early 2001, Rodriguez learned that gang members at ECI wanted to kill him for renouncing his gang membership. Kugler and Johnson were already aware Rodriguez was on CM for assaulting another prisoner and for gang activity. Rodriguez was stabbed within hours of being released into general population on April 10, 2002.

The district court granted summary judgment to Kugler, holding that Rodriguez's complaints did not contain "specific facts" to show Kugler had subjective knowledge of the risk of harm. The claim against Johnson proceeded to trial. After Rodriguez presented his case, the district court held that Johnson was entitled to judgment as a matter of law because he did not have final authority to release Rodriguez into the general prison population.

On appeal, Kugler and Johnson argued they were unaware of any "facts indicating a sufficiently substantial danger" to Rodriguez, and no causal connection existed because they did not

have final authority to order his release from CM. The Eleventh Circuit rejected those arguments.

In the summary judgment proceeding, Rodriguez provided a declaration stating he had verbally informed Kugler on two separate occasions of the threat against his life by gang members, and had requested protection and a transfer to another prison. The appellate court held that such evidence, in conjunction with Kugler's denial of Rodriguez's allegations, created a genuine issue of material fact precluding summary judgment.

Similarly, Rodriguez also spoke with Johnson several times about the threats. While Johnson promised he would "look into" it and "get with" classification about the matter, he did not inform anyone about Rodriguez's safety concerns.

The Court found Johnson was aware of the threat of harm because Rodriguez advised him that (1) he was a former Latin King who had renounced his membership; (2) he was threatened with death by gang members for that renunciation; (3) ECI was heavily populated with Latin Kings; and (4) he needed protection to prevent an attempt on his life.

When addressing the causal connection, the Court found the same factors applied to both Kugler and Johnson. The Eleventh Circuit ruled that in the face of Rodriguez's request for protection at a hearing on his release from CM, Kugler and Johnson recommended his release and told him he would be subject to disciplinary action if he refused to return to general population. Kugler and Johnson argued that because their action was only a recommendation to the State Classification Office, they had no final authority to release Rodriguez from CM.

However, both Johnson and Kugler had the authority to set in motion procedures to immediately place Rodriguez in administrative confinement and initiate a protective management review, which could have resulted in a transfer to another facility if the threat of harm was substantiated.

Instead, neither Johnson nor Kugler took action to protect Rodriguez.

Rather, the only action they took was to “recommend that Rodriguez be returned to the compound –where he would have no protection at all from the Latin Kings who had threatened his life.” Therefore, the Eleventh Circuit found a “‘necessary causal link’ between Johnson’s actions and Rodriguez’s injury,” and vacated the district court’s judgment as a matter of law in favor of Johnson. See: *Rodriguez*

v. Sec’y for the Dep’t of Corr., 508 F.3d 611 (11th Cir. 2007).

Following remand, the case went to a federal jury trial on April 8, 2008, and the jury found in favor of the defendants, Kugler and Johnson, on all claims. Rodriguez was represented by the Miami law firms of Akerman Senterfitt, Berger Singerman, and Kasowitz Benson Torres & Friedmann, LLP. ■

\$3.3 Million Settlement Fund Established in New Mexico Jail Strip Search Settlement

A \$3.3 million settlement fund has been established in a class action lawsuit alleging an unconstitutional blanket strip search at the Valencia County Detention Center (VCDC) in New Mexico violated the rights of the class. VCDC was operated under contract by private prison vendor Cornell Companies, Inc.

The lead plaintiffs in the action, Jose Torres and Eufasio Armijo, were arrested on minor charges in separate incidents and taken to VCDC and strip searched “without regard to the nature of” the alleged offenses for which Plaintiffs had been arrested, and without Defendants having a reasonable belief that the Plaintiffs possessed weapons or contraband, or that there existed facts supporting a reasonable belief that the search would produce contraband or weapons.”

The complaint sought to discontinue the blanket strip search policy to require such searches only when there is “individualized reasonable suspicion.” HCDC contended the policy was related to “legitimate penological interests in deterring

the introduction of weapons, drugs, or other contraband into the detention center.” The parties engaged in three days of mediation that resulted in a settlement on September 22, 2008.

That settlement established a class period from April 3, 2004 to April 3, 2007. The strip search policy changed on December 5, 2006 as a result of efforts between the parties. The settlement class members include persons arrested on “Non-VDW offense[s]” on the charge list that is part of the settlement.

Torres and Armijo were allocated \$85,000 to be split evenly amongst them for their efforts in the lawsuit. The attorneys for the class will receive \$1,100,000 for attorney fees and costs. The costs to administer the fund will also come out of the Settlement Fund.

The Administrator is to notify the class members by using the last known information in HCDC’s database. They then must submit a valid and timely claim to receive funds from the settlement. Failure to file a claim or voluntary opt out

will preclude receipt of any funds from the settlement.

The class was represented by Santa Fe attorneys Robert Rothstein, Mark H. Donatelli and John C. Bienvenu, as well as Las Cruces attorneys Michael W. Lilley and Marc A. Lilley.

See: *Shannon v. Hidalgo County Board of Commissioners*, USDC D. New Mexico, Case No: CIV-08-0369 JN/LFG ■

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Former California DOC Worker Kept Confidential Prison Gang Files at Home

A former typist for the California Dept. of Corrections and Rehabilitation (CDCR) was convicted of having confidential prison gang files in her Sacramento home. The files also included the names and social security numbers of 5,500 state employees.

Convicted of theft in November 2008, Rachel Rivas Dumbrique (Rivas) was sentenced to one year in county jail plus five years probation. She was also ordered to pay \$122,000 in restitution to cover the Department of Consumer Affairs' costs in taking steps to protect state employees against any resultant identity theft.

Rivas was married to CDCR prisoner Edward Dumbrique. She met Edward, a Mexican Mafia gang member doing life

for murder, when she served as an alternate juror in a 2005 trial where he was acquitted of assaulting a prison guard. She was hired by the CDCR in March 2006, and worked there for six months before transferring to another state job position.

While she was at the CDCR, Rivas downloaded a personnel roster and e-mailed it to a private account, "dumbrique.luv." When suspicious Consumer Affairs investigators raided her house looking for the roster, they also found four other documents stamped "confidential" in her bedroom closet. Those highly sensitive files included CDCR reports on prisoners who were documented members of the Northern Structure Gang, Aryan Brotherhood and Mexican Mafia, as well as

debriefing reports on gang activity within CDCR facilities.

Prosecutors did not say whether the gang-related files had been shared with Edward. Rivas' defense attorney, Jeremy Van Etten, postulated at sentencing that she was only a pawn and the documents had been planted in her home.

Superior Court Judge Steve White wasn't impressed with that argument. He described Rivas' crime as a "serious matter," and denied requests for leniency based upon Rivas having three children and no previous criminal record.

Rivas and Edward Dumbrique have since divorced. ■

Sources: *Sacramento Bee*, *Associated Press*

California Jury Awards Deaf Prisoner \$5,000 for Failure to Provide Interpreter; \$193,582 in Fees Awarded by Court

A state court jury has awarded \$5,000 to a deaf prisoner against the County of Los Angeles for failing to provide him with a sign language interpreter while he was in jail. The jury, however, found no liability for the same claim brought against the City of Torrance.

When Humberto Suarez was arrested as the result of mistaken identity on August 8, 2005, he spent several days at the Twin Towers Correctional Facility in Los Angeles. On November 20, 2005, he was again arrested due to mistaken identity by the City of Torrance. He spent less than 24 hours in jail for the latter arrest.

Suarez filed suit, alleging that the failure to provide him with an American Sign Language interpreter while he was jailed violated his rights under the Americans with Disabilities Act (ADA). At trial, which lasted two weeks, the County of Los Angeles and City of Torrance disputed that Suarez needed an interpreter.

After two days of deliberation, the jury found against Los Angeles County and awarded Suarez \$5,000. It found no liability as to the City of Torrance. Suarez was represented by Los Angeles attorneys Daniel M. Holzman and Thomas L. Dorogi of the Caskey & Holzman law firm. In a post-trial order, they were awarded \$193,582.50 in attorney fees.

See: *Suarez v. County of Los Angeles*, Superior Court of Los Angeles, CA, Case No. BC353872.

Suarez filed a separate federal lawsuit against the Superior Court of Los Angeles, claiming the court had not provided him with an interpreter in a timely

manner. That suit was dismissed and the dismissal was affirmed by the Ninth Circuit, as the brief delay in obtaining an interpreter did not result from deliberate indifference. See: *Suarez v. Superior Court of California*, 283 Fed.Appx. 470 (9th Cir. 2008) (unpublished). ■

Louisiana Private Prison Warden Arrested for Malfeasance

Leroy Holiday, Sr., 55, a regional warden for LaSalle Management Company, LLC (LMC), a private prison firm, was released on \$5,000 bond after being arrested and booked into the LaSalle Parrish Jail in November 2008.

According to LaSalle Parish Sheriff Scott Franklin, Holiday was charged with improperly using prisoners and employees at a minimum-security prison for personal purposes. Franklin said Holiday had been charged with only one count of malfeasance, but his office had enough evidence to charge him with 40 additional counts and the investigation was ongoing.

Holiday was the warden of the LaSalle Correctional Center (LCC) in Urania, Louisiana, where the malfeasance is alleged to have occurred. He also oversaw LMC-managed facilities in Catahoula,

Concordia and Ouachita parishes.

LCC is run in cooperation with the sheriff's office, which retains the ability to hire and fire employees and commission them for law enforcement. However, Franklin said Holiday was an employee of LMC, and referred questions about his employment status to company officials. Franklin also noted that Holiday's law enforcement commission had been revoked and he would not be allowed back on LCC grounds. ■

Source: www.thetowntalk.com

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Massachusetts Prisoner Awarded \$550,307 in Attorney Fees and Costs in Unsanitary Conditions Case

On December 30, 2008, a Massachusetts state court awarded a former prisoner \$547,566 in attorney fees and \$2,741 in costs and litigation expenses in a civil rights action in which the plaintiffs were awarded only nominal damages.

Stephen Doherty and ten other Massachusetts state prisoners filed a civil rights suit pursuant to 42 U.S.C. § 1983 in superior court alleging they were subjected to inhumane conditions for three weeks following a disturbance at MCI-Cedar Junction, in violation of the Eight Amendment's prohibition against cruel and unusual punishment.

The jury found that they were deprived of "sanitary living conditions, including clean water, working toilets, healthy meals, and breathable air," and that feces was smeared on the walls, floors and tables of the unit where they were held. Despite knowing that most of the plaintiffs were serving life sentences for serious crimes, the jury returned a verdict in their favor but only awarded nominal damages of \$1.

Doherty, who was represented by Bonita Tenneriello and Peter Berkowitz of Boston-based Massachusetts Correctional Legal Services, Inc., filed for attorney fees and costs pursuant to 42 U.S.C. § 1988 and Mass.R.Civ.P. 54, requesting \$842,408.70 in fees for the three attorneys and one paralegal who worked on the case. The superior court found that Doherty's attorney fee request was not subject to the PLRA cap because he had been released from prison

before the suit was filed. It also found that Doherty was the prevailing party and thus was entitled to attorney fees.

Furthermore, the court held that "Doherty's victory was not merely technical or de minimus," and because the attorneys did the same work for Doherty as for the other plaintiffs, the work they did on his case was not severable. Doherty did not prevail on all his claims, but the claims were interrelated and the attorneys would have had to do most of the same work had the unsuccessful claims not been raised. Also,

the nominal damages award did not diminish "the value of a favorable verdict for the plaintiff," as it "may simply reflect the unquantifiable nature of some harms."

However, the court reduced the requested attorney fees by 35% due to the "gap between the damages sought and the damages awarded," and granted a combined total of \$550,307 in attorney fees and costs. See: *Ashman v. Marshall*, MA Superior Court-Suffolk, Civil Action No. 00-05618. The ruling is posted on PLN's website. 🗞



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Foundation For Innocence LLC - 'FFI' is a small private company that reviews, researches and reconstructs investigations in cases of wrongful convictions nationwide.

To all inmates that have sent their completed assessment forms and for inmates still awaiting their assessment forms, your patience is appreciated. Due to the over whelming requests for assistance received, Director Lori Smith, is working to submit a Petition on behalf of all inmates to Washington DC., by December 2009. The Petition will include all inmate assessment case profiles received by Express Legal Services LLC., which later transferred to Foundation For Innocence LLC.

This Petition will seek an avenue to provide assistance to all those in each state that have been wrongfully convicted, that do not always qualify with DNA evidence to challenge their convictions.

FFI LLC will resume operations by September, 2009 and work to ensure all assessment forms are processed by December. Again, we appreciate your patience.

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\$75,000 Settlement for Shutting Off Water in Seattle Jail Prisoner's Cell

Washington State's King County Jail has settled a pre-trial detainee's claim that he was unconstitutionally punished. The Jail settled the matter for \$75,000. The basis of the claim was a guard shutting off the water in the prisoner's cell for 30 hours.

Sidney Charles Randall was housed on the tenth floor of the Jail on August 5, 2005. Guard Theodore Larson let Randall out of his cell twice that day. The first was for a seventy minute recreation period. The second time was for forty minutes, with an option to take a shower or use the telephone.

After that second time period, Randall was escorted to court. When he

returned, he asked Larson to allow him to take a shower because he missed the opportunity by going to court. When Larson refused, Randall said he would wash in his cell. Larson told him twice that he would not, and when Randall said he couldn't stop him, Larson shut the cell's water off. He then told Randall, "You're going to burn in hell, you better take some barbeque sauce with you, it's going to be hot."

Over the next 30 hours, Randall complained that he was thirsty and his cell smelled bad from the accumulation of feces and urine in his toilet. After 30 hours, Randall fainted. A nurse revived him with drinking water and his cell water was

turned back on. Randall claimed he injured his back from the fall when he fainted, providing documentation to support it.

He filed a civil rights action and both parties moved for summary judgment. The Washington federal district court granted Randall's motion and denied Larson's. The Court then appointed Randall pro bono counsel to prepare for a damages trial.

On February 2, 2009, Randall received \$75,000 to settle the matter. He was represented by Perkins Coie. The documents related to this case are on PLN's website. See: *Randall v. Larson*, USDC, W.D. Washington, Case No: C06-0798-JCC. ■

Oregon Teenage Girls Stage Brazen Escape Attempt

A bold and bloody escape attempt from an Oregon lockup sent three guards to the hospital. In a stunning twist, the masterminds behind the well-planned, brazen attempt were not hardened criminals, but rather a group of eight teenage girls ranging from 13 to 17 years old.

Close to midnight on December 20, 2008, several girls staged a fight in a 19-bed dormitory at the Oak Creek Youth Correctional Facility in Albany, according to Oregon Youth Authority spokeswoman Perrin Damon.

When three male guards entered the dorm to break up the fight, they were ambushed. "The kids rushed them," Damon said. "They had weapons and overpowered them. ... They had weapons fashioned from everyday things." Damon refused to describe the weapons but said they were used as clubs.

The guards fled to another building as the girls entered the recreation yard, where they attempted to flee through a gate, according to Damon. "They never breached the perimeter," she said, because a pair of high fences prevented their escape.

Albany police and Linn County sheriff's deputies were called to help restore order. Officers maintained a presence outside the fences, while others took the

girls back into custody. Meanwhile, the three guards were transported to Samaritan Albany General Hospital. One guard suffered a head wound that required 32 staples; the other two had minor injuries. They were treated and released.

The Oregon State Police and Oregon Youth Authority are investigating the incident. ■

Sources: *The Oregonian*, *Salem Statesman Journal*

California: Waiver of Private Psychotherapist-Patient Privilege an Unreasonable Condition of Parole

The California Court of Appeal (2nd District) agreed with a superior court that it was unreasonable for a parole officer to insist that a parolee must, as a condition of parole, waive his confidential privacy privilege with his private psychotherapist.

Reynaldo Corona was released on parole in May 2006 after serving 3 years for molesting his stepdaughters over a span of several years. He was given five special conditions of parole: (1) attend the parole outpatient clinic, (2) participate in programs specific to his offense history as directed by his parole officer, (3) participate in an approved psychiatric treatment program, (4) participate in the sexually violent predator program, and (5) submit to any psychological or physiological assessment to assist in treatment planning and parole supervision due to his prison psychological history.

Corona asserted he followed all of those conditions to minimize his chances

of reoffending, and also retained a private psychotherapist specializing in sex offenders.

Six months later, Corona's parole officer asked him to sign a privilege waiver permitting his private therapist to share information with parole officials. Corona was told he must sign the waiver if he wanted to continue seeing the private therapist. He declined and instead filed a habeas petition in superior court.

The court ruled that "it would be against public policy to prohibit [Corona] from seeking private counsel and being able to disclose to them in a confidential manner the things in his life that may be needing to really be addressed if he's going to get over this problem. So I'm going to prohibit that."

The parole officer appealed, claiming that the requested waiver fit into the fourth parole condition. However, Corona took the fourth condition to be a waiver of privilege for a state-supplied thera-

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pist. The officer persisted, claiming that Corona was revealing more to his private therapist than to his state therapist.

At the outset, the appellate court noted that participation in private therapy was not prohibited by Corona's conditions of parole. The court relied on *In re Stevens*, 119 Cal.App. 4th 1228 (Cal.App. 2d Dist. 2004) [*PLN*, July 2005, p.22] for limitations on restrictions that may be placed on parolees. At a minimum, such restrictions must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle. A condition that bars lawful activity must be related to the crime of conviction or be for the purpose of deterring future criminality. However, in examining the record, the appellate court could not identify a "nefarious reason for Corona's decision to engage in additional therapy."

The court also rejected the parole officer's reliance on Evidence Code §§ 1012 and 1024 as exceptions to the privilege rule. Those provisions require a therapist to warn an intended victim or the police if he or she determines that a patient presents a serious danger of violence to another. There was no such indication in this case.

Further, the appellate court was incensed that Corona was threatened with violation of his parole for refusing to sign the waiver, because that implicated

his right to due process. Accordingly, the superior court's decision was affirmed. See: *In re Corona*, 160 Cal.App.4th 315 (Cal.App. 2d Dist. 2008). ■

\$445,000 Settlement in Ohio Jail Prisoner's Medical Death

Ohio's Hancock County Jail agreed to pay \$445,000 in the death of a prisoner. The settlement provides no liability of wrongdoing in the April 26, 2006 death of prisoner Lisa Waddell.

The suit was brought by Waddell's daughter. Waddell was found unresponsive in her cell on April 25 and she died the next day at a local hospital. Details on the cause of death were not available.

What is known is that guard Jeffrey T. Baney was fired in November 2006 because of the event. In August 2007, Baney, who was in charge of ensuring prisoners received medical care, was found guilty of a second degree misdemeanor for dereliction of duty. He was sentenced to 30 days in jail.

The January 24, 2009 settlement provides for the defendants to pay the costs of the litigation. The plaintiff was

represented by attorney Paul Belazis. See: *Shoemaker v. Heldman*, USDC, N.D. Ohio, Case No: 3:07CV00617. ■

Additional Source: *Toledo Blade*.

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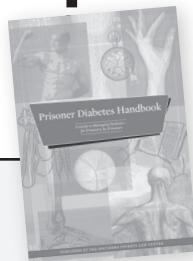
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State, Not County, Required to Pay Attorney Fees in Georgia Death Penalty Cases

On March 9, 2009, the Georgia Supreme Court affirmed a lower court's order holding the Georgia Public Defender Standards Council ("Council"), in contempt for refusing to pay two defense lawyers in a death penalty case.

The Supreme Court's unanimous decision involves the Council's failure to pay \$68,946.61 to attorneys Michael Garrett and J. Randolph Frails for defending Willie W. Palmer, who had been retried for capital murder. The Council, a state agency, contended that because Palmer had been indicted prior to enactment of the statute that created the Council, the cost of his representation should be borne by Burke County, where the trial was held.

In 1997, Palmer was sentenced to death for the murder of his estranged wife and her 15-year-old daughter. His conviction was overturned in 2005 when it was discovered that prosecutors had failed to disclose a \$500 payoff to the state's key witness. A new trial was ordered. The trial court appointed Garrett, who employed Frails as co-counsel, after the Council's director informed the court "that all attorney's fees and expenses would be paid by the Council."

Palmer was again convicted and sentenced to death. Following the retrial, the Council balked at paying Garrett and Frails' fees, contending that as Palmer had been indicted prior to the January 1, 2005 effective date of the legislation that created the Council, the county was required to pay the cost of his legal representation.

The trial court disagreed and when the Council still refused to pay, the court entered a contempt order. The Council appealed. The Georgia Supreme Court rejected the Council's contention that the legislation only contemplated payment of attorney fees in contemporaneous or future death penalty cases.

The Court held that the Council's argument ignored the fact that once a conviction is overturned, the state and the defendant start anew with a clean slate. Whether a new trial even occurs depends upon the state.

If the Council's position was accepted, whenever a case is retried the court would have to follow the original statutory scheme for the defendant's legal represen-

tation, which "the General Assembly has determined to be deficient and which has [since] been remedied by a new statutory scheme."

Under current law the state is required to pay the cost of legal representation for

indigent defendants in death penalty cases. As such, the trial court's order holding the Council in contempt was affirmed. See: *Georgia Public Defender Standards Council v. The State*, 285 Ga. 169 (Ga. 2009). ■

Pennsylvania County Sex Offender Residency Ordinance Voided

by David M. Reutter

On March 20, 2009, a Pennsylvania federal district court held that an Allegheny County ordinance which restricted where sex offenders could live was in conflict with state law, and thus was invalid.

The plaintiffs in this case were a group of sex offenders whose residency was affected by the county ordinance. Their complaint alleged the ordinance violated various constitutional guarantees, the Fair Housing Act and state law. Under the ordinance, sex offenders who are required to register under what is commonly known as Megan's Law cannot live within 2,500 feet of any child care center, school, public park or public recreation facility.

The county published a map on its website indicating where sex offenders could and could not reside. The vast majority of the county, and virtually all of the City of Pittsburgh, fell within an area of restricted residency. Permissible areas were generally confined to outlying, suburban communities.

After each party in the lawsuit complied with the district court's order to file summary judgment pleadings, the court rendered its decision. In Pennsylvania, under the Home Rule doctrine, municipalities can enact local governance ordinances without express authorization by state statute, so long as they do not conflict with state law. A local ordinance may be preempted under one of three theories: express preemption, implied (or field) preemption, and conflict preemption.

At issue here was conflict preemption, which applies when there is an actual, material conflict between a state law and a local ordinance, and the interests of the wider constituency can only be protected by striking down the ordinance.

Allegheny County's ordinance had

a stated objective of protecting children yet it was imposed on sex offenders who never committed a crime against a minor, as Megan's Law applies to all sex offenders regardless of the age of the victim. The intent behind the ordinance, however, was not of primary importance in the court's conflict preemption analysis.

What was dispositive was a conflict between the operational effect of the ordinance and Pennsylvania's uniform system of sentencing, parole and probation. Not only did the ordinance fail to include statewide goals of rehabilitating and reintegrating offenders, avoiding unnecessary incarceration and maintaining uniformity in the supervision of parolees and probationers, but it served as an obstacle to those goals by placing strict limits on areas where sex offenders could live.

Further, the ordinance conflicted with Pennsylvania's explicit objective to establish a uniform, statewide system for supervision of offenders on probation and parole. For example, parole agents had to replace their statewide guidelines for offenders' home plans with new directives to comply with Allegheny County's ordinance.

The statewide impact of the ordinance was demonstrated by a "ripple effect" that would result in neighboring communities enacting similar laws after receiving an influx of sex offenders leaving Allegheny County due to the residency restrictions. This would leave parole officers with few options for offender placement. Finally, state law allows even the most egregious Megan's Law offenders – sexually violent predators – to live within 2,500 feet of a school, college or day care center, provided the institution is directly notified of their presence.

Moreover, parole agents review each offender's circumstances prior to approving their residence. The Allegheny County ordinance would overrule a determination by a parole agent (or court) that an offender's residence was appropriate, due to

the blanket residency restrictions.

As such, the district court predicted the Pennsylvania Supreme Court would find the ordinance was preempted by state law, and thus held it was invalid and unenforceable. The court did not reach the

federal issues raised by the plaintiffs. See: *Fross v. County of Allegheny*, 2009 U.S. Dist. LEXIS 24472.

Allegheny County has since appealed this ruling to the Third Circuit Court of Appeals. ■

\$9,000 Award for Hawaiian Prisoners Bitten By Dogs at Oklahoma CCA Prison

On October 31, 2008, a Hawaiian state court awarded \$3,000 each in damages to three Hawaiian prisoners who were bitten by dogs while incarcerated at a private prison in Oklahoma.

Jonathan K. Lum, John Daffron and Frank Frisbee are Hawaiian state prisoners who were incarcerated at the Diamond Back Correctional Facility in Watonga, Oklahoma, a private prison run by Corrections Corporation of America (CCA). They alleged the prison was engaged in a for-profit program of training dogs

donated by animal shelters then selling them. All three were bitten by dogs, two by the same dogs in separate incidents. They filed suit against Hawaii and CCA in Hawaiian state court.

Plaintiffs alleged defendants were negligent and grossly negligent because they had prior notice the dogs were dangerous and had bitten other prisoners. They alleged bleeding, scarring, fright, emotional distress and tear duct injury on one prisoner. The case was sent to arbitration. The defendants claimed that the program was not for profit because

they gave the dogs away and they had given free medical attention to the plaintiffs who suffered minimal injury and scarring. They claimed Lum was never bitten by a dog, but had fallen down in a bathroom, and alleged Daffron had contributed to his injury. The arbitrator awarded \$3,000 to each plaintiff for general damages solely against CCA. Plaintiffs were also awarded costs of \$277.67. Plaintiffs were represented by attorneys John L. Rapp and Meyers S. Briner. See: *Lum v. Hawaii*, Hawaii 1st Circuit, Civil No. 071570. ■

Florida and Oregon Prison Employees Face Sex Charges

On November 7, 2008, prison guard Geno Lewis Hawkins was arrested by the Florida Department of Law Enforcement (FDLE) and the Inspector General's Office of the Florida Department of Corrections (FDOC) on a charge of sexual battery.

In August 2008, FDLE and FDOC initiated a joint investigation of Hawkins, a 43-year-old Corrections Corporation of America (CCA) employee, for having a sexual relationship with a female prisoner at the Gadsden Correctional Facility.

Hawkins was charged with one count of sexual battery and booked into the Leon County Jail without bond. His prosecution is still pending.

In an unrelated case, Oregon Department of Corrections groundskeeper Paul William Golden, 37, was arrested on January 16, 2009 for sexually abusing six female prisoners at the Coffee Creek Correctional Facility.

Golden worked as a landscaper at Coffee Creek from October 2004 until his April 2008 resignation, and supervised prisoner work crews. He was arraigned on 31 counts of custodial sexual misconduct, rape and supplying contraband, according to Lt. Gregg Hastings, a spokesman for the Oregon State Police. Golden has pleaded not guilty; his trial is set for June 23, 2009.

These are only two of numerous cases

involving sexual abuse by prison staff nationwide, which occur with disturbing frequency. [See: *PLN*, May 2009, p.1]. ■

Sources: *FDLE Media Release*, *The Oregonian*

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Fifth Circuit Rules Texas Parole Law Not Ex Post Facto

The U.S. Fifth Circuit Court of Appeals ruled that a Texas parole law created in 1993, but applied retroactively to capital offenders in 1995, was not ex post facto.

Billy Ray Wallace was sentenced in December 1981 for the crime of capital murder. At the time of his offense, Wallace was under a parole law that required him to obtain two votes from a three-member panel in order to make parole.

In 1993, as part of Texas' get-tough-on-crime initiative, the legislature created an 18-member parole panel and required newly-convicted capital offenders to obtain a minimum of two-thirds approval (12 votes) to make parole. In its original wording, Senate Bill 1067 of the 73rd Texas legislature was prospective. However, in 1994, on its own initiative, the parole board began to apply the law retroactively.

When Wallace came up for parole he received two favorable votes from board members in his region. However, as the voting continued he did not receive the twelve votes required under the 2/3 approval rule as it was being applied by the board.

Wallace filed a writ of habeas corpus in state court, which was denied without a written order. He then filed a habeas petition in federal district court. That writ and the accompanying certificate of appealability (COA) also were denied.

Finally, Wallace appealed to the Fifth Circuit where the appellate court granted his COA and reviewed the merits of his claim.

The Court of Appeals first reviewed the language of the law in effect at the time Wallace was sentenced, specifically the phrase that read, "the parole board members and commissioners may act in panels comprised of three persons in each panel." The Court found that the wording in the original law was discretionary and did not hold the board to any fixed number of voting members.

Next, the appellate court reviewed the 1995 version of the Texas statute that was being applied to Wallace, and determined that the wording of the law was merely a guideline on how parole suitability was to be determined. The Fifth Circuit used precedents established in *Shears v. United States*, 822 F.2d 556 (5th Cir. 1987) and *Portley v. Grossman*, 444 U.S. 1311 (1980) to establish the wide latitude of discretion

exercised by the board in its application of parole guidelines.

The Court then relied on *Simpson v. Ortiz*, 995 F.2d 606 (5th Cir. 1993) to make a distinction between the concepts of parole eligibility and parole suitability. According to the appellate court, *Simpson* held "[t]he Parole Commission determines a prisoner's suitability for parole, not his eligibility. The code that Wallace contests addresses parole board decision-making; it relates directly to the Commission's determination of suitability for parole and does not have ex post facto implications."

No Qualified Immunity for Pepper Spraying Alabama Prisoner; Case Settles After Remand

by David M. Reutter

The Eleventh Circuit Court of Appeals held that pepper spraying a prisoner, keeping him in a small cell for longer than necessary to gain his compliance, and not allowing him to decontaminate properly or receive medical care after being sprayed can constitute excessive force and deliberate indifference to serious medical needs. The appellate court also held that jail supervisors could be liable for failing to prevent this practice where they had notice through reports and complaints concerning the guards involved in the abusive pepper spraying.

When Kevin B. Danley was arrested on July 11, 2004 for driving under the influence, he was taken to Alabama's Lauderdale County Detention Center and placed in a communal cell that had no toilet. Upon asking the guards to use the bathroom, Danley was taken to a small 5x7' cell that had an "unsanitary" toilet with no toilet paper and no running water.

After he finished Danley asked jail guards Ruby Allyn, Jeff Wood and Steve Woods if he could have some toilet paper to wipe himself. Allyn told Danley to watch his profanity-laced mouth, to shut up, and to get back in the small cell. He protested that he was done with the small cell, and Allyn threatened to spray him.

When Danley asked what "spray" him meant, Allyn told Wood to use pepper spray. After a "close range" spraying of 3-5 seconds with pepper spray designed for large-scale crowd control, Danley was pushed into the cell. He had trouble

The Fifth Circuit acknowledged that "parole board discretion does not displace the Ex Post Facto Clause's protections." *Garner v. Jones*, 529 U.S. 244 (2000). However, the Court found that even though Wallace had provided proof that he obtained two favorable parole votes, which was the original suitability standard, his claim presented only "speculative evidence that the new rules produced a risk of increased confinement." The district court's order denying Wallace's habeas petition was therefore affirmed. See: *Wallace v. Quarterman*, 516 F.3d 351 (5th Cir. 2008). ■

breathing, began to hyperventilate and screamed that he could not breathe. In response, the guards laughed and made "mock-choking" gestures by placing their hands at their necks. They also told Danley that "if he did not shut up he would not be let out."

After ten minutes he quieted down, but the guards left him in "the small, poorly ventilated cell for approximately 20 minutes." They then allowed him to take a two-minute shower, made him put the same clothes back on and returned him to the communal cell. Thirty minutes later, Danley's cellmates' eyes were still burning from the pepper spray residue on his clothes.

Danley continued to suffer asthma-like symptoms, and his eyes burned and swelled so badly he could hardly see. His requests and those of another detainee for medical help were ignored. After twelve or thirteen hours of suffering, he was released on bond and went to see his doctor, who prescribed "appropriate medication."

Danley complained to the jail administrators but they merely ratified the guards' actions. He then sued and the U.S. District Court denied the county defendants' motion to dismiss on qualified immunity grounds. They appealed, and their first argument was that the Eleventh Circuit should separate the pepper spraying incident from Danley's confinement in the small cell.

The appellate court declined to do so,

stating that as the “plaintiff is the master of the complaint,” it had to consider both the spraying and the confinement as a single claim of excessive force. The Court of Appeals then held that the “use of pepper spray against Danley immediately followed by confinement in a small, poorly ventilated cell, which enhanced the effects of the spray, is analogous to two blows in a beating.”

The Eleventh Circuit also noted that if it was only the initial pepper spraying that resulted from Danley’s failure to comply with Allyn’s commands, there would be no Fourteenth Amendment violation. The court found a difference in this case. “Although less common than the direct application of force, subjecting a prisoner to special confinement that causes him to suffer increased effects of environmental conditions – here, the pepper spray lingering in the air and on him – can constitute excessive force.”

“When jailers continue to use substantial force against a prisoner who has clearly stopped resisting – whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated – that use of force is excessive,” the appellate court held. After the

pepper spray had its intended effect to disable Danley, the use of force through extended confinement was excessive. Thus, the defendants were not entitled to qualified immunity.

The Eleventh Circuit further found that the failure to provide Danley with medical treatment or allow him to properly decontaminate constituted deliberate indifference to his medical needs. Finally, the court held that jail administrator Jackie Rikard and Sheriff Ronnie Willis had received “force reports and similar documents, inmate complaints, jailer complaints, attorney complaints, judicial officer complaints, and personal observation” that guards at the jail “regularly used pepper spray excessively as a means of punishment and not for legitimate reasons.”

The Court of Appeals found Danley’s allegations were sufficient to overcome the defendants’ claims of qualified immunity, and to impose supervisory liability on the jail administrators. The district court’s order was therefore affirmed. See: *Danley v. Allyn*, 540 F.3d 1298 (11th Cir. 2008).

Following remand, the case settled in March 2009. The monetary amount of the settlement was confidential, but a separate

part of the settlement mandating policy changes was not. The policy changes at the Lauderdale County jail included no longer using chemical agents designed for crowd control on individual prisoners; updating jail policies and providing additional training regarding the use of pepper spray; allowing prisoners subjected to pepper spray “to decontaminate promptly”; and making grievance forms readily available to prisoners, who can use them to grieve use-of-force incidents.

“Mr. Danley insisted that the settlement of his case include changes at the jail to prevent others from suffering like he did,” said attorney Henry F. Sherrod III. “He firmly believed that no human being should be made to suffer like he suffered.” See: *Danley v. Allyn*, U.S.D.C. (ND Ala.), Case No. 3:06-cv-00680-IPJ. ■

Additional source: *Press release from Law Office of Henry Sherrod*

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Alabama: In April 2009, two unnamed Walker County jail guards were suspended with pay pending an investigation into a female prisoner's claim that she was raped by a male prisoner who had been temporarily transferred from state prison to the jail to attend a funeral. Sheriff John Mark Tirey said his office was investigating whether malfunctioning equipment or employee negligence was responsible for the male prisoner gaining access to the female prisoner's cell. Tirey said he expects the male prisoner will be charged with sexual abuse.

California: On May 1, 2009, former jail guards Daniel Lindini, Roxanne Fowler and Ralph Contreras were scheduled to appear in court for a pretrial hearing on murder charges. They are charged with murder and related crimes after beating prisoner James Moore to death in the Bakersfield jail on August 15, 2005 while Moore was handcuffed and shackled. Contreras failed to appear at the hearing and a bench warrant was issued for his arrest. Lawyers for the three defendants asked for yet another continuance, even though the case has been rescheduled numerous times. Trial was set to begin on May 11.

Florida: On April 22, 2009, Gainesville resident Victoria Thorp, 19, was arrested after sneaking into a minimum security prison to have sex with her boyfriend. Thorp climbed through a window to have sex with Aquilla Wilson, 18, according to Police Lt. Wayne Ash. Wilson jumped out a window when authorities discovered the couple. "It appeared that she climbed through the window for a little tryst, and when they got caught, he left and left her there," Ash said. Thorp was being held at the Alachua County jail on charges of aiding a prisoner's escape and introduction of contraband into a prison. Wilson remained at large while police continued to search for him.

Reunion Island: On April 27, 2009, Juliano Verbard, a religious cult leader and convicted child molester, escaped in a helicopter from the Domenjod prison on with two other prisoners. The other prisoners, Alexin Jismy and Fabrice Michel, are members of Verbard's cult and his co-defendants. Unnamed accomplices boarded a tourist helicopter and hijacked it at gunpoint. The accomplices ordered the pilots to fly the chopper to the prison's exercise yard, where Verbard and the other prisoners boarded. The helicopter

then landed a few hundred yards from the prison and the men escaped in a waiting van. Authorities continue to search for them. This is the tenth helicopter escape from a French prison since 1996.

Idaho: In January 2009, a deputy at the Ada County jail mistakenly gave prisoners used disposable razors left in a storage area where new razors are usually kept. Jail officials are running blood tests on approximately 192 prisoners to determine whether any of them contracted diseases, such as hepatitis B. Jail spokeswoman Andrea Dearden said the tests were offered as a precaution; less than half of the unit's prisoners took the test. The jail is investigating why the razors were not disposed of properly.

Illinois: In late April 2009, federal authorities apprehended a man wanted on an outstanding warrant for sexual assault following a conviction in Sweden. The man, Jerry Pomush, was arrested at the Sheridan Correctional Facility where he worked as a drug and alcohol counselor. Pomush's conviction stemmed from his assaulting a female prisoner while working as a prison guard in Stockholm, Sweden in 1999. He passed a background check prior to beginning employment at the Sheridan facility. Illinois officials blamed Sweden for failing to notify the United States about the warrant. Pomush awaits extradition to begin serving an 18-month sentence at the Swedish prison where he was once a guard.

Indiana: In November 2008, three men and three women were charged with escape for sneaking between cell blocks in the Greene County Jail to have sex with each other. Authorities allege the prisoners removed metal ceiling panels and used a passageway to meet for sex more than a dozen times in September and October 2008. Judge Dena Martin dismissed the charges in one case because the prisoner did not actually leave the jail. Prosecutor Jarrod Holtsclaw said he expects the other charges will likewise be dismissed.

Louisiana: On April 23, 2009, Angelo Knighton Vickers, 47, a guard at the Terrebonne Juvenile Detention Center in Houma, was arrested and charged with two counts each of child molestation and sexual malfeasance in prison. Vickers allegedly gave teenage female prisoners various privileges, such as phone access and snacks, in exchange for sex. Floyd Wesley Howard and Darwin Jamal

Brown, both guards at the facility, were arrested on identical charges. Another guard, Tiffani Denin Blakemore, was charged with obstruction of justice for allegedly threatening a teenage girl. All four have been fired. The allegations came to light when a former prisoner contacted officials to report she had sex with a guard while confined. Another girl made similar claims during the investigation, which is ongoing.

New York: On November 11, 2008, four guards at the GEO-owned Queens Private Correctional Facility were arrested and charged with use of excessive force and obstruction of justice. Marvin Wells, Stephen Rhodes and Kirby Grey allegedly beat a prisoner in April 2007 after he made derogatory comments about the appearance of female guard Krystal Mack. They then allegedly threatened the prisoner with death if he reported the beating. Other prisoners reported the victim's severe injuries. Wells, Rhodes and Mack also allegedly tried to cover up the beating by preventing other guards from reporting it. The four guards were indicted on November 24, 2008.

Oklahoma: In April 2009, two female prison guards were strip searched by investigators looking for Indian Brotherhood tattoos, an American Indian prison gang. In the first incident, the guard acknowledged having tattoos but denied that any of them signified the Indian Brotherhood. A female investigator asked the guard to lift her dress above her head. In the second incident, the guard had to remove her jeans for an investigator. No Indian Brotherhood tattoos were found. Scott Barger, deputy director of the Oklahoma Public Employees Association, said the union believes the incidents violated Department of Corrections policy regarding strip searches of employees. "We don't feel like the policy was followed," he stated. Jerry Massie, a DOC spokesman, said the agency had performed a preliminary inquiry and found "no indication of a strip search" because the guards volunteered to expose themselves. "It was appropriate," Massie said. No further investigation is planned. The irony of the guards' complaint is that they most likely conduct far more invasive searches of prisoners on a regular basis, and would certainly turn a deaf ear to any complaints about their conduct.

Peru: On April 7, 2009, former Peru-

vian president Alberto Fujimori, 70, was convicted of crimes against humanity and sentenced to 25 years in prison by a three-judge court in Lima. The conviction stems from killings carried out by army death squads during Fujimori's presidency from 1990-2000. Fujimori was found guilty of giving political cover and leadership to the death squads during the height of Peru's fight against insurgents. The trial focused on two death squad incidents: one in November 1991 in which 15 people – including an eight-year-old boy – were shot dead at a barbecue in a Lima suburb, and another in July 1992 where nine university students and their professor were abducted and shot in the capital. Throughout the 16-month trial – which was the longest and costliest in Peru's history – Fujimori maintained his innocence. The trial represents a landmark case because it is the first time a Latin American head of state has faced trial in his own country for human rights violations.

Rhode Island: On April 27, 2009, Daniel Cooney, director of the controversial Donald W. Wyatt Detention Facility, was fired by Central Falls Mayor Charles Moreau. The jail has been under scrutiny since ICE prisoner Hiu Lui "Jason" Ng died last year from late-stage cancer that went undiagnosed. ICE removed all 153 of its prisoners from the facility following Ng's death. The jail relies heavily on government contracts, so the removal of ICE prisoners seriously affected its profitability. Cooney was fired for comments in a newspaper interview that stirred additional controversy and undermined the jail's ability to secure a new contract with ICE. When questioned about conditions at the jail by a *Providence Journal* reporter, Cooney stated he was "looking at it like I'm running a Motel 6 ... I don't care if it's Guantanamo Bay. We want to fill the beds." Despite Cooney's firing and assurances from the mayor that jail conditions would improve, his comments prompted the Rhode Island ACLU to lobby the state's congressional delegation to oppose placement of ICE prisoners at the facility. Other human rights groups held a protest outside the jail following Cooney's termination.

Syria: In December 2009, riots broke out on two separate occasions at Sednaya prison, located in Northwest Damascus. The prison is run by military intelligence and holds hundreds of Islamist activists opposed to the current secular Syrian regime, many of whom have never stood

trial. Human rights advocates claim that Syrian security forces killed approximately 25 rioters and buried their bodies several months later under cover of darkness at cemeteries throughout Damascus. According to civilians who witnessed the burials, Syrian officials used heavy machinery to dig the graves, which were then filled with bodies that had been stored in refrigerators since the riots. "The reports we have received suggest that yet more prisoners were killed during a second outbreak of rioting at Sednaya prison last December," said an anonymous Syrian human rights activist. "The high number of deaths is indicative of the Syrian authorities' heavy-handed treatment of detainees." New York-based Human Rights Watch recently reported that many prisoners had not seen their families in more than a year even though they had not been officially charged with a crime. Syrian officials have refused to discuss the reports, and access to the prison is severely limited by security officials.

Texas: Former Montague County Sheriff Bill Keating died of a heart attack in his home in Forestburg on April 30, 2009. In February, a federal grand jury had returned a 106-count indictment against Keating and 16 other defendants. The

indictment charged Keating with official oppression and sexual assaults against female prisoners during his tenure as sheriff from 2004 to 2008. In one instance, Keating coerced a woman into performing oral sex on him by promising not to arrest her after deputies found drug paraphernalia in her house. Also indicted were several jail guards, mostly women, who were charged with various offenses involving sex or drugs and other contraband. Several prisoners also were charged. Keating had pleaded guilty to a civil rights violation and was expected to be sentenced to 10 years in federal prison on June 22.

Washington: Former King County jail employee Lynita Regis was surprised when she went to an ATM on May 12, 2009. When she was previously employed at the jail she had access to the jail's bank account. When she opened a new personal account, the bank mistakenly gave her access to more than \$271,000 in jail funds. Although broke and facing eviction, Regis reported the error to the bank, which immediately corrected the mistake. Regis said she was tempted to spend the money but decided to "do the right thing." Perhaps she didn't relish the idea of being a prisoner at the jail where she had previously worked. 📰

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\$1,800,000 Settlement in Michigan Jail Prisoner Suicide Case

On January 1, 2008, the defendants in a Michigan federal civil rights action involving the suicide of a jail prisoner settled the case for \$1,800,000, the largest jail suicide settlement in Michigan history.

Tatisha Grant, 23, was arrested by River Rouge, Michigan police officers at about 2:00 a.m. in a bar parking lot on an outstanding warrant for loitering. She was uncooperative and fought the arresting police officers. She attempted escape, but was discovered hiding under a car in the police garage and sprayed with chemicals to drive her out into the open. She was hosed off and put in a cell. At shift change, arriving Lt. Camilla Worthy was informed of events and told to watch Grant closely.

Police policy called for hourly checks on all prisoners, more frequent in cases like Grant's. Worthy waited well over an hour to check on Grant, then discovered her body hanging from the drawstring of her sweatpants.

A videotape of Grant's cell shows her banging her head against the cell wall and covering the camera lens with bread from her breakfast tray. When the bread fell off ten minutes later, it shows her hanging body and eventually records the arrival of the emergency medical responders. An audio tape from the jail's interview room revealed guards discussing Grant's bizarre behavior, including self-mutilation by biting chunks out of her arm. However, they failed to summon medical or psychi-

atric help for Grant while she lived. An autopsy revealed the presence of cocaine in Grant's body.

Worthy was charged with misdemeanor or willful neglect of duty. A jury acquitted her. The suit alleged that she and Sgt. Jeffery Harris committed gross negligence, indifference and criminal negligence.

Grant's estate was represented by Farmington Hills attorney Arnold E. Reed. He has asked the Wayne County Prosecutor's Office to reopen its investigation into Grant's death. See: *Grant v. River Rouge Police Dept.*, USDC-MI, No. 2:06-CV-14267-PBD. ■

Additional Sources: *Detroit Free Press*, *Michigan Trial Reporter*

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

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Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi; Seal Press, 295 pages. \$15.95. Best book available explaining and covering the issues of imprisoned women. Detailed account of a crisis hiding in plain sight. 1066

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$19.00. Documented first hand reporting on law enforcement's war on the poor. Covers paramilitary policing, the INS and prisons. 1002

Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Celling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$29.95. Exposes the dark side of America's 'lock-em-up' political and legal climate. 1041

The Celling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 pages. \$22.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$14.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

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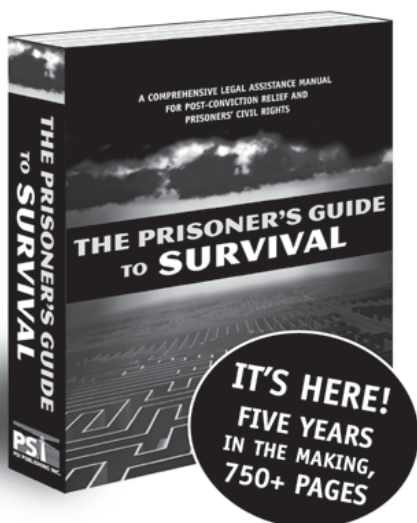
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August 2009

Judge Not: Judges Benched for Personal Misconduct

by Gary Hunter & Alex Friedmann

They decide hot-button topics ranging from abortion and racial discrimination to religious freedoms and contested elections. They can put you in prison or vindicate your civil rights. They can even sentence you to death. Who am I talking about? Judges.

Of all the public officials involved in the justice system, including the police, prosecutors, prison guards and parole officers, judges wield the most influence and power. Presumably, then, when we entrust members of the judiciary with such power we expect them to follow the law and conduct themselves in an ethical and professional manner.

Unfortunately that is not always the

case, as demonstrated by the following recent examples of judicial misconduct.

Federal Judicial Hijinks

On February 6, 2008, Massachusetts U.S. Bankruptcy Court Judge Robert Somma, 63, was pulled over following a minor car accident and charged with driving while intoxicated. He was wearing high heels, stockings and a cocktail dress at the time, and the arresting officer noted that the judge had to retrieve his driver's license from his purse.

The following week Somma pleaded no contest to the misdemeanor charge; his license was suspended for a year and he was ordered to pay a \$600 fine. He tendered his resignation two days later. However, after more than 200 attorneys signed on to a letter of support submitted to the First Circuit Court of Appeals, Somma sought to rescind his resignation.

"He made a mistake; he took responsibility for it," said First Circuit Executive Gary H. Wentz. Ultimately, though, Somma agreed to step down. "The United States Court of Appeals for the First Circuit and Judge Robert Somma have agreed that he will not resume service on the United States Bankruptcy Court for Massachusetts but is leaving to pursue other endeavors," the Office of the Circuit Executive wrote in a terse statement issued May 30, 2008.

Somma is now employed at the Boston law firm of Posternak Blankstein & Lund, as senior counsel. While he was not charged with ethical misconduct, apparently his penchant for crossdressing and drunk driving was too much for the dignity of the federal courts.

The resignation of another federal judge, U.S. District Court Judge Edward W. Nottingham, became effective October 29, 2008. Nottingham, who served as the chief judge for the District of Colorado, came under fire when a messy divorce settlement with his third wife revealed salacious details about his personal life, and his problems steamrolled from there.

The first of four complaints against Nottingham was related to his admission in his divorce case that he had spent \$3,000 during a single night at a strip club. Complaint number two was lodged by a disabled attorney who blocked Nottingham's car with her wheelchair after he parked in a handicap parking space. The attorney said Nottingham identified himself as a federal judge and threatened her. He was fined \$100 for the incident.

A third complaint accused Nottingham of soliciting prostitutes using his court-issued cell phone and visiting an escort service's website while at work. He was also accused of lying to investigators about the accusations.

On October 10, 2008, a fourth complaint was filed after a prostitute testified that Nottingham was one of her clients and had asked her to lie to federal authorities investigating their relationship.

Although Nottingham referred to the issues raised in the complaints as "private and personal matters involving human frailties and foibles," he announced his resignation on October 21, 2008. The misconduct charges were then dropped by the Judicial Council of the Tenth Circuit as being moot. The Council noted that the former chief judge "may have made false statements" during the disciplinary investi-

Inside

From the Editor	8
Sotomayor Nomination	12
Brett Dignam Interview	16
California Health Receiver Motion	20
Oregon's Expensive Prisons	22
Taser Suit Attorney Fee Award	25
Jailhouse Lawyer Review	28
Ohio parole Suit	32
Texas Judges Faces Removal	34
Illinois Phone Suit Proceeds	37
Arpaio Loses Records Suits	38
BOP Guards' Convictions Upheld	44
News in Brief	50

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Judicial Misconduct (cont.)

gation, but he was not criminally charged. See: *In re: Nottingham*, Judicial Misconduct Complaint No. 2007-10-372-36, et al. (Judicial Council of the Tenth Circuit).

Nottingham said he was "embarrassed and ashamed for any loss of confidence caused by [his] actions and attendant publicity," and apologized to "the public and the judiciary." The former chief judge, who was dubbed "Judge Naughty" by the local press, is now in private practice in Denver. He still faces an ethics complaint filed with the Colorado Attorney Regulation Counsel. Judge Nottingham had been appointed by president George H.W. Bush and was generally fair in lawsuits filed by prisoners.

As more details of his sexual proclivities circulated in the local media, judge Nottingham held a bench trial on one of the last cases before he resigned which was a lawsuit brought by federal prisoner Mark Jordan challenging the constitutionality of the Ensign Amendment, the statute which bars federal prisoners from receiving sexually explicit materials in the mail. He quickly upheld the statute. Apparently it is immoral for prisoners to look at pictures and cartoons depicting nudity while judges consort with prostitutes with impunity until their spouses file for divorce.

U.S. District Court Judge Samuel B. Kent, 59, of the Southern District of Texas, also brought unwanted scrutiny to the federal bench. On Sept. 28, 2007, Kent received a three-page reprimand and 120-day suspension with pay from the Fifth Circuit Judicial Council, stemming from a complaint of sexual harassment. See: *In re: Complaint of Judicial Misconduct against United States District Judge Samuel B. Kent*, Docket No. 07-05-351-0086 (Judicial Council of the Fifth Circuit).

Kent's case manager, Cathy McBroom, accused the judge of touching her in a lewd manner without her permission on several occasions. "The abuse began after Judge Kent returned to work intoxicated. He attacked me in a small room not 10 feet from the command center where the court security officers worked," McBroom stated. "He tried to undress me and force himself upon me, while I begged him to stop. He told me he didn't care if the officers could hear him because he knew everyone was afraid of him."

McBroom's request for harsher sanctions against Judge Kent was denied by the

Fifth Circuit in December 2007. Dissatisfied with the light punishment imposed by the appellate court, McBroom hired Houston attorney Rusty Hardin.

On August 28, 2008, Kent was indicted on one count each of abusive sexual contact, attempted aggravated sexual abuse and obstruction of justice. Kent's secretary, Donna Wilkerson, claimed that the judge had sexually abused her, too, and Kent was indicted on three additional counts on January 6, 2009. He was the first federal judge to ever be charged with sex-related offenses.

Kent later pleaded guilty to lying to federal investigators. Although the sex charges were dropped, he admitted that he had engaged in nonconsensual sexual conduct. Kent received a 33-month prison sentence on May 11, 2009; he was also fined \$1,000 and ordered to pay \$6,550 in restitution to his victims. See: *United States v. Kent*, U.S.D.C. (S.D. Tex.), Case No. 4:08-cr-0596-RV. He was given the opportunity to further reduce that sentence by one year if he sought treatment for alcoholism while in prison.

Kent then announced his retirement from the bench due to disability – alcoholism and mental illness. By retiring rather than resigning, he would be able to continue receiving his \$174,000 annual salary. However, the Fifth Circuit refused to grant him disability status, stating "a claimant should not profit from his own wrongdoing by engaging in criminal misconduct and then collecting a federal retirement salary for the disability related to the prosecution."

After members of Congress demanded that he resign or face impeachment, Kent agreed to step down effective June 2, 2010, which would have allowed him to collect his salary for another year while he was incarcerated. Unsatisfied, the House unanimously voted to impeach him, and Kent resigned effective June 30, 2009 before the Senate could consider the articles of impeachment.

"It is now time for justice: justice for the American people who have been exploited by a judge who violated his oath of office," stated U.S. Rep. Lamar Smith.

The lenient punishment initially imposed by the Fifth Circuit, and the secretive manner in which it was issued, caused some critics to question the conduct of the appellate court. Prior to the complaint against Kent, of the 671 judicial complaints filed in the Fifth Circuit from 2000 to 2007, none resulted in formal

Judicial Misconduct (cont.)

discipline.

Another federal judge in the Fifth Circuit, Louisiana U.S. District Court Judge G. Thomas Porteous, Jr., 62, also faces impeachment. As part of a judicial disciplinary investigation, Porteous acknowledged that he had filed a bankruptcy proceeding under a false name, made false statements, concealed assets and gambling debts, and "solicited and received" money and gifts from attorneys who had cases pending in his court.

Judge Porteous was also accused of misconduct in a bankruptcy trial, in which he "denied a motion to recuse based on his relationship with lawyers in the case" and "failed to disclose that the lawyers in question had often provided him with cash."

On September 18, 2008, the Judicial Council of the Fifth Circuit issued a public reprimand and suspended Porteous from hearing any cases for two years. The Council had previously found that he had "engaged in conduct which might constitute one or more grounds for impeachment." Although Judge Porteous was not charged with any criminal wrongdoing, the Judicial Conference of the United States recommended to Congress that he be impeached.

The House Judiciary Committee voted unanimously to proceed with an impeachment investigation, and the U.S. House of Representatives passed a resolution on January 13, 2009 (H.Res. 15) that authorized the Committee to determine whether Porteous should be impeached and removed from office. In May 2009, U.S. Rep. Steve Scalise urged the Judiciary Committee to "act swiftly" to complete the investigation, following a three-month delay due to a conflict of interest involving

the private attorney appointed to oversee the impeachment process.

Until he is impeached, Porteous remains a federal judge and continues to collect his full salary. In defending against the disciplinary complaint, Porteous claimed he had alcohol and gambling problems, as well as a genetic pre-disposition to depression, which contributed to his misconduct.

The issues raised in the complaint against Judge Porteous were discovered during an FBI investigation of Louisiana state court judges (where Porteous served for 10 years before joining the federal bench), dubbed "Operation Wrinkled Robe." See: *In re Complaint for Judicial Misconduct against U.S. District Judge G. Thomas Porteous Jr.*, No. 07-05-351-0085 (Judicial Council of the Fifth Circuit).

Most recently, Alex Kozinski, 58, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, was admonished on June 5, 2009. Kozinski was accused of having "sexually explicit photos and videos" on his publicly-accessible website, including "a photo of naked women on all fours painted to look like cows," "a video of a half-dressed man cavorting with a sexually aroused farm animal," and "a graphic step-by-step pictorial in which a woman is seen shaving her pubic hair."

Kozinski said the risqué material, which was never meant to be publicly available, consisted of files he had received in e-mails from friends and acquaintances over many years. The files were stored on a personal computer at his home that was connected to the Internet using web server software. It was not intended to be a public website, and site visitors had to know the specific folder where the images were located in order to access them.

The admonishment was handed down by the Judicial Council of the Third Cir-

cuit since there was a conflict of interest in the Ninth Circuit. The Council found no ethics violations as a result of Kozinski's conduct, but said he had exercised "poor judgment" by failing to take safeguards to prevent the sexually explicit material from becoming publicly accessible, and that his carelessness was "judicially imprudent."

Ironically, at the time the inappropriate online content was reported by the *Los Angeles Times* on June 11, 2008, Judge Kozinski was overseeing a high-profile obscenity trial. Due to the resultant publicity he declared a mistrial in that case. Kozinski himself asked the Council to investigate the explicit photos and videos on his website, and apologized for causing "embarrassment to the federal judiciary." See: *In re Complaint of Judicial Misconduct*, No. 09-08-90035 (Judicial Council of the Third Circuit).

State Court Corruption

State court judges are far more numerous than federal judges, and consequently there are more incidents of misconduct among the state judiciary. The following examples are only some of the cases reported within the past year.

In August 2008, the Montana Judicial Standards Commission heard testimony against Lincoln County Justice of the Peace Gary D. Hicks, alleging that he demanded sexual favors from defendants in exchange for lighter sentences.

Nine women testified before the five-member Commission. They accused Hicks of demanding sex in exchange for leniency, making inappropriate comments about their looks, and even stopping by their homes on occasion. "There certainly was a sense that if they had sex with him, they'd be treated with leniency in his court," said Steven C. Berg, an attorney appointed to investigate the allegations.

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The Commission recommended in October 2008 that Hicks be removed from the bench. He was ordered removed by the Montana Supreme Court on December 30, 2008, after the Court found the accusations had been proven by "clear and convincing evidence."

In the meantime Hicks had filed two lawsuits against Lincoln County, accusing the county commissioners of slander and causing him emotional distress, and arguing the county was required to cover his legal fees. The county settled the latter lawsuit and agreed to pay Hicks \$40,000.

New York Family Court Judge David F. Jung was removed from the bench by order of the Court of Appeals – New York's highest state court – on October 28, 2008. Jung had repeatedly held hearings in which he revoked defendants' parental rights, even though he knew they were incarcerated and could not appear in court. In several cases he sentenced the defendants *in absentia* to more jail time.

It was Jung's policy that prisoners "would not be produced for a proceeding unless [they] specifically asked to be produced"; however, incarcerated defendants were not informed of that policy and Jung said they had to learn about it by "word of mouth." He also enforced a policy that imposed strict deadlines on defendants who requested representation by public defenders. In one case he sentenced an illiterate and learning disabled woman to 180 days in jail after her request for counsel was made "too late."

The Court of Appeals found that such policies "resulted in gross and repeated deprivation of the fundamental right to be heard...." Jung argued, unsuccessfully, that his actions were within the "wide discretion" afforded to Family Court judges. See: *Matter of Jung*, 2008 NY Slip Op 08155, 11 NY.3d 365 (NY Ct. Appeals 2008).

In December 2008, a federal grand jury indicted former New York Third Judicial District Supreme Court Justice Thomas Spargo, 65, on charges of attempted bribery and attempted extortion. The state Commission on Judicial Conduct had ruled in 2006 that Spargo should be removed from office because he handed out coupons for free gas and coffee and bought drinks for voters during one of his election campaigns. He was also accused of trying to shake down attorneys for contributions to his legal defense fund.

Spargo was removed from the bench after the Court of Appeals found he was "an active participant in raising funds for

his personal benefit from lawyers with cases before him." His federal prosecution is still pending. See: *United States v. Spargo*, U.S.D.C. (N.D. NY), Case No. 1:08-cr-00749-GLS.

"This case should demonstrate that the FBI will pursue all allegations of judicial corruption vigorously, as public corruption violations are among the most serious of all criminal conduct and can tear at the fabric of a democratic society," stated FBI special agent John Pikus.

On December 10, 2008, South Carolina County Magistrate Judge William E. Gilmer, 61, was arrested and charged with filing a false police report. Gilmer had filed a report with the Honea Path Police Department in August 2007, claiming he received a threatening phone call from someone who said Gilmer's wife was having an affair. He later admitted there had been no phone call or threat.

"This incident should not have ever happened. You expect a report made by a County Magistrate to be true," stated police chief David King.

On January 6, 2009, Hinds County, Mississippi Circuit Court Judge Bobby DeLaughter was indicted by a federal grand jury on felony counts of conspiracy, fraud and harassment of a witness. DeLaughter, a former prosecutor, is accused of making favorable rulings in a high-stakes case in exchange for being considered for an appointment to a federal judgeship.

DeLaughter is perhaps best known for his successful 1994 prosecution of white supremacist Byron De La Beckwith for the civil rights era murder of Medgar Evers. "Is it ever too late to do the right thing? For the sake of justice and the hope of us as a civilized society, I sincerely hope and pray that it's not," he said at the time.

According to federal prosecutors, DeLaughter was improperly influenced by attorney Richard Scruggs – who is currently serving a 7-year prison sentence for bribing two judges, including DeLaughter – in connection with a multi million-dollar

asbestos litigation fee dispute between Scruggs and a former business partner. DeLaughter allegedly had ex parte communications with Scruggs' legal team and issued rulings in his favor; the judgment in the case saved Scruggs an estimated \$15 million.

In return, Scruggs encouraged his brother-in-law, then-U.S. Senator Trent Lott, to nominate DeLaughter for a federal judgeship in the Southern District of Mississippi. Scruggs and his associates also reportedly hired one of DeLaughter's close friends, paying him \$1 million to influence the judge.

In a motion to dismiss the criminal charges, DeLaughter's attorneys argued

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Judicial Misconduct (cont.)

that Lott's consideration of DeLaughter for a lifetime appointment to the federal bench was worth nothing of value, and thus no crime was committed. The motion was denied and DeLaughter is scheduled to go to trial on August 17, 2009. He remains free on \$10,000 bond.

Florida Second District Court of Appeal Judge Thomas E. Stringer, 64, resigned on February 10, 2009 following a tabloid-style scandal related to his involvement with a stripper named Christy Yamanaka. "It is axiomatic that 'Judge' and 'Stripper' showing up in a headline is never a good thing, especially if you happen to be the 'Judge,'" wrote a columnist for the *Tampa Tribune*.

Yamanaka claimed that she and the married judge had been romantically involved, that he helped her hide assets from creditors by depositing her income in his bank accounts, and that he had put her up in an apartment rented under his name. She went public after Stringer allegedly failed to repay \$50,000 that he had borrowed from her.

Misconduct charges were filed against Stringer with the Judicial Qualifications Commission, but were dropped after he resigned and agreed to never serve as a judge again. He now draws retirement benefits of \$8,069 per month.

Erie County, New York Supreme Court Justice Joseph G. Makowski, 55, agreed to resign on February 20, 2009. Makowski allegedly tried to help a female attorney friend avoid a DUI charge by submitting an affidavit in her case that conflicted with witness accounts. The attorney eventually pleaded guilty to DUI and tampering with evidence; Makowski, who recanted his affidavit, was not charged.

PLN previously reported on the embarrassing antics of former Mobile County, Alabama Circuit Court Judge Herman Thomas, who resigned in October 2007 after being accused of paddling or whipping male prisoners on their buttocks and making them perform sex acts. The sexual misconduct allegedly took place in a small storage room in Thomas' judicial chambers, where semen stains were found. [See: *PLN*, Feb. 2008, p.30].

On March 27, 2009, Thomas was arrested on 57 counts that included kidnapping, sodomy, sex abuse and extortion; the charges involve nine victims, all

current or former prisoners. His attorney described the prosecution as "racism at its very finest." Thomas is black, as are all of the victims cited in the indictment. He has pleaded not guilty.

Another Mobile County Circuit Court judge, Joseph S. Johnston, stated in a March 9, 2009 order that Thomas had "used his office to threaten criminal defendants with jail time, penitentiary time and probation revocations if they did not engage in sexual acts with him." Thomas has appealed that order, saying it is based on "allegations and innuendo and rumors."

Former Pennsylvania Superior Court Judge Michael T. Joyce, 60, was sentenced to 46 months in federal prison and ordered to pay \$440,000 in restitution on March 12, 2009, following his conviction on eight counts of mail fraud and money laundering last November.

Joyce was found guilty of lying about or exaggerating his neck injuries resulting from a car accident in order to collect insurance money, which he used to buy real estate, a Harley Davidson motorcycle and a partial interest in an airplane. He reportedly played golf, went scuba diving and took lessons to obtain a pilot's license during the time he claimed he was injured.

Joyce had resigned from the bench in 2007 following his indictment; he reported to prison in April 2009. Despite his conviction, he will receive an \$82,000 annual pension because the insurance fraud was not related to his employment as a judge. See: *United States v. Joyce*, U.S.D.C. (W.D. Penn.), Case No. 1:07-cr-00031-MBC.

On April 15, 2009, Christopher Sheldon, a Superior Court judge in Riverside County, California, agreed to resign and accept a public censure from the Commission on Judicial Performance. The Commission found that Sheldon "routinely" left court early, often before noon, and said his practice "of working part-time while being paid a full-time salary is utterly unacceptable and casts disrepute upon the judicial office."

Sheldon had been disciplined previously for neglecting his work duties. His resignation is effective October 23, 2009, which will give him 20 years on the job and make him eligible for a full judicial pension.

Jacquelin Gibson, 57, a part-time Juvenile Court judge in Fulton County, Georgia, was arrested in May 2009 on a misdemeanor charge of battering her 92-year-old mother, Eula Mae Gibson.

According to police reports, the judge and her brother tried to remove Eula from the home of one of Jacquelin's sisters as part of a long-running family feud.

Their mother didn't want to leave and a struggle broke out, resulting in a battery charge against Jacquelin Gibson and disorderly conduct charges against three of her family members. Eula stated that Jacquelin had injured her, and said "I don't want her to go to jail, but she has to be punished."

Judge Gibson has taken a leave of absence from her courtroom duties pending the outcome of the misdemeanor battery charge. She rejected a plea bargain that would have required her to attend anger management counseling.

On June 18, 2009, Texas District Court Judge Woody Ray Densen, 69, was indicted on a felony criminal mischief charge for allegedly keying a neighbor's SUV. Densen, who serves as a visiting judge in the Houston area, was videotaped walking behind his neighbor's vehicle and making contact with it. A surveillance camera was set up after the SUV was repeatedly scratched, resulting in \$3,000 in repair bills.

Lastly, the Arizona Commission on Judicial Conduct announced on June 25, 2009 that Yavapai County Superior Court Judge Howard D. Hinson, Jr. had agreed to resign from office, effective September 30, to resolve disciplinary proceedings against him. Judges in Arizona are required to rule on matters within 60 days and certify they do not have any past-due cases in order to receive their salaries. Hinson admitted that he had issued late rulings in 25 cases and submitted inaccurate salary certifications 11 times over a three-year period.

The Commission also recommended that Judge Hinson be publicly censured; the Arizona Supreme Court will decide the outcome of that recommendation.

A Myriad of Judicial Misconduct

In addition to the above examples of judicial misconduct, *PLN* has recently reported on two Pennsylvania state court judges who pleaded guilty to accepting bribes in exchange for sending juveniles to private detention facilities [*PLN*, May 2009, p.20]; on the indictment of several judges in Georgia's Alapaha Judicial Circuit and Fulton County on charges ranging from human trafficking to extortion [*PLN*, March 2009, p.48; July 2008, p.36]; and on Texas Court of Criminal Appeals judge

Sharon Keller, who faces ethics charges before the Commission on Judicial Conduct after she prevented attorneys for a death row prisoner from filing a last-minute after-hours appeal, resulting in his execution [PLN, July 2008, p.22] (see related article in this issue of PLN).

In rare cases, judges are disciplined even when they try to improve the justice system – as when St. Lucie County, Florida judge Cliff Barnes filed a mandamus petition to reduce overcrowding in the local jail. The Florida Supreme Court issued a reprimand, stating Barnes had “clearly crossed the line between what is appropriate and what is not.” [PLN, June 2009, p.21].

A significant problem with the current method of judicial discipline is that the disciplinary councils or other investigative bodies are usually composed of judges who pass judgment on their peers – and often do so in secrecy with little or no public oversight. Such self-regulation results in a perception that complaints against judges are not taken seriously, and this perception is bolstered by the statistical outcome of judicial complaints.

For example, 1,163 complaints were filed against federal judges from October

1, 2007 through September 30, 2008, and 759 complaints were concluded during that time period. The vast majority of the concluded complaints – 742 – were dismissed, nine were withdrawn, and only four resulted in any type of disciplinary action (including one public censure).

The statistics in state courts are similar. In California, 909 judicial complaints were filed in 2008 and 892 were concluded. Of the concluded complaints, only 34 (3.8%) resulted in punishment – ranging from advisory letters to removal from the bench. New York’s Commission on Judicial Conduct received 1,923 complaints last year, a record number. Of those, around 3% led to discipline, including 33 letters of caution and 26 formal charges.

Such infrequent punishment may embolden judges who engage in misconduct and encourage those who otherwise would not commit unethical or illicit acts. Further, many of the commissions that oversee judicial complaints can only impose discipline on sitting judges, and at most can order or recommend removal from the bench. Judges who resign or retire while facing misconduct charges can avoid disciplinary sanctions altogether, and sometimes retain full

retirement benefits.

Judicial immunity, a legal construct that protects judges from civil liability for acts taken as part of their judicial duties, may also contribute to misconduct because it removes a safeguard that otherwise would force judges to consider the consequences of their behavior in terms of personal accountability.

Despite the sparse number of judicial complaints that are upheld, judging from the above examples it is apparent that state and federal judges are not immune to criminal acts, lapses in judgment and outright stupidity – not unlike many of the defendants who appear before them in court, who are routinely convicted and sent to prison. ■

Sources: *National Law Journal*, www.law.com, www.boston.com, www.abovethelaw.com, *Washington Post*, www.judicialaccountability.org, www.knowyourcourts.com, *Denver Post*, www.judgewatch.org, www.victimsofthewar.net, *Houston Chronicle*, *Associated Press*, *CNN*, *The Recorder*, *New York Times*, *New York Law Journal*, *Atlanta Journal-Constitution*, *Pittsburgh Tribune-Review*, *Judicial Business of the U.S. Courts (2008 Annual Report)*



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From the Editor

by Paul Wright

The cover story and a number of other articles in this issue of *PLN* focus on misconduct by judges. As this article goes to press the anointment hearings of Judge Sonia Sotomayor to the US Supreme Court are taking place in the US senate. Sadly, it appears she is a much more pro government judge than justice David Souter whom she is replacing and will most likely further shift the court in its anti criminal defendant and prisoner direction. For prisoners it is difficult to overstate the importance of the judiciary since, by definition, it takes a judge's sentencing to send someone to prison and a judge's order to keep someone in jail more than 48 hours. To the extent there are 2.5 million people imprisoned on any given day in the US, the vast majority of those detained are detained based on a judges' order.

Unlike some third world countries where the judiciary is corrupt the United States has an even more serious problem: a biased, results oriented judiciary. The corrupt judge can be bought off by the highest bidder and that has a certain egalitarian notion to it: come up with the money and you get the

desired ruling. The biased judge is much more perverse. They cannot be corrupted by money because they are ideologically corrupt. In the United States today this translates into putting form over substance to get the desired result which usually translates into ruling for the government against prisoners and criminal defendants and ruling for corporations against consumers. No amount of money will change that outcome.

The article by Jeffrey Deskovic illustrates this bias. Which is common in American politics as well as the judiciary. Asked about the death penalty, then candidate Barak Obama said he was opposed to "executing the wrong guy." Most people are. Yet in Deskovic's case, he was not facing the death penalty but was instead factually innocent and serving a life sentence for a rape murder he had not committed. Sotomayor was among the judges who denied his appeals. Thus the "wise Latina" reached the same conclusion innumerable white male jurists have reached: ruling for criminal defendants, even factually innocent ones is bad for your career and keeping them locked up can only advance it. Even if they are innocent. Sotomayor's strongest supporters, senators Leahy and Schumer duly note she rules for the government and upholds 98% of criminal convictions and in federal immigration asylum cases by immigrants seeking to avoid deportation to countries where they face the likelihood of murder and torture, she ruled in favor of the government 83% of the time. These are her strong points pushed by her supporters which fully illustrate the bi partisan, consensus nature of America's criminal justice policy.

Texas judge Sharon Keller's disciplinary proceeding over closing the courts in Texas to ensure a death row prisoner was denied the opportunity to seek a stay of execution is another example of this results oriented judiciary.

Of course, there are many fine state and federal judges serving on the bench in the US. While the notion of an independent judiciary is fine, the reality is that faced with criticism or pressure many judges quickly fold and provide expedient rulings rather than constitutional ones. Judges who are ready to apply the constitution first and rule accordingly are few and far between. The reverse process is what occurs: figure out the desired outcome and go from there. Heroic giants of the American judiciary like

Judge William Justice who desegregated Texas schools and brought Texas prisons into the 19th century; circuit judge Stephen Reinhardt and justices Earl Warren and William Brennan are among those who come to mind as examples of judges who analyze[d] the constitution and let the chips fall where they may. Often to the dismay of those who appointed them to the bench.

Law professor and former National Lawyers Guild president Michael Avery once commented that any judicial nominee or candidate should have to pass what he called the "Kleenex test". Which meant that as a lawyer they had to keep a box of Kleenex on their desks for their clients to use who would cry in their offices because they were too scared, too brutalized, too marginalized and disempowered and desperately needed the representation of such a lawyer. Presently, anyone who can pass the Kleenex test has little chance of being appointed to the judiciary.

In the US today the quickest and surest way to a judgeship is via the offices of prosecutors and government agencies. Tellingly, being or having been a public defender, legal aid, personal injury or civil rights lawyer is deemed a disqualification. Thus the only type of "public service" that counts is service to the repressive organs of the state or its government bureaucracy. Government lawyers like Jay Bybee who drafted the torture memos justifying the torture of prisoners at Guantanamo have been rewarded with judgeships (he sits on the 9th circuit). Justices Sotomayor and Alito are among those who rose through the judicial ranks after stints as prosecutors. Why are there no public defenders or criminal defense lawyers on the Supreme Court? And very few in the lower judicial ranks?

A long time ago I observed that the only people who like the rule of law are the weak (presumably why court petitions are called "pleadings"); the strong hate it and see it as a constraint on their power. Since the powerful are the ones who appoint or elect the judges it is not surprising that they seek out those who will defer to that power and maintain the status quo. A strong judiciary should be the bulwark that protects the disempowered; all the often it is merely how the wealthy and the state exercise repressive power whether it means foreclosing on homes and farms, ensuring impunity for abuse and imprisoning millions. ■



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FedCURE Entitled to Fee Waiver for FOIA Request

by Brandon Sample

On March 19, 2009, U.S. District Judge Reggie Walton granted a motion for summary judgment filed by FedCURE, a non-profit organization that advocates for federal prisoners and their families, in a suit filed under the Freedom of Information Act (FOIA) against the Bureau of Prisons (BOP).

In 2005, FedCURE sent a FOIA request to the BOP for various records related to the BOP's ion spectrometry program. For years, federal officials used ion spectrometry equipment to detect drugs on visitors and BOP prisoners. The devices have since been discontinued following concerns about their accuracy [See: *PLN*, Feb. 2009, p.11].

BOP demanded that FedCURE pay \$3,976 in search and copying fees before processing the FOIA request. In response, FedCURE asked for a fee waiver. FedCURE argued that it was a "noncommercial scientific institution" and a "representative of the news media" by virtue of the newsletter it published. Additionally, FedCURE asserted that disclosure of the requested records was in the public interest and that it intended to publish the ion spectrometer information in its newsletter and on its website. The BOP denied the request for a fee waiver, prompting FedCURE to file suit.

On cross-motions for summary judgment, Judge Walton agreed that FedCURE was entitled to a fee waiver. The BOP had argued that the requested information related to its ion spectrometry program would only be conveyed to a small group of people if provided to FedCURE. This, according to the BOP, demonstrated that disclosure of the records was unlikely to be "meaningfully informative" and unlikely to contribute to "increased public understanding" of the federal government.

Judge Walton disagreed. "Information disseminated by FedCURE via its website, newsletter, and chat room will inevitably trickle down from those who have sent inquiries to others who have an interest related to prisons," he wrote.

Next, the BOP challenged FedCURE's ability to disseminate the requested information to a broad audience. According to the BOP, FedCURE's website was a "pas-

sive distribution source," and its newsletter was "infrequently published."

Relying primarily on his decision in *Prison Legal News v. Lappin*, 436 F.Supp.2d 17 (D.D.C. 2006) [*PLN*, Sept. 2006, p.15], Judge Walton concluded that FedCURE's website and newsletter reached a wide enough audience. In *Prison Legal News*, the court granted a fee waiver to *PLN* after finding that its monthly publication at that time reached some 3,600 subscribers and 18,000 readers. Numbers which have increased substantially since evidence was submitted in that case in 2005.

The BOP attempted to distinguish the *Prison Legal News* ruling from FedCURE's request for a fee waiver, arguing that *PLN* was printed monthly whereas the FedCURE newsletter was published infrequently. Judge Walton found this distinction unpersuasive, holding that "while FedCURE may publish infrequently, that fact does not prove that FedCURE cannot disseminate information to a reasonably broad section of the public." Further, Judge Walton concluded that FedCURE had received some 250,000 visitors to its website since 2007, making it and the organization's newsletter effective means to distribute the requested information to the public.

Finally, the district court held that the dearth of information about the BOP's ion spectrometry program already in the public sphere militated in favor of a fee waiver. Accordingly, FedCURE's motion for summary judgment was granted and the BOP's cross-motion was denied. See: *Federal Cure v. Lappin*, 602 F.Supp.2d 197 (D.D.C. 2009). ■

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Violence on the Rise in BOP Facilities

by *Brandon Sample*

Killings, assaults and other acts of violence are becoming more widespread in the federal Bureau of Prisons (BOP), as the prison population increases and staff-to-prisoner ratios decline. Fifteen prisoner-on-prisoner BOP homicides occurred in 2008 compared with 12 in 2007. Serious assaults on staff increased to 82 in 2008 from 72 in 2007, following a decline in previous years.

The BOP operates 115 facilities that house over 205,000 prisoners. Most of the violence is relegated to U.S. Penitentiaries (USPs), which typically hold high-security offenders serving lengthy sentences.

On April 20, 2008, for example, a massive 30-minute riot at the USP in Florence, Colorado broke out in the recreation yard. The incident began after white supremacist prisoners celebrating Adolf Hitler's birthday began yelling racial epithets at black prisoners. The white supremacists were drinking hooch, a form of homemade wine, and were armed with rocks and improvised weapons. Approximately 200 prisoners were involved in the melee.

To quell the riot, guards fired more than 200 M-16 rounds, 300 pepper balls and almost a dozen tear gas canisters, plus sting grenades. Two prisoners, Brian Scott Kubik and Phillip Lee Hooker, were shot to death by tower guards. Although the BOP initially reported that five other prisoners had been hurt, it was later learned that 30 prisoners and one staff member were injured during the incident.

Frank Sims, a prisoner allegedly involved in the riot, described the scene on the yard as "lil' Baghdad." Ken Shatto, president of the American Federal of Government Employees Local 1302 (AFGE), which represents BOP workers at the prison complex, remarked "It's the craziest thing in 15 years I've seen with the Bureau."

Outsiders like Mark Potok of the Southern Poverty Law Center, an organization that tracks hate groups, were surprised that white supremacist prisoners were allowed to congregate in the yard that day. "I'm not an expert in keeping prisons calm, but it certainly does seem like dangerous business to allow groups of white supremacist criminals to congregate on Hitler's birthday," said Potok. "The truth is, it is an iconic day in the white

supremacist calendar."

Leann LaRiva, a spokesperson for USP Florence, said prisoners are not separated by race on Hitler's birthday or any other anniversary. "We don't discriminate on race or ethnicity or segregate," she said. Not even, apparently, to prevent riots that result in prisoners being shot to death.

Union officials have long called for increased staffing to help prevent such violent outbreaks – and, of course, to boost their membership ranks. In April 2008, just weeks before the riot occurred, Phil Glover, a legislative coordinator with the AFGE, testified before Congress about rising levels of violence in the BOP. Glover blamed the violence on insufficient staffing and resources.

According to Glover, the BOP has filled only 87 percent of staffing positions compared to 95 percent during the 1990s. He stated that staffing levels in federal prisons may drop as low as 76 percent if budget shortfalls continue. Compounding this staff shortage, BOP facilities are 36 percent over capacity systemwide.

The BOP has recognized the potential for increased violence due to staffing deficiencies. In a March 2008 memo, prison officials estimated that a projected \$289 million budget shortfall could force the cutting of guard positions to the point "where safety and security of staff and inmates could be in jeopardy."

Immediately following the USP Florence riot, then-U.S. Senator Ken Salazar contacted Attorney General Michael Mukasey and requested that additional guards be sent to the facility. Salazar has also called on the BOP to release reports about the riot to the public.

"The people of Colorado, especially those in the communities surrounding the USP, deserve the assurance that the BOP is taking the steps necessary to improve security at the facility and prevent terrible incidents like this in the future," Salazar wrote to BOP Director Harley Lappin. Despite Salazar's requests, the BOP refused to release details regarding the riot, citing an ongoing investigation. The FBI is also conducting a review.

Amazingly, just three months after the riot, the warden of USP Florence, Sara Revell, received an Excellence in Prison Management award. According to Felcia Ponce, a BOP spokesperson, the award

"recognizes outstanding contributions by a warden in the overall management of staff, inmates, and general population." The BOP did not comment on why Revell was given the award following a major riot.

On August 10, 2008, just weeks after Revell was recognized for her excellence in prison management, USP Florence was again placed on lockdown due to a prisoner-on-prisoner homicide.

Violence at USP Florence has even extended to the visiting room. In November 2008, days after visitation was restarted at the institution, a prisoner attacked two visitors. An unidentified BOP guard claimed the prisoner tried to stab his wife and mother-in-law. "It was some type of paper, folded or rolled really tight with a blade in the end of it," the guard said. "He managed to cut his wife's neck and then tried to cut up the mother a little bit." The visitors were taken to a hospital and released.

The BOP is in the process of separating outside recreation yards at all USPs into smaller, more manageable areas. While the timing of the change may seem related to the Florence riot, BOP officials said it was part of a nationwide move following the June 20, 2008 murder of Jose Rivera, a guard at USP Atwater in California.

Rivera was stabbed at least 28 times with an 8" ice pick-like weapon; he was unarmed, had no protective equipment, and other prison employees were delayed in coming to his rescue due to a locked door. The two prisoners accused of stabbing Rivera to death, Jose Cabrera Sablan and James Ninete Leon Guerrero, who are both serving life sentences, are scheduled to go to trial on murder charges in September 2010. They face the death penalty.

USP Atwater was placed on lockdown for three months after Rivera was killed. Once the lockdown was lifted, the prison was plagued by numerous fights – including a dozen stabbings over a one-week period – which resulted in another lockdown. In November 2008 the BOP replaced Atwater warden Dennis Smith, who was transferred to a medium-security facility.

A subsequent BOP report found that weapons were commonly available at USP

Atwater and prisoners were able to get drunk on homemade alcohol. The prisoners who killed Rivera were reportedly drunk at the time. Between 2005 and 2007 the number of prisoner-on-staff assaults at Atwater had quadrupled from 13 to 57 per year. This included assaults involving prisoners spitting or throwing urine on guards, and attacking them with fists or food trays. Half of the reported assaults took place in the facility's Special Housing Unit.

The AFGE sharply criticized the BOP over Rivera's murder, calling for the resignation of top BOP officials and demanding that prison guards be provided with stab-proof vests and Tasers, pepper spray and other self-defensive equipment.

"We have lost all faith in the BOP management," stated AFGE president John Gage. "It's incredible to us that the Bureau is making this a labor dispute, that they refuse to give these basic, common-sense tools to our officers. We feel, in the Rivera case, if these simple things we are asking had been granted, he would be alive today."

Violence in the BOP has not been confined to USP Florence and Atwater.

USP Pollock in Louisiana was the leader in prisoner-on-prisoner homicides in 2007. Two prisoners, Tyrone Johnson and Derrick Sparks, were killed in April 2007 after being stabbed with homemade weapons. Three months later another two prisoners were stabbed in the stomach. In November 2007, prisoners William Bullcock and Donald Till were murdered by other prisoners. USP Pollock rang in the new year in January 2008 with the killing of prisoner Peter Avalos Gutierrez, 55, barely a month after he was transferred to the facility. He was stabbed to death with a shank.

Other institutions with high levels of violence include USP Beaumont, better known as "Bloody Beaumont." In November 2007, prisoner Gabriel N. Rhone was stabbed to death; a guard received 13 puncture wounds during the attack, which involved two other prisoners.

USP Lee is another honorable mention. On September 30, 2008, prisoner Quentin Corniel died after sustaining multiple stab wounds. He was less than a year away from his release date.

The Metropolitan Correctional Center (MCC) in Chicago, Illinois; the Federal Correctional Institution (FCI) in

Three Rivers, Texas; and the FCI in Phoenix, Arizona round out the top-ranked BOP facilities for levels of violence.

Jason Katz, serving a nine-month sentence, was beaten to death at the MCC in March 2008 by fellow prisoner Jason Tolen, 20, who was indicted on second-degree murder charges. At FCI Three Rivers, a prisoner was killed during a fight in March 2008. And a brawl involving three prisoners at FCI Phoenix in January 2008 resulted in one prisoner suffering stab wounds to the head.

Other BOP facilities have experienced their own share of violence. On January 25, 2009, a "large-scale fight" at Federal Correctional Complex (FCC) Coleman, located about 50 miles northwest of Orlando, Florida, left eight prisoners hospitalized with stab or gunshot wounds. One of the prisoners was shot by guards "to prevent possible loss of life," stated Rita Teel, a BOP spokeswoman.

Another major fight broke out at the facility in March 2009 that involved dozens of prisoners and left 14 prisoners with serious injuries. Eleven were airlifted to hospitals. FCC Coleman was placed on lockdown, and the incident is under investigation. "It was a busy day, to say the

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Violence in BOP Facilities (cont.)

least,” said Jim Judge, director of Lake-Sumter Emergency Medical Services.

Two separate fights at the USP in Tucson, Arizona on May 28, 2009 sent three prisoners to the hospital with stab wounds. Most recently, FCI Victorville was placed on lockdown on June 6, 2009 following an attack by prisoners in which four staff members suffered minor injuries, and on June 11 a prisoner was shot by guards at USP Terre Haute during a fight with another prisoner on a recreation yard. Both prisoners were hospitalized.

On June 18, 2009, the U.S. House of Representatives passed an appropriations bill that includes \$71 million for hiring 745 new BOP guards; the bill still must be approved by the Senate. It is hoped that an increase in staffing levels will reduce violence in federal prisons. The BOP has taken additional steps to confront increasing levels of violence, including transferring high-security offenders to other facilities and prosecuting prisoners involved in fights.

In October 2008, the BOP created a new security level – dangerous prisoners at USP Atwater will be sent to USP Lewisburg in Pennsylvania, a high-security prison. “What we’ve seen is some very positive steps and progress. We are going to see a change in the entire federal penitentiary system,” stated U.S. Rep. Dennis Cardoza, after touring Atwater.

Rep. Cardoza introduced federal legislation in 2008 that would have required the BOP to provide stab-resistant vests to all federal prison guards, who would have to wear them while on duty (H.R. 6462). The bill, titled the “Jose Rivera Correctional Officer Protection Act,” failed to pass; however, the BOP has been distributing vests to BOP staff who request them.

In regard to prosecutions, in October 2008 two FCC Terre Haute prisoners, Michael S. Vaught and Whitney H. Smith, were indicted on charges of assault with intent to commit murder and assault resulting in serious bodily injury, resulting from a May 27, 2008 razor attack on another prisoner. In August 2008, FCC Coleman prisoners Gerardo Martinez and Osbaldo Farias were charged with conspiracy to commit murder in connection with the October 2007 death of Orlando Yazzie, who was beaten and stabbed to death in a recreation cage.

On June 4, 2009, USP Big Sandy prisoner Manuel Cardosa, 28, was convicted of attacking and stomping fellow prisoner Marvin Fontenette, leaving him paralyzed and half-blind. While prison officials may not be able to prevent violence at BOP facilities, that doesn’t stop them from prosecuting violent offenders after the fact.

Meanwhile, in June 2009, the mother of slain prison guard Jose Rivera filed a lawsuit against federal officials, including BOP Director Harley Lappin and former Atwater warden Dennis Smith. The suit alleges that BOP officials “willingly and knowingly participated in the creation of dangerous conditions that resulted in [Rivera’s] death.” See: *Rivera v. Lappin*, U.S.D.C. (E.D. Cal.), Case No. 1:09-cv-

00954-LJO-SMS.

According to Mark J. Peacock, the attorney representing Rivera’s family, “Officer Rivera’s death highlights the complete and utter breakdown of the prison’s management in protecting their employees. This can’t be allowed to continue.”

The same can be said about the inability of BOP officials to protect prisoners from increasing levels of violence, which also cannot be allowed to continue. ■

Sources: *Colorado Independent*, *Rocky Mountain News*, *Denver Post*, *Associated Press*, *Channel 13 KRDO*, *Corpus Christi Caller-Times*, *Beaumont Enterprise*, *Arizona Republic*, *Chicago Tribune*, *Bristol Herald Courier*, www.thetowntalk.com, *KSWT*, <http://lccorspecops.com>

Judge Sonia Sotomayor Denied My Appeal and I Spent 16 Years in Prison for a Crime I Didn’t Commit

by Jeffrey Deskovic

My name is Jeffrey Deskovic. At age 17, I was wrongfully convicted of murder and rape, a conviction that was based upon a coerced false confession, the fabrication of evidence, prosecutorial misconduct, and fraud by a medical examiner. I was cleared 16 years later – almost three years ago – when DNA evidence proved my innocence, while also identifying the real perpetrator, who subsequently confessed to the crime. Since my release, I have made it my life’s mission to battle against wrongful convictions and fight for legislation that would minimize the chances of what happened to me happening to someone else. It is this fight that compels me to speak out about Supreme Court nominee Sonia Sotomayor.

Before I was exonerated, I sought out every legal avenue I could to win my freedom. I defended my innocence before the New York Appellate Division, raising such proof as the fact that the physical evidence found did not match me and arguing that the police violated my rights by coercing a false confession from me at the age of 16. The court ruled against me 5 to 0, concluding that there was nothing wrong with my interrogation and stating that there was “overwhelming evidence of guilt,” despite the fact that there was no

evidence beyond my forced confession. In truth, the DNA and the hairs found on the victim’s body were evidence of my innocence.

When my lawyer was denied a chance to reargue the case on the grounds that the court’s decision ran counter to the law and to the facts, we moved to the Court of Appeals, the highest court in New York. I filed a Writ of Habeas Corpus, in which I argued that my conviction was a violation of the U.S. Constitution. The year was 1997. The year before, Congress had passed Bill Clinton’s Anti-Terrorism and Effective Death Penalty Act (often called AEDPA in legalese), which mandated that from then on, all state prisoners would have only one year to appeal to a federal court after being denied an appeal by their state’s highest court.

As a result, there was some confusion in the federal courts regarding the filing procedure; it was not clear how this new law would apply to cases already in the system. Different jurisdictions were answering the question in different ways; my lawyer called the court clerk and asked whether it was enough that my petition be post-marked on the due date, or if it had to physically be filed and in the building on the due date. The court clerk told my attorney that it was enough that it be postmarked. That information turned out to be false.

Consequently, my petition arrived four days too late.

Westchester District Attorney Jeanine Pirro seized on the late petition, arguing that the court should dismiss my case without even considering my innocence claim. The court agreed. I then appealed my case to the 2nd Circuit. It was there that I first met Judge Sonia Sotomayor.

My lawyer gave three reasons why Judge Sotomayor and her colleague should overturn the procedural ruling: 1) Upholding such a ruling would cause a miscarriage of justice to continue; 2) Reversing the procedural ruling could open the door to more sophisticated DNA testing; 3) The late petition was not my fault or my attorney's. To our dismay, Judge Sotomayor and her colleague refused to reverse the ruling. "The alleged reliance of Deskovic's attorney on verbal misinformation from the court clerk constitutes excusable neglect that does not rise to the level of an extraordinary circumstance," they wrote. "Similarly, we are not persuaded that ... his situation is unique and his petition has substantive merit." A second appeal to Sotomayor's court resulted in the same decision. The U.S. Supreme Court refused to hear my case, and I remained in prison for six more years.

When I first learned that Judge Sotomayor was nominated to the U.S. Supreme Court, I was immediately alarmed. What would it mean for other people who were wrongfully convicted? Judge Sotomayor put procedure over innocence in my case. Could she be trusted

not to do so again in the future? Could she be counted on to correct injustices when the facts indicated and/or the legal arguments could demonstrate that a trial was unfair?

Judge Sotomayor condemned me to serve a life sentence for a murder and rape that I did not commit. That other innocent people could be denied relief based on procedural technicalities is no mere possibility. Take the case of Troy Davis, who faces execution in Georgia despite overwhelming proof of his innocence – proof that has never been allowed in a courtroom. Consider, too, the recent U.S. Supreme Court ruling in *Alaska v. Osborne* [129 S. Ct. 2308 (U.S. 2009)], in which the U.S. Supreme Court stated that no prisoner has a constitutional right to DNA testing even when such testing could demonstrate innocence. That decision came down to a 5 to 4 vote; if Judge Sotomayor had been on the court, can anybody say with confidence that she would have voted in favor of DNA access?

There are human consequences to these decisions. I can still see the prison cell, the barbed wire, the isolation from my family, the depression, helplessness, frustration, abuse by prison guards, the constant physical danger in prison, no opportunities to build for my future, missing births, deaths and holidays. We need to awaken this country to the role that judges play in perpetuating wrongful convictions by putting procedure over innocence, by putting finality of conviction over accuracy, and by rubber stamping appeal denials regardless of whether a trial was truly fair.

Judge Sotomayor will appear before the Senate for her confirmation hearing. Given that she has been nominated to a lifetime appointment that affects all of our rights, what she did in my case – condemning me to a life sentence based on procedure in the face of an airtight innocence claim – should be part of the discussion. I want my case to be a part of the national discussion. I want Senators to ask Judge Sotomayor if she stands by her ruling, and whether she would rule that way in the future. If I could I would testify at the Senate confirmation hearing, about the human impact of Judge Sotomayor's putting procedure over innocence. Thus far, however, I have received no response from either side on Capitol Hill.

It is deeply dismaying that neither the Republicans nor the Democrats have introduced my case to the national conversation about Judge Sotomayor. Do people remember Anita Hill? As serious as her allegations of sexual harassment were, I would think that my serving time in prison wrongfully and being condemned to a life sentence for a crime that I was innocent of would be even more serious. Why does Judge Sotomayor continue to ignore this story? Does President Obama agree with Judge Sotomayor's ruling? Does he think that ruling served justice? Is that the type of "empathy" he wanted? I lost 16 years of my life. It seems evident that politics is trumping justice; that I am once again being wronged by the system. ▀

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Oregon Prosecutes Teen to Avoid Liability; Bizarre 2 1/2 Year Legal Battle Ends

by Mark Wilson

Seventeen year old David Simmons and his fourteen year old girlfriend began a sexual relationship which continued after they turned 18 and 15, respectively. The relationship ended, however, on September 27, 2006 when the girl's angry parents had Simmons arrested on suspicion of rape and sodomy.

On October 5, 2006, Jefferson County, Oregon deputy district attorney Steve Leriche took the case before a grand jury, seeking to charge Simmons with six felony sex crimes, carrying substantial prison time. Finding insufficient evidence of a criminal offense, the grand jury refused to indict Simmons. Grand Jury Foreman James Green checked "Not a True Bill" on the indictment and returned it to Leriche.

Leriche, presiding Judge Daniel Ahern and Simmons's defense attorney, Jennifer Kimble, all failed to notice that the grand jury refused to indict Simmons. Such a failure "is just extraordinary," said University of Oregon law school dean Margaret Paris.

Five days after the grand jury's decision, on October 10, 2006, Simmons pleaded guilty to two charges – third degree rape and third degree sodomy. Nine days later, on October 29, 2006, Simmons was sentenced by Judge George Neilson, who also missed the grand jury's refusal to indict.

At sentencing, Simmons apologized to his former girlfriend's family and was ordered to serve 30 days in jail, five years on probation and register as a sex offender. That would have been the end of the story if Grand Jury Foreman Green had not stumbled onto a story about Simmons's sentence in the local newspaper.

Shocked, Green called Leriche on October 31, 2006. "Didn't you read the indictment?" Green asked. "We didn't indict the kid." By then, Simmons had served his entire jail term, but Leriche and Kimble ran frantically to Judge Neilson for damage control. Kimble joined the prosecution's motion to vacate the conviction and Neilson quickly granted it.

"Mr. Simmons, this is an experience I've never had before in 27 years," said Neilson. "What transpired here in essence is a nullity. It will be treated as if it never

happened in the sense of the law." Still, Neilson warned Simmons that he could be prosecuted again.

Simmons's attorney admitted her role in the blunder. "I assumed – and that was my error in this case – that because it had gone through the district attorney, and he'd signed it, and gone through the judge, that someone would have looked at it, or the grand jury would have mentioned, 'By the way, we didn't indict this person,'" said Kimble. "But in the young man's case, none of that happened."

Recognizing the egregious nature of the error, which causes Simmons to spend additional days in jail when he should have been released on October 5, 2006, Kimble alerted Simmons that he may have potential legal claims against her, the prosecutor, the judge and the county jail.

"My thought at the time would be, they would apologize to him and pay him some money," said longtime Portland criminal defense attorney Laura Graser. Believing, however, that the best defense is an aggressive offense, the State went after Simmons like a rabid pitbull.

On November 30, 2006, the prosecution filed six new charges against Simmons: four counts of contributing to the sexual delinquency of a minor and two counts of third-degree sexual abuse. Leriche admitted that he filed only misdemeanor charges to avoid "being barred by a grand jury not-true bill."

"I can't believe they prosecuted him again," said Graser. Simmons's new defense attorney, Steven Richkind, says the new charges are a blatant attempt to avoid responsibility for "how badly they screwed it up." He notes that "this was a failure on the part of the prosecutor, the judge and the defense attorney. It was a failure to do the most fundamental thing, to read the charging instrument."

The new charges are nothing more than an underhanded tactical move, argued Richkind. "Once he's convicted, their argument in the civil case will be, 'He spent 30 days in jail, ladies and gentlemen, he has no damages because he would have served 30 days anyway,'" Richkind suggests. "They're using the criminal proceeding to minimize their liability in a civil action. Every citizen in the State

should be outraged."

On June 1, 2007, Richkind asked the Oregon Supreme Court to stop the new prosecution but the Court refused to hear the case on July 31, 2007. Still, Richkind insists the new charges subject Simmons to double jeopardy. "They punished him once by putting him in jail for 30 days. The constitution says you punish him once and you're done."

Oregon Attorney General Hardy Meyers and his staff were apparently reading a different constitution. In a 19-page June 2007 opinion, Meyers argued that since all the previous proceedings were a legal nullity, in the absence of a legitimate indictment, Simmons hadn't really been convicted and was, therefore, vulnerable to face charges again.

Adding insult to injury, the State blames Simmons for the mess. "Although he blames the prosecutor and the trial court for failing to notice that the indictment was not a true bill, the record show that neither he nor his attorney noticed that defect either," wrote Meyers. "Thus, he is equally responsible for the fallout."

Apparently, the issue became a bit too hot for Leriche and the other county prosecutors. The County asked the State Attorney General's office to take over the Simmons prosecution, admitted Deputy Attorney General Peter Shepherd. Asked if the State is attempting to minimize its liability, Shepherd declared, "That's not true." Yet, he concedes that prosecutors are anxious to convict Simmons.

"There has been no conviction of record," notes Shepherd. "One function of criminal law is to affix responsibility in an authoritative way. That hasn't happened yet in this proceeding." The irony of that statement offends Richkind. "That's the part that's most disturbing," he says. "When the ones who point the fingers have the fingers pointed at them, they duck their responsibility. They can't live by their own standards. And that goes to the highest level, to the Oregon attorney general and the state Supreme Court."

On March 20, 2008, Richkind filed a federal civil rights action on behalf of Simmons, seeking to stop the new prosecution – on double jeopardy, "fundamental fairness" and due process grounds – and

seeking \$3.5 million in economic and punitive damages.

While the Attorney General scoffed at the suit, many others insisted that Simmons should prevail. "As far as a judgment being entered and time served, that would probably prohibit you from prosecuting again," suggested Portland defense attorney Richard Wolf. "This young man has been put through jeopardy. I don't know that they can unring that bell," agrees Dean Paris. "This is very, very unusual. It's really an extraordinary and fascinating case."

But the State ultimately did unring that bell. In December 2008, a federal judge dismissed the suit, though Richkind vowed to appeal to the Ninth Circuit Court of Appeals.

On December 16, 2008, Richkind was again in state court arguing that the new prosecution should be dismissed. "How can the government do this to him and say it's a do-over?" he asked Lane County Circuit Judge Karsten H. Rasmussen. Richkind argued that the new case is vindictive and retaliatory and that officials filed it to cover their tracks in the first case. Assistant Attorney General Darrin E. Tweedt disagreed, however, claiming

that there was no proof of retaliation, especially given that the new charges were less severe than the original ones.

Rasmussen took the matter under advisement, stating that he would decide whether to dismiss the case in early January 2009. On January 5, 2009, however, Richkind and prosecutors submitted a plea deal to Rasmussen. The agreement calls for Simmons, who is now living in Texas, to plead guilty to harassment but not serve more jail time, probation or be required to register as a sex offender. The State also agreed not to block any attempt by Simmons to have his record of arrest or conviction expunged if he does not have contact with the victim or incur any felony or misdemeanor convictions for three years.

"It was a good outcome for my client," said Richkind, noting that it will finally be over after 2 1/2 years. The State just had to have the last word. "Basically, our position is there was no evidence of vindictiveness or retaliatory prosecution here," said Attorney General Spokesman Tony Green. "In fact, it was a simple mistake and the evidence supported that a crime did occur." Translation: "Whew!"

Source: *The Oregonian*.

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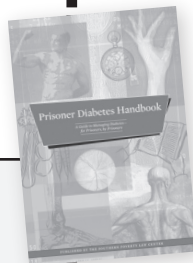
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A Bridge Between The Ivy League And The Jailhouse: An Interview with Brett Dignam, Clinical Professor of Law and Supervising Attorney at Yale Law School

by Todd Matthews

Thirty years ago, Brett Dignam would not have believed she would spend her career as an attorney advocating for prisoners' rights. Dignam's passion at the time was performance, and she was deeply interested in teaching children's theater.

"Law school was something I did so that I would have enough credibility to start my own theater," she explains.

That changed, however, in the early-1980s when she needed a part-time summer job and was hired by attorney Dennis Curtis, who was then heading up a law clinic at the University of Southern California. Dignam's task was to manage the cases that students had started in the spring. Her first client was serving a federal sentence, having already served state time. "During the first visit, I read his handwritten petition for a writ of habeas corpus and was very impressed," she recalls. "He had become a published playwright and poet while inside. We were almost exactly the same age but we had grown up in different neighborhoods."

Dignam's career in prisoners' rights advocacy was sealed when she asked Curtis -- who had left a small Washington, D.C., boutique law firm after arguing in the Supreme Court a few years out of law school -- why he had left that practice. It was simple: he liked his clients more and enjoyed the work. "He was correct," says Dignam. "The work is compelling. The clients are remarkably self-reliant -- they have no one else most of the time, very knowledgeable about the system and excellent teachers. Plus, you get to talk about the Constitution and are forced to come up with creative legal theories in order to avoid terrible precedent."

Since 1992, Dignam has been on the faculty at Yale Law School, where she is Clinical Professor of Law and Supervising Attorney. Dignam and her students have helped prisoners in issues of medical claims, claims of sexual assault, felon disenfranchisement, challenges to sex offender classification, and cross-gender pat searches through three important clinics -- Prison Legal Services, Complex Federal Litigation, and Supreme Court Advocacy.

PLN spoke with Dignam about her interest and work in prisoner rights issues, what she hopes to achieve at Columbia, and her thoughts on young people pursuing this field of law.

PRISON LEGAL NEWS: Are there two or three cases, decisions, or areas of reform you were involved in as a private practice attorney that would be considered 'landmark' or significant?

BRETT DIGNAM: In private practice, no. That is the reason I left that practice. I did work for 20 months or so for a small division at the Department of Justice, Criminal Appeals and Tax Enforcement Policy. Eight lawyers from that section traveled around the country arguing criminal tax appeals. We had interesting initiatives under the then new Money Laundering statutes and did a bunch of motor fuel excise tax cases involving the Russian mob on Long Island. We prosecuted high-level oil officials who learned what conspiracy was all about. The power of the prosecutor to confess error is a great tool. The ability to say no to ambitious politicians who want to use the tax law to further their own careers through high-profile indictments was also interesting. The chief of that section was an old school Bobby Kennedy hire who understood that the goal of the department is justice.

PLN: In 1992, you joined Yale Law School as an associate clinical professor. Most notably, you have supervised law students who have assisted prisoners at the Federal Correctional Institution (FCI) for women in Danbury, Conn. Describe the program and the work students do on behalf of prisoners.

DIGNAM: Denny Curtis and Steve Wizner were hired in 1969 and 1970 by rebellious students who wanted to begin helping people while in law school. They created a clinic that focused on federal parole. The students were disturbed by the unfettered exercise of discretion and advocated for more structure. Congress passed the Parole Reorganization Act creating parole guidelines that led to the Sentence Reform Act and federal sentencing guidelines. Careful what you wish for.

After parole disappeared, we broadened the work we did for inmates. In 1994, Danbury became an institution for women and we saw a dramatic change in the issues. Sexual assault dominated our docket. Adrian LeBlanc, in her wonderful book *Random Family*, describes one of the early cases we had. A woman was impregnated with twins by her work supervisor. We had been contacted by her defense attorney and asked to help get her an abortion. She changed her mind and we represented her on health care issues and later in a Federal Tort Claim and *Bivens* action. Although the local U.S. Attorney's Office has prosecuted numerous staff members, the contact has been outrageous. We have also done a number of immigration and medical cases.

PLN: How do prisoners learn about the program?

DIGNAM: We have an excellent relationship with the inmate librarian who keeps applications for our assistance in English and Spanish -- Danbury is also an immigration site. We have done "know your rights" power point presentations and produce packets on topics of interest. A former warden allowed us to meet with her inmate advisory board; those women identified topics of particular interest and we developed information.

PLN: How many students are helping prisoners at any given time?

DIGNAM: Usually around 20 students in my clinic. There are other clinics who focus on immigration, detention and national security issues. At times, students from those clinics also represent prisoners.

PLN: What issues do they address?

DIGNAM: Medical issues have been a big area recently. Sexual assault is a priority as well. Unfortunately, issues involving children in other states are difficult for the students to handle effectively and are often a high priority for the women. Occasionally, we will handle a particularly difficult parole or habeas issue, but Connecticut defendants have a right to appointed counsel through habeas appeal.

PLN: Are there one or two cases stu-

dents have been involved in over the years that have had significant benefits to FCI prisoners?

DIGNAM: *Peddle v. Sawyer* got a lot of attention. The perpetrator was perhaps uniquely bad -- arrested for masturbating in front of a gym with a glass wall and returned to work in the trauma unit. We brought a claim under Violence Against Women Act which allowed us to describe the conduct as violence. We were appointed to represent a woman in a habeas challenging cross gender pat searches. Unfortunately, it had fatal Prison Litigation Reform Act exhaustion problems but the judge allowed us to make a full record, kept the preliminary injunction prohibiting the searches in place and held her decision until our client was released. We created a record and conducted discovery that will be very helpful in a case we have now litigating the same issue on behalf of a Muslim woman.

PLN: I'm interested in what the future looks like for attorneys representing prisoners. I'm guessing there's a bigger draw to pursue corporate law or another field. Yet, there also seems to be more opportunities at the university level for students to get involved -- particularly through innocence projects and prison law clinics -- than existed 20 years ago.

DIGNAM: My anticipated move to Columbia has sparked a lot of concern among the students about the continuation of the prison clinic at Yale. This concern was raised during the Liman Public Interest Conference last March as both Denny Curtis and Steve Wizner were honored (both are allegedly retiring). Bob Dinerstein from American University cited a study that reported there were 11 prison clinics in the country at this point. My sense is that the momentum is in the direction of representing those in immi-

gration detention. We have a Wrongful Conviction Commission in Connecticut and I taught a seminar with Mike Lawlor (sponsor of the bill that created it) to help create its structure. The public defender's office now has an office and we have had one high profile exoneration. Karen Goodrow is the dynamic lawyer who spearheads that effort. She would love to supervise law students and my sense is that the students would love to represent the innocent. My own bias is that someone needs to represent the guilty who are incarcerated and housed in deplorable conditions. Students remain passionate about the prison conditions work. They like tilting at windmills and like struggling with the procedural hurdles, pushing to find creative ways around them.

PLN: What is your sense in terms of the number of students you see who have an interest in prisoners' rights as a career?

DIGNAM: A relatively small number but Sara Norman, one of my first two supervisees, is now the Managing Attorney at The Prison Law Office. One of the other lawyers was also a student here and others have worked there. Robin Toone, Sara's supervision partner, did prison work with Steve Bright for a few years and wrote *Protecting Your Health and Safety* [which is distributed exclusively by PLN]. Even though the numbers are small, they do great work.

PLN: Do you see similarities among those students who do show an interest in the field?

DIGNAM: I have had a number of math majors and a number of professional musicians. Go figure.

PLN: How big of a role does a university play in steering students toward this field of law?

DIGNAM: Yale prides itself on promoting and encouraging public interest

careers. We are incredibly fortunate to be fully funded by the university, other than some litigation expenses which we finance with attorneys fees. I think the identity and style of the supervising attorney plays a big role. Doing work in federal court is a draw. Our civil procedure faculty -- Harold Koh and Judith Resnik, particularly -- teach habeas and believe it to be important so the students are introduced to that aspect of the work during their first semester.

PLN: What is the picture like for prisoners in Connecticut jails and prisons?

DIGNAM: Grim but nothing like Florida or Texas. Twenty of the facilities went on line in the 1990s and are the "shopping mall atrium" style with high ceilings and natural light. Northern, our supermax, has never been filled with the "worst of the worst" it was built to house. It is poured concrete, reflective glass and stainless steel. Very disorienting and depressing. There are far too few jobs and lots of idle time. The staff reports a real difference between the northern part of the state where the correctional officers describe themselves as "cowboys" and the southern part of the state.

PLN: How many people are incarcerated, and has that number increased or decreased in recent years?

DIGNAM: We had rampant overcrowding and decades of litigation that ended with the doubling of the number of facilities in the 90s. We are back to being overcrowded.

PLN: What area(s) of prison and jail reform need the most work in Connecticut?

DIGNAM: We need better treatment and alternatives to incarceration for those with mental health issues. We need a strategy to deal with the health needs of an aging population.

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Interview with Brett Dignam (cont.)

be leaving Yale Law School to become a clinical professor of Law at Columbia Law School in fall 2010. Why have you decided to start this new chapter in your career?

DIGNAM: Personal reasons largely drove the decision. My youngest children (twin daughters) graduate from high school next June. This opportunity fell in our laps: my spouse teaches tax law and will also move to Columbia. Moving to the city was appealing. Change is good and there appears to be no shortage of prison work in NYC.

PLN: What do you hope to achieve at Columbia Law School?

DIGNAM: I would like to look at what the needs of the prison population are and how we can be useful. Preliminary conversations suggest that the students would add value by interviewing prisoners and vetting potential cases for the firms. Developing interviewing and client counseling skills is an important piece of clinical education. Every lawyer should understand the impact of our criminal justice policy and no one does without visiting a prison and, ideally, representing a prisoner. Columbia students have been doing state parole and family law work for years with Philip Genty. I hope to focus on conditions work in federal court. The Columbia students are extremely enthusiastic about expanding their work. I am hopeful that we can collaborate with other organizations that are already doing stellar work and help them craft new legal theories.

PLN: You have been involved with prisoners' rights issues for more than 20 years. In your opinion, what have been the biggest overall achievements in the field?

DIGNAM: The development of premier offices that focus on prisoners' rights and that are led by excellent and dedicated lawyers. The emergence of *Prison Legal News*, an intelligent and authoritative voice led by those with actual experience. The increasing involvement of international human rights organizations who have investigated and reported on our society's disturbing fascination with and commitment to mass incarceration.

PLN: What areas still need more improvement?

DIGNAM: The United States Supreme Court would greatly benefit from a member who has had a relative or close friend behind bar. [Editor's Note: justice Clarence Thomas's nephew Mark Martin,

is currently serving a 30 year federal sentence for distributing drugs. Justice Thomas routinely votes against prisoners and criminal defendants alike.] We could repeal or amend the Prison Litigation Reform Act so cases could actually get to court and lawyers would have an incentive to bring them. We could re-establish rehabilitation as a goal of sentencing and incarceration. We could establish programs that would allow mothers to be with their babies for a couple of years. We could provide educational opportunities to prisoners and teach them real skills so they are employable when they are released. We could always use more lawyers, particularly for the cases that have great dignitary harm but are unlikely to result in large verdicts. ■

[Editor's Note: Brett Dignam and the law students of Yale currently represent PLN in a public records action before the

Connecticut Freedom of Information Act commission. As I meet lawyers who do prison and jail litigation I often ask them how they got interested in the work. At least 7 have told me it was because they took Brett's courses at Yale and were introduced to the theme. Brett does a great job of giving her students an opportunity to experience the criminal justice system firsthand through the work itself, speakers and visiting facilities. I have been a speaker on prison and criminal justice issues at Yale several times since my release from prison and can only say that Columbia's gain is Yale's loss. As a practical matter, Brett has provided a living example of how a dedicated instructor can have a serious impact on nurturing a new generation of prisoner rights lawyers; helping prisoners who have suffered grievous injury and further educate law students by giving them real world litigation experience they would otherwise not obtain. Paul Wright.]

Florida's Private Prisons Still Lack Meaningful Oversight

by David M. Reutter

Florida's Office of Program Policy Analysis and Government Accountability (OPPAGA) has issued a report that finds that oversight of the state's private prisons has strengthened under the Department of Management Services (DMS) but significant weakness still abounds.

The Florida Legislature authorized private prisons in 1989. When the Florida Department of Corrections (FDOC) had not contracted for any privatization by 1993, the Legislature established the Correctional Privatization Commission to realize the savings that are ballyhooed by privatization advocates. As *PLN* previously reported, the Commission's first executive director was fined and fired for ethics violations and the second imprisoned for embezzlement of state funds.

That prompted the legislature to abolish the Commission and place responsibility for private prison contracting and oversight under the charge of DMS. Of the 19 states to have private prisons, only Florida places administrative responsibility for private prisons outside of its prison agency or a prison commission overseeing both public and private prison systems.

As of October 1, 2008, Florida's six private prisons housed 7,725 of the state's 99,048 prisoners at an approximate annual cost of \$133 million. By Florida law, private prisons must save 7% of the cost of operating a comparable state prison while housing a representative cross-section of the state's prison population. Due to the corruption of previous years, it is doubtful taxpayers ever realized this savings.

To strengthen its oversight, DMS created a 300 item evaluation checklist that established detailed contract monitoring requirements. Once implemented in October 2007, the oversight resulted in removal of three prison wardens and assessment of \$3.4 million in deductions and fines.

Nonetheless, a critical weakness is that DMS has failed to address problems identified by FDOC's reviews of security, contraband and health infirmity operations of private prisons. The security issues include inoperable alarms, spotlights and escape sensors. Tool control and checking for tunneling under buildings has also been a problem. The infirmity operations include lost or never executed laboratory tests, unsanitary conditions and nursing staff vacancies. Contraband issues involve drugs, gang

material and weapons.

There is no adequate mechanism to resolve these problems. While FDOC issues its audit reports, it has no authority to compel the private prisons to comply. DMS has taken no action because its contract monitors are not "subject matter experts" in prisons.

The OPPAGA also found that private prisons are not serving prisoners with comparable medical and mental health conditions as those housed in public prisons. Only 16% of the prisoner population at five of the six private prisons are medical grade one or two. Meanwhile, comparable state prisons have a medical grade one or two population that ranges from 29% to 53%. Similar results in population occur for psychological grade 3 prisoners. Prisoners in these categories require medication and other special services.

The result of these disparities undermines the requirement that private prisons operate at 7% lower cost than public prisons. The cause for this is locked in percentages created by the contracts, which were fine when they were signed, but fail to keep up with the state's fluid prison population.

Another problem with the contracts negotiated by DMS is that they fail to hold the private prisons accountable for the effectiveness of prisoner education and rehabilitation programs. Although the contracts require that 10% to 30% of all prisoners must be enrolled in academic, vocational, behavioral and substance abuse programs, they lack performance standards of program quality and success.

The report also finds that prisoner families are not treated equitably in regard to telephone and visitation policies. While families of prisoners in public prisons pay \$1.80 for a 15-minute collect call, those in private prisons pay on average \$6.18 for that same call.

Private prisons also restrict visits to every other week or only on Saturday or Sunday. Public prisons allow visits every week and visitors may come on both Saturday and Sunday. DMS says the reason is smaller visit areas in private prisons, but its data shows those prisons have twice the median square feet of those in public prisons.

Finally, the OPPAGA found that there are no established guidelines for the allowable uses of the approximate

\$1.5 million annual profits from prisoner canteens and telephone systems. Those monies are supposed to be used for prisoner benefit but have been used instead by the private prisons to purchase computers and software for administrative staff.

The OPPAGA's December 2008 report makes recommendations for each area identified and the DMS said it will act on some. Specifically, it said it will take action to assure FDOC's audit reports are acted upon within 45 days to resolve violations, it will train its staff in prison-related operation and management, private prisons will be accountable for performance of their programs, telephone rates will be set comparable to public prisons and guidelines will be set for use of welfare trust fund monies.

DMS said it would not hire managers and contract monitors with adult prison expertise, adjust the percentages of special needs prisoners at private prisons or change the visitation policy without conducting a survey to see if families wanted it and then it would occur only on a case-by-case basis.

OPPAGA report number 08-71 is available on PLN's website or at www.oppaga.state.fl.us. ■

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15 Guards Charged with Assaulting Maryland Prisoners

by David M. Reutter

The Maryland Attorney General's Office has charged 15 former prison guards with assaulting prisoners. The charges come nearly a year after the guards were fired from the North Branch Correctional Institution and Roxbury Correctional Institution; another eight guards were not charged due to lack of evidence. [See: *PLN*, July 2008, p.38].

Nine former Roxbury guards were charged with second-degree assault: Robert D. Harvey, 62; Reginald Martin, 38; Scott Boozel, 28; Michael Morgan, 39; Tim Mellott, 28; Justin Norris, 24; Keith Morris, 26; Tyson Hinkle, 33; and Lucas A. Kelly, 29.

In addition to assault, the six North Branch guards were charged with conspiracy to assault. They include Jason Weaver, 35; Kenneth Platter, 26; Richard Robinson, 36; Tony Nery, 42; Sherman Jones, 39; and Ryan Dolan, 28.

If found guilty, the guards each face up to 10 years and a \$2,500 fine. Their union, however, is confident of acquittals. "We feel that at the conclusion of this that the officers are going to walk away from this cleared of the charges," said Patrick Moran, director of AFSCME Maryland. "We're going to work through it and at the end people will be vindicated."

The charges stem from the March 8, 2008 beating of prisoner Kenneth J. Davis, who had allegedly assaulted Mellott. As a result of four beatings by guards at North Branch, Davis was hospitalized; the attack left him "unrecognizable" according to court documents. Prison officials fired 25 guards for using excessive force on Davis and a group of other prisoners who were transferred from Roxbury to North Branch after fighting with guards on March 6, 2008. Three guards were later reinstated.

Despite Moran's confidence that the former guards would be acquitted at trial, some apparently were not so sure. On May 26, 2009, Mellott and Kelly pleaded guilty to one count of second-degree assault. Both had agreed to cooperate with investigators; their sentencing hearings have not yet been scheduled.

Prosecutors dropped charges against Reginald Martin in June 2009, and the charge against Scott Boozel resulted in a hung jury on June 16. The remaining former guards have yet to go to trial. Two have

regained their jobs after winning hearings before administrative law judges.

"If I had to do it over again, I would do the same thing," stated Gary Maynard, Secretary of the Maryland Dept. of Public

Safety and Correctional Services, in reference to the firings. ■

Sources: *Associated Press*, *The Herald-Mail*

Motions to Oust California Prison System's Federal Healthcare Receiver Denied

by John E. Dannenberg

On March 24, 2009, motions by the California Department of Corrections and Rehabilitation (CDCR) to terminate the Receivership now operating the state's prison healthcare system under a longstanding federal lawsuit were denied by the U.S. District Court.

Judge Thelton E. Henderson found that the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, did not preclude him from appointing a Receiver – as was argued by the CDCR two years after they agreed to such an appointment. Additionally, the court rejected CDCR's motion to terminate the Receiver's prison medical facility construction plan, which the CDCR alleged was too intrusive into state rights.

The federal Receivership was ordered in February 2006 after Judge Henderson found that inadequate healthcare at CDCR facilities was violating the constitutional rights of prisoners (literally killing them at a rate of over 60 per year), and that no alternative narrowly-drawn remedy would cure the violations.

While some of the Receiver's CDCR medical facility construction projects were in fact begun (most notably the new hospital at San Quentin State Prison and temporary modular clinics at three other prisons), no work was commenced at the remaining 29 CDCR facilities covered by the Receiver. The Receiver had demanded that state officials advance \$250 million in legislatively-appropriated funds to begin planning for the needed expansion in prison hospital beds statewide, but Governor Arnold Schwarzenegger refused to comply.

Instead, Attorney General Jerry Brown (currently an announced candidate for governor in 2010) filed a motion to dismiss the Receiver and replace him with a "special master" with vastly reduced

powers. Brown argued that the state was improving prison healthcare and that a Receiver was no longer needed. Of course, the improvements he cited were due to court-ordered requirements in the lawsuit, under the direction of the court-appointed Receiver.

Brown's motion amounted to a tactical delay in funding, a move no doubt tied to California's massive budget crisis – but it did nothing to salve the healthcare deficiencies suffered by the state's 170,000 prisoners.

The district court rejected CDCR's argument that appointing a Receiver exceeded the authority vested in the courts under the PLRA. CDCR had tried to confuse the issue by citing Congressional intent language tied to an earlier bill that had been rejected. Judge Henderson relied on the axiom that discarded language from a prior version of a bill cannot later be resurrected when construing the final form of the legislation.

CDCR then argued that the Receiver's medical facility construction plan should be terminated. This approach failed when the court noted that it had not in fact "ordered construction," but rather had ordered the CDCR to bring its prison healthcare system up to constitutional standards. Thus, the court was not operating in excess of its authority.

As to the Receiver's orders, the district court found that his plan was not a set of detailed orders for construction and therefore did not amount to "ordered construction" as claimed. Regarding the proposed construction of prison medical facilities, none had yet been approved by the court and thus the state's objections were premature.

In sum, CDCR's motions to reduce the strain of California's budget crisis on the backs of prisoners being denied

constitutional healthcare were denied. CDCR has since appealed this ruling to the Ninth Circuit. However, the outlook in the appellate court is not good. The day after Judge Henderson denied the motions, the Ninth Circuit rejected the state's appeal of his October 2008 order to hold a contempt hearing against Governor Schwarzenegger for failing to advance the \$250 million demanded by the Receiver. This pits the court against the governor's line-in-the-sand, and the cost of constitutional prison medical care against the CDCR's concededly deficient healthcare services.

On June 25, 2009, Gov. Schwarzenegger scuttled a tentative agreement with the Receiver to build and refurbish prison medical facilities as part of a plan to regain state control over the CDCR's healthcare system. The governor issued a statement saying he "cannot agree to spend \$2 billion on state-of-the-art medical facilities for prisoners while we are cutting billions of dollars from schools and health care programs for children and seniors."

However, CDCR Secretary Matthew Cate acknowledged that money for the new medical facilities would not negatively impact California's \$24.3 billion budget deficit, since the funding would come from other sources.

The state's refusal to build more prison medical facilities to ensure constitutional healthcare for prisoners puts the ball back in Judge Henderson's court. The Receiver, Clark Kelso, has recommended a ten-year plan to construct 5,000 to 10,000 prison hospital beds, which will cost the state an estimated \$4-8 billion. See: *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), Case No. C01-1351 TEH.

Ominously, in the Eastern District of California, U.S. District Court Judge Lawrence K. Karlton appeared ready to

appoint a second healthcare Receiver in a 19-year-old case regarding the CDCR's failure to treat mentally ill prisoners, who are often driven to suicide. On March 24, 2009, Karlton gave prison officials 60 days to come up with a remedial plan or face more contempt charges, and during a June 16 hearing he remarked that unless the state provided solutions to improve prison mental health care, he would "start eating into their budget in a real dramatic way." See: *Coleman v. Schwarzenegger*,

U.S.D.C. (E.D. Cal.), Case No. C-90-0520 LKK JFM.

PLN has extensively reported on the *Plata* and *Coleman* lawsuits, including the February 9, 2009 order by a three-judge panel overseeing those cases that may lead to the early release of tens of thousands of California prisoners. [See: *PLN*, March 2009, p.40].

Additional source: *San Francisco Chronicle*

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Oregon's Criminal Justice Economic Recovery Plan: Keep Digging!

by Mark Wilson

Like every other state, Oregon has been hit hard by the worst economic crisis in recent American history. Yet standing in an ever-deepening fiscal crater, prosecutors and victims' rights groups keep handing out shovels and Oregonians stubbornly refuse to stop digging. This may not be what President Obama envisioned when he referred to "shovel ready" public works projects.

On February 20, 2009, Oregon economist Tom Potiowsky reported that the state faced an \$855 million budget shortfall for the final four months of the current biennium (two-year period) ending June 30, 2009, up \$55 million from estimates just three weeks earlier. When Oregon's jobless numbers were released on February 27, 2009, the state's unemployment rate had hit 10 percent – the fifth worst in the nation.

By all accounts, the 2009-2011 biennium will be even worse. "We're falling basically into a pit," said Potiowsky. "The perfect storm is here and Oregon is feeling the recession stronger than many other states."

In December 2008, Oregon Governor Theodore Kulongoski released his proposed 2009-2011 budget and warned of a "budget hole" of "about \$1.2 billion" for that biennium, but when Potiowsky issued his report just two months later the hole had more than doubled in size, to a \$3 billion void. "I think we're all just sort of breathless in seeing how rapid this is, how steep and rapid," said state Rep. Vicki Berger. "The implications are just stunning." The budget deficit has since increased to almost \$4 billion.

"We're not going to be out of this in a year," remarked Senate President Peter Courtney. "It's just going to get worse and worse." To balance the 2009-11 budget, at least 25 percent in state spending must be cut, slashing \$322 million from public schools, nearly \$200 million from human services and \$109 million from public safety. "I cannot see how we maintain current services for any agency or state service," said Courtney.

On February 2, 2009, lawmakers issued a long list of proposed cuts that included the possibility of closing eight minimum-security prisons and granting early release to prisoners. "These are red flags being waved so people can un-

derstand how serious a position we find ourselves in," stated Rep. Peter Buckley, who co-chairs the committee charged with deciding what budget cuts to make.

Even prosecutors have supported early release for up to 2,000 nonviolent offenders as a way to cut costs, which gives some indication of the severity of the state's budget crisis.

In a decision that angered Buckley and fellow lawmakers, on February 27, 2009, Paul De Muniz, Chief Justice of the Oregon Supreme Court, announced that effective the following month all Oregon state courts would be closed on Fridays, and courts in some of Oregon's smaller, rural counties may see additional closures. The move, which would affect and delay over 12,000 pending cases, is estimated to slash \$3.1 million from the budget shortfall by reducing payroll costs for 1,800 state workers.

"Oregonians will have the unfortunate opportunity to learn how justice delayed means justice denied," said De Muniz. Worse yet, the plan may cost more than it is designed to save. According to De Muniz, the state would lose about \$5 million in revenue because, with fewer days of court, fewer defendants would be ordered to pay fines and fees – and staff will have less time to collect them. "I hope these cuts don't turn out to be penny-wise but pound-foolish," De Muniz observed.

The state courts closed for the first time on March 13, 2009, but De Muniz and legislative leaders announced an agreement to move money from other areas so the court closures could be rescinded through the end of the biennium. They warned, however, that it may be necessary to reinstitute the closures during the next budget cycle.

Despite Oregon's dire economic outlook, on November 4, 2008, Oregon voters had approved Ballot Measure 57, which requires both longer prison time and substance abuse treatment for drug and property offenders. State officials estimate that the law, which became effective January 1, 2009, will add about 1,600 nonviolent offenders to Oregon's prison system by 2013.

Of course, getting tough on property and drug offenders is outrageously expensive. Measure 57 will cost an estimated \$411 million over the first five years it is

in effect. Between 2010 and 2017, Oregon will be forced to borrow \$314 million to finance prison expansion due to expected increases in the prison population, and will have to repay that money in addition to \$203 million in interest over the next 25 years.

Measure 57 does not include a funding source, so lawmakers must find money, where none exists, to implement it. "I wish we didn't have to fund it, but I have to," said Governor Kulongoski. "Now it's a choice between building prisons, and healthcare and schools. It's a tough issue but the public has spoken."

The Governor's 2009-11 budget, however, provides for only half of the estimated cost of implementing Measure 57, including just \$20 million of the \$40 million he originally promised for drug and alcohol treatment. Oregon ranks 45th among the states in terms of access to funded substance abuse treatment.

"If they give short shrift to treatment, I think they have seriously violated the trust of the voters," said Kevin Mannix, an attorney and former state legislator whose much tougher – and much more expensive – Ballot Measure 61 was defeated by the Measure 57 campaign.

"The strongest argument they had was that 57 had a treatment component and 61 did not," argued Mannix. "They've got to keep that promise, and that costs money."

Kulongoski's Chief Public Safety advisor, Joe O'Leary, said \$20 million for treatment "was what we thought was absolutely the best we could do," given Oregon's grim economic realities which seem to continually worsen. "The ground is still moving beneath it, and we don't know when it's going to end," admitted O'Leary. Still, in theory lawmakers can't avoid their obligation to comply with Measure 57.

"We do have a responsibility to start down that road," said Sen. Courtney. "It's going to be very hard to do that." House Speaker Dave Hunt also acknowledged the duty that lawmakers owe voters, but quickly added that drug treatment for property offenders must be balanced against other services competing for the same scarce tax dollars, such as education, health care and public safety.

"The question is did people vote for

sending inmates to the front of the line, or did they vote for treatment?" asked Rep. Chip Shields. "I think you can make a case that they voted for drug treatment, and we're going to do everything we can to fulfill that promise."

Shields, who co-chairs the Public Safety Subcommittee of the Joint Ways and Means Committee, is forming a group he calls The Promise of Measure 57 Coalition, which will explore ways to expand substance abuse treatment programs for prisoners. "There is a tendency to want to be tough on crime no matter what," he said. "I think it takes courage to be more critical about what works and what doesn't in our corrections system."

Still, Measure 57 presents far thornier problems than treatment availability. Oregon Department of Corrections (ODOC) officials are scrambling to find ways to absorb the expected influx of Measure 57 prisoners. Plans include adding temporary beds to housing units, classrooms, medical units and visiting areas at eleven of ODOC's 14 prisons; unless, of course, lawmakers make good on their threats to close eight of those facilities.

"People don't like to use the word 'crowding' but that essentially is what it

is," admitted Nathan Allen, ODOC's planning and budget administrator. ODOC is operating in "a whole new world," Allen noted, because it is impossible to predict the exact impact of Measure 57 on the prison population. "If we're wrong, we're in trouble."

ODOC Director Max Williams' assessment was even more blunt. "This is a structural nightmare. This is the box the legislature is in," he stated. "If we can't change the size of the box, we are going to be stuck."

The Oregon District Attorneys Association was a chief proponent of Measure 57, but now the Association's president, Clackamas County District Attorney John Foote, suggested that prosecutors are willing to work with the legislature – whatever that vague declaration means. He quickly warned, however, that finding a solution won't be easy. "We know that money is tight but we also know the public has spoken on this in the middle of this [economic] downturn," said Foote.

There is ample reason, however, to seriously question the prosecutors' feigned team spirit. The District Attorneys Association is offering to help mitigate a financial nightmare that they helped

create by supporting Measure 57. Yet a cursory examination of the Association's 2009 legislative agenda reveals they are simultaneously pushing needless, feel-good legislation that will cost Oregon voters hundreds of millions of dollars if enacted.

At the request of crime victims' rights groups, earlier this year the Association introduced House Bill 2335, which targets around 1,600 offenders (11.6% of Oregon's 13,750 prisoners) who remain under the jurisdiction of the state parole board – a class composed of offenders who have served *at least* 20 years in prison.

Proponents of HB 2335 have recently concluded that it's just too distressing for crime victims to attend parole hearings every two years, which is the current deferral period. One victim who attends the hearings called the process "bi-annual hell." As such, the initial legislative proposal was to require all parole-eligible prisoners to serve a mandatory five years between parole hearings.

According to the ODOC website, the daily incarceration cost for a single offender is \$77.78, or \$28,389.70 per year. At that rate, a single two-year parole deferral under current law results in

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Oregon Recovery Plan (cont.)

an incarceration cost of \$56,779.40. The proposed five-year deferral results in an incarceration cost of \$141,948.50 – an increase of \$85,169.10 – for each prisoner who is deferred.

Assuming all 1,600 parole-eligible offenders are deferred just once under HB 2335's five-year proposal, the cost of making victims feel a little more comfortable – more than 20 years after the offense – is an increase of \$136.3 million over the current cost for two-year deferrals. If just half (800) of those offenders are deferred only once, the five-year proposal would still result in an increased cost of \$68.1 million. Even if only 100 offenders were each to receive one five-year deferral, HB 2335 would cost \$8.5 million more.

Worse yet, the Board of Parole did not like that HB 2335 removed the Board's discretion, so the prosecutors and the Board reached a compromise. Instead of five-year mandatory deferrals, the Board will retain discretion to defer parole hearings anywhere from two to ten years. Of course there is no indication why one prisoner would receive a 2-year deferral but another would get a 10-year deferral – except, of course, that one has opposition from vocal victims and prosecutors while the other does not.

There is nothing that would prevent the Board from deferring all parole eligible offenders 10 years at a time, to the tune of \$272.6 million in increased incarceration costs. Given that the Board may defer release only upon finding that a prisoner suffers from an emotional condition but no treatment is available to treat that condition within the prison system, multiple deferrals and the associated endless costs are almost a certainty.

HB 2335 passed in the House but failed to pass in the state Senate before the end of the legislative session. Ironically, Crime Victims United voiced opposition to the bill, because in its amended form it would have suspended implementation of Measure 57 until 2012, and increased to 30% the amount of “earned time” that certain classes of prisoners can receive off their sentences.

The Oregon Business Administration, in an effort to protect school funding, also proposed suspending Measure 57 to save money. “If we want to set a floor for education funding, then we have to be willing to take on issues such as Measure

57,” said Ryan Deckert, president of the business association and a former state lawmaker.

As Oregon residents find themselves at what they desperately hope is the bottom of a massive economic crater, wondering how they are going to get out, the solution proposed by Mr. Foote and his fellow prosecutors was to hand out bigger shovels and urge them to “keep digging!”

On June 27, 2009, Oregon lawmakers reached a compromise and passed House Bill 3508, introduced just nine days earlier, which suspended most provisions of Measure 57 for 18 months, effective February 2010. Which is interesting considering that the Oregon legislature had put Measure 57 on the ballot in the first place. HB 3508 also increased the maximum amount of earned time for nonviolent prisoners from 20% to 30%.

These provisions are expected to save the state about \$32 million. The bill further reduces the amount of prison time that some probation violators have to serve, and allows probationers who comply with supervision terms to reduce their time on probation. Those provisions will save another \$14.8 million.

“In many ways, this deal is historic because it's very rare that the legislature chooses to be smart on crime rather than just tough on crime,” said Rep. Shields.

But in a nod to victims' rights groups and prosecutors, HB 3508 also incorporated the two to ten-year discretionary parole deferrals from HB 2335. Thus, the potential savings from suspending Measure 57 and increasing earned time for nonviolent prisoners may be offset – or even exceeded – by expanded incarceration costs caused by longer deferrals of parole-eligible prisoners by the Board of Paroles.

“Much of this bill is an acknowledgement that there are smarter ways to address crime and public safety than Oregon's status quo,” said David Rogers, director of the Partnership for Safety and Justice, a statewide advocacy group. Whether HB 3508 will be a successful stop-gap solution to Oregon's criminal justice budget crisis, however, remains to be seen. ■

Sources: *The Oregonian*, *Statesman Journal*, *House Bills 2335 and 3508 (2009)*, *ODOC website*, *ODOC Issue Brief 2008*, *The Register-Guard*

Indiana Lifelong Violent Offender Registration Preliminary Injunction Upheld in Part

On December 29, 2008, an Indiana Court of Appeals upheld a superior court's preliminary injunction against lifelong registration for violent offenders.

A July 1, 2007 Indiana statute added people who had been convicted of certain violent crimes to the state's registry requirement, which previously was solely reserved for sex offenders. Ind. Code §§ 11-8-8-7 to 17 required persons convicted of murder, manslaughter, attempted murder and attempted manslaughter to register for ten years after their release from prison or placement on probation, parole or in a community transition program. Violent offenders who committed specified crimes were required to register for the rest of their lives.

Annual, in-person registration with local law enforcement was mandated for the locations where such persons lived, worked or attended school. The required registration information included full name, alias, date of birth, gender, race, height, weight, hair color, eye color,

distinguishing features, social security number, driver's license number, vehicle description, license plate number, address, description of offense and a recent photograph. Much of this information was published on the Internet (www.in-sor.org), and failure to register or make timely notification of a change of address was a felony.

Indiana residents James Gibson, Mark Lamar and John Doe were subject to the registration requirements for violent offenders. They filed a class action lawsuit in state superior court that challenged the legality of the statute under the state constitution. The court issued a preliminary injunction on some, but not all, of the issues raised in the suit, and both sides appealed.

The Court of Appeals upheld the lower court's ruling on the constitutional issues, holding that the registration requirements did not violate the Privileges and Immunities Clause, Article I, Section 23 of the Indiana Constitution, because the violent crimes were limited to those

demonstrating intentional deadly behavior toward another person, which was not an arbitrary classification.

The appellate court also found that the registration requirements did not violate Article I, Section 12 of the Indiana Constitution, because "there is some (albeit slight) recidivism among violent offenders at least for some time after release" and "community notification about violent offenders provides an opportunity for enhancing public safety," which is a legitimate state interest. Therefore, "the requirement that violent offenders register for at least some amount of time meets the low threshold requirement of rational relation" to a legitimate state interest.

The Court of Appeals noted that neither constitutional provision could justify a preliminary injunction. However, the language of the lifetime registration requirement was confusing and made no sense, in that it referred to both violent and sex offenders in some places but to only sex offenders in others, and the most logical reading was that most violent offenders should have been excluded from lifetime registration. This justified a preliminary injunction as to the life-long registration requirement for violent offenders who had not been convicted of sex-related crimes or crimes against children.

The superior court's preliminary injunction appeared to apply to *all* violent offenders. Therefore, the appellate court upheld the granting of the preliminary injunction, but reversed the injunction insofar that it could be construed to apply to sexually violent predators. See: *Gibson v. Indiana Department of Corrections*, 899 N.E.2d 40 (Ind. Ct. App. 2008). ■

\$1,423,127 in Attorney Fees Awarded in Taser Suit; Damages Reduced

A California federal district court has awarded \$1,423,127 in attorney fees in the first lawsuit to result in a verdict against TASER International for failing to warn purchasers its electronic control devices pose a risk of acidosis, to a degree that posed a risk of cardiac arrest, when its devices are used for a prolonged administration of electricity on people.

Before the Court was a motion for attorney fees after a jury found against TASER, but its June 6, 2008 verdict found the police officers from the City of Salinas did not use extreme force when they used their Tasers on Robert C. Heston. The jury found that TASER's failure to warn users of the risks associated with prolonged deployment was a substantial factor in causing police officers to administer a prolonged deployment, which resulted in Heston having a cardiac arrest and dying.

The jury awarded Heston's estate \$21,000 in compensatory damages and \$200,000 in punitive damages. His parents were awarded \$1 million in compensatory damages and \$5 million in punitives for wrongful death. The jury, however, found that Heston was 85% comparatively at fault in causing his injuries due to his history of drug abuse and use of methamphetamine at the time of his death, reducing the compensatory awards to \$3,150 and \$150,000 respectively. The Court vacated the punitive awards in entirety on grounds they were improper as a matter of law. Thus, the total award amounted to \$153,150.

The plaintiff's attorneys moved for attorney fees under Cal. Code Civ. Prov.

§1021.5. The Court found it was an important right affecting the public interest, for warnings on their use is significant considering the growing prevalence as a law enforcement weapon. Because the verdict in this case has caused police departments across the nation and the world to heed the risks of prolonged and repeated deployment of Taser electrical current, the lawsuit had a significant benefit to the public or a large class of persons. Additionally, the private burden of the litigation transcended the personal interest because significant compensatory damages were not feasible and the availability of punitive damages was uncertain. Finally, the attorneys took the case on contingency and requiring the plaintiffs to pay their lawyers from the relatively small recovery would be contrary to the public interest in light of the benefits to the public. In refusing the City of Salinas' costs for being a prevailing party, the Court said that such an award "substantially risks chilling future civil rights litigation" of this type. Thus, the plaintiff's attorneys were awarded \$1,423,127 in fees against TASER and Salinas' motion for costs was denied. The plaintiffs were represented by attorney John Burton. See: *Heston v. City of Salinas*, USDC, N.D. California, Case No: C 05-03658 JW. ■

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Report Concludes Hispanics Receiving a Greater Share of Federal Sentences

by David M. Reutter

Hispanics are comprising a higher percentage of federal sentences, concludes a February 2009 report issued by the Pew Hispanic Center. The rise is attributed to a heightened focus on immigration enforcement. The findings of the report are based on data collected by the United States Sentencing Commission (USSC).

In 2007, Hispanics accounted for 40% of all sentenced federal offenders, which is triple their share of the U.S. adult population. Trying to combat an increase from an estimated 3.9 million undocumented immigrants in the U.S. in 1992 to 11.9 million in 2008, federal officials have cracked down on undocumented immigrants.

Of the Hispanics sentenced in federal court in 2007, 72% of them were not U.S. citizens, an increase from 61% in 1991. The number of Hispanics sentenced in federal court between 1991 and 2001 nearly quadrupled, jumping from 7,924 to 29,281. This comprised 54% of the increase in sentenced federal offenders over that period.

Over that time period, the dynamics of the criminal nature that Hispanics were sentenced for changed. In 1991, 60% of Hispanics were sentenced for drug crimes and 20% for immigration crimes. By 2007, 48% of Hispanics were sentenced for immigration offenses while 37% received prison time for a drug offense. We say prison time because 96% of all Hispanics were sentenced to prison, while non-Hispanics received such a sentence for the same conviction 82% of the time.

The type of crime Hispanics are sentenced for depends, largely, on whether they are a citizen or non-citizen. For immigration offenders, 75% were sentenced in 2007 for crimes of entering the U.S. unlawfully or residing in the country illegally. Another 19% were convicted for smuggling, transporting or harboring an unlawful alien. The non-citizen Hispanics in that group make up 81% of convictions for unlawful entry or residence in the country. By contrast, 91% of Hispanic U.S. citizens were sentenced for smuggling, transporting or harboring illegal aliens.

The report, however, concludes that Hispanics with U.S. citizenship are unlikely to commit immigration offenses. Those

Hispanics with citizenship who faced federal sentencing more likely faced drug offenses, which comprised 56% of such sentences, while 14% were for immigration offenses and 30% for other offenses. Meanwhile, non-citizen Hispanics were convicted of immigration offenses 61% of the time, 31% were convicted of drug offenses and 9% were convicted of other offenses.

Hispanics, nonetheless, received average prison sentences of only 46 months versus 91 months for whites and blacks. A non-U.S. citizen Hispanic fares better than Hispanics with citizenship, receiving an average sentence of 40 months compared to 61 months for citizens.

The report, *A Rising Share: Hispanics and Federal Crime*, is available on PLN's website. ■

Report Recommends Lawmakers Reinstate College Programs in Prison

by David M. Reutter

Citing the benefits of college prison programs, a report by the Correctional Association of New York recommended several policy changes to increase and recognize participation in degree-awarding programs. The report says the principal benefits of college programs in prison are: reduced recidivism because of the enhanced problem-solving skills, greater opportunities for steady employment provided to prisoners, safer and more manageable prison conditions and a cost-effective option for improving public safety.

When President Bill Clinton signed the Violent Crime Control and Law Enforcement Act, also known as the Clinton Crime Bill, into law in September 1994, the use of Pell Grants by prisoners to fund secondary education was eliminated. Upon taking office as New York's governor in 1995, George Pataki banned prisoners from receiving grants through the Tuition Assistance Program. Nationwide, nearly all 350 post-secondary correctional education (PSCE) programs closed. Only 4 of the 70 in New York remained.

The report under review here found this was a grave mistake. It examined several studies that found PSCEs reduce recidivism. In New York, those who earned a degree while in prison recidivated only 26.4% of the time, compared to 44.6% for those who did not earn a degree. A three-state study of Ohio, Maryland and Minnesota found a 22% recidivist rate for PSCE degree-earners and a 41% rate for those not participating in PSCEs.

"Those people who got an education on the inside had the same problems when

released as those who didn't," says Christina Voight, who earned an Associate's Degree and began a Bachelor's at a New York PSCE, "but those without college kept falling while those who had an education got back up and kept going."

When released, former prisoners "are at a dual disadvantage: they are chronically undereducated, which limits employment options, and are stigmatized as ex-offenders when filling out applications." However, earning a college degree in an "adverse environment is evidence of strength, intelligence, and dedication, qualities critical to succeeding on the outside."

In addition to gaining cognitive skills, PSCEs have "multiple benign effects: providing an incentive for good behavior; producing mature, well spoken leadership who have a calming influence on other inmates and on correction officers; and, communicating the message that society has sufficient respect for the human potential of incarcerated people." Prisoners in PSCEs avoid disciplinary problems, encourage each other to improve and their children take education more seriously.


Along with providing a safer and more manageable prison environment, PSCEs are a cost-effective method of improving public safety. "A better educated population means a more productive population." Policymakers can help reduce former prisoners' reliance on public assistance by assuring they have sufficient education to earn a wage above the poverty line, which is usually their fate.

The three-state study concluded: "A \$1 million investment in incarceration will

prevent about 350 crimes, while that same investment in education will prevent more than 600 crimes. Correctional education is almost twice as cost-effective as incarceration."

The report then examines successful, cost-effective programs in North Carolina, Texas and New York. It recommends that lawmakers in New York restore and expand public funding for college programs in prison, require the parole

board to consider PSCE participation as a qualifying indicator for parole release and to expand programs that provide higher education to former prisoners as a means of supporting successful reentry and community well-being.

The report, *Education from the Inside, Out: The Multiple Benefits of College Programs in Prison*, is available on PLN's website. 

Improper Classification that Resulted in Seattle Jail Beating Settles for \$37,500


Washington State's King County Jail settled a claim that a prisoner was beaten severely by another prisoner due to improper classification for \$37,500.

While at the Jail on August 2, 2003, Ian Kennedy Lennox was beaten by Carlos Martell Balcinde. The beating occurred without any provocation by Lennox, who was serving a sentence for a misdemeanor.

Balcindec was a convicted felon with a propensity for violence. Despite that, he was improperly classified in a trustee tank area with non-violent prisoners. As

a result of the beating, Lennox suffered a head injury, shoulder injury, lower back injury and pain in general. He required surgery for the back injury and anticipated shoulder surgery.

Lennox, represented by counsel, filed a negligence and constitutional tort action in state court. On August 15, 2008, Lennox accepted \$37,500 to settle the matter. He was represented by Seattle Attorney Charles S. Hamilton, III.

See *Lennox v. King County*, King County Superior Court, Case No: 06-2-37205-1. The documents related to this case are on PLN's website. 

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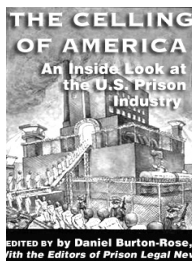
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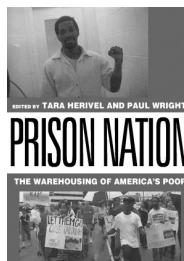
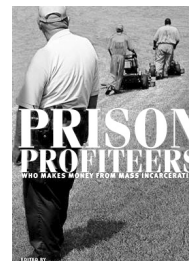
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Reopened Abu Ghraib Prison Haunted by its Past

by Matt Clarke

On February 21, 2009, Iraqi officials reopened the most infamous icon of human rights abuses under two different governments – the Abu Ghraib prison. Located near western Baghdad on 113 hectares of land, the immense prison complex now boasts a barber shop, recreation yard, playground for children visiting prisoners, modern health and dental care facilities, and a mosque. Greenhouses are being constructed.

The facility has been spruced up, repainted and renamed Baghdad Central Prison. The hooks and wires – reminders of its tortured and torturous past – have been removed from the walls, and the resulting holes have been patched over. Stains have been cleansed from the blood-soaked concrete. The prison smells of fresh paint, sanitizer and cleaning agents. Signs posted throughout the facility read “Respecting the dignity of the detainees is one of the noble goals of the Iraqi correctional services.”

When U.S. forces invaded in 2003, Iraqis told them of torture and wholesale murder by Saddam’s minions at Abu Ghraib, which had been built by British contractors in the 1960s. Instead of demolishing this symbol of oppression, the U.S. military instead decided to use it for their own purposes. This served to encourage the Iraqi resistance and made the prison the hated symbol of the U.S. occupation.

The widely-distributed photos of American guards abusing Iraqi prisoners at Abu Ghraib, which were disclosed in April 2004, certainly didn’t help matters. [See: *PLN*, May 2006, p.14]. Twelve U.S. soldiers were convicted in the ensuing investigation, including Charles Graner, who received a 10-year sentence. Abu Ghraib was closed by the U.S. military in 2006 and its 4,500 prisoners were moved elsewhere. Even today, the Obama administration has refused to release most of the photographs depicting abuse at the infamous prison.

Ignoring objections from Iraqis who had been tortured by U.S. forces at Abu Ghraib, and lured by the potential to add much-needed beds to the overcrowded Iraqi prison system, Iraqi officials have now reopened the facility.

The problem is that Abu Ghraib has

become something much larger than a mere prison complex. It’s as if the Germans had suddenly decided to incarcerate their prisoners at Dachau or Auschwitz. [editor’s note: The Polish government is sending prisoners to Auschwitz, see the news in brief for details.] Abu Ghraib should only survive if it, like Auschwitz,

serves as a museum to preserve evidence of the magnitude of man’s inhumanity to man.

Otherwise it should be razed to the ground. ■

Sources: www.thestar.com, *Reuters*, www.cnn.com, *UPI*

Jailhouse Lawyers: Prisoners Defending Prisoners v. The U.S.A., by Mumia Abu-Jamal, Published by City Lights Publishers, ISBN 978-0-8728646-9-6; 286 Pages; \$16.95

by Gary Hunter

Prisoners helping prisoners with legal issues would not seem strange to most people. But the idea of prisoners protecting the U.S. constitution is a notion not many can grasp unless they take the time to read *Jailhouse Lawyers*.

In *Jailhouse Lawyers*, author and *PLN* Columnist Mumia Abu Jamal raises the bar for the serious scholar who has never considered the concept of justice being defended “from the bottom.” He educates the reader of the extent to which the constitutional rights of “free” society are protected by the often desperate efforts of its incarcerated citizens. He introduces us to prisoners whose names are legends in legal circles as well as to unknown prisoners who have made major differences in the way the law works for every citizen whether free or incarcerated. Mumia also reminds us that this bottom-up protection often comes with a very high price to those who fight for it. Such is the dynamic that drives *Jailhouse Lawyers*.

Consider Clarence Earl Gideon, the legal legend with an eighth grade education. Almost everyone knows that if they are arrested they have the right to an attorney. Few realize that they enjoy that right because of a hand-written petition filed by a 51-year-old, uneducated prisoner.

As Mumia puts it, “At the time of [Gideon’s] filing, nearly half of the people convicted in courts could not afford a lawyer and thus, like Gideon, had to either try to defend themselves or sit silently while the state exacted its pound of flesh.” Now *Gideon v. Wainwright* is the standard that ensures every U.S. citizen the right to

counsel in a court of law.

Richard Mayberry is a jailhouse lawyer of legendary status by virtue of his numerous courtroom victories. Mayberry’s successes are made even more remarkable given the circumstances under which he labored. As Mumia tells us, Mayberry had no formal training in the law and “In 1963 there were no law libraries in Pennsylvania prisons, and being caught with a law book was an automatic trip to the hole for possession of contraband.” In one case Mayberry suffered retaliation from a judge for no reason other than he had the audacity to act as his own defense counsel.

David Ruiz upended the entire Texas prison system when he dared to defy the rampant cruelty dispensed by guards and prisoners alike while prison administrators turned a blind eye. Ruiz’s first writ was actually torn up and thrown away by the unit warden. But because of his perseverance Texas was subjected to over 25 years of federal court supervision and, just as with Mayberry in Pennsylvania, the state was forced to completely revamp the way it ran its prisons.

Or consider the inception of the magazine *Prison Legal News* (*PLN*). For over a decade its founder, Paul Wright, suffered multiple forms of retaliation from jail officials for documenting court decisions that would help other prisoners fight their cases. Because these he was willing to suffer for the constitutional rights of others, what started as a ten-page newsletter has become a nationally recognized, award winning, human rights magazine.

In *Jailhouse Lawyers*, Mumia takes us behind the deception of our nation's highest elected leaders and exposes how they have eroded prisoners' efforts to litigate based on fear-induced propaganda, political prejudices and outright lies by the media. He exposes how former president Bill Clinton, purported champion of unwitting minorities nationwide, sold the civil rights of their incarcerated loved ones downriver as he capitulated to the conservative agenda of political eugenics advanced by the Republican party.

With the stroke of a pen and without so much as a minute of debate on the floor, former President Clinton signed into law the Prison Litigation Reform Act (PLRA) which drastically curtailed a prisoner's ability to defend his or her rights in court.

Jailhouse Lawyers points out that if the atrocities committed in Abu Ghraib took place in an American prison, the PLRA "signed by President Clinton does not allow for recovery for psychological or mental harm or injury." Yet many of the deplorable acts perpetrated in Abu Ghraib were committed by U.S. Army Reservists employed as prison guards in the U.S.

In the forward, political activist Angela Davis reminds us, "Mumia has urged us to reflect on this dialectic of freedom and unfreedom." Because the truth is that the survival of many of our constitutional rights is not based on "charitable legal organizations in the 'free world.'" They are "pioneered" by prisoners. *Jailhouse Lawyers* is available from Prison Legal News for \$16.95, plus \$6.00 shipping for orders under \$50.00. 📖

\$2.1 Million Award in California Prisoner's Choking Death

A California federal jury has awarded the estate of a prisoner who was choked to death by prison guards \$2.1 million. Prisoner Johnny Young, who was mentally ill, died on December 30, 2004, while being restrained by guards at the Richard J. Donovan State Prison.

While walking to breakfast that morning, the 40-year-old Young had a psychotic episode that caused guards to forcibly restrain him. When Young continued to move around, guards placed him "in choke holds and head locks, kneeled on his neck and back, and stomped on his neck and back," causing his death.

The matter proceeded to a three week trial. The jury found that guard Robert Craig used excessive force and acted maliciously and sadistically for the purpose

of causing Young harm. It also found that Craig and guards Edwin Fontan, Jose Rodriguez, and Edward Wamil acted with deliberate indifference to Young's safety, causing him harm. It awarded Young's estate \$100,000 on this count.

The jury further found that Craig, Fontan, Rodriguez, and Wamil were negligent in such a manner to be a substantial factor in Young's death. In all, it found these guards were 50% responsible for his death and non-party psychiatric, medical, and guard staff was 50% responsible. For the negligence claim, the jury awarded the estate \$2 million.

Representing the estate to obtain the April 29, 2009, verdict was San Diego attorney Thomas Luneau. See: *Young v. Hernandez*, USDC, S.D. California, Case No: 05-CU-2375 W CCAB) 📖

\$10,000 Settlement for Bunk Bed Railing Hitting Prisoner

Washington State's King County Jail has paid \$10,000 to settle a claim for physical injury caused by defective bunk bedding. The bed was not defective until a guard kicked it.

During count at the Jail on October 4, 2006, at around 3:00 PM, prisoner Tanner C. Brown was sitting on the bunk with his arm resting on the metal frame. Underneath him was his bunkmate, Mr. James, who was fast asleep. When James failed to respond to guard L. Mients's call, Mients

violently kicked the bunk bed.

As a result, the steel upright railing that Brown was leaning against "violently struck" his elbow, causing immediate pain. Brown went to see a nurse and filed a grievance. Represented by the Law Office of David S. Roth in Seattle, Brown accepted the \$10,000 settlement for damages and fees on September 4, 2008.

The documents relative to this claim are available on PLN's website. See: King County Claim No: 42478. 📖

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Poaching Boast Lands Oregon Prison Guard in Hot Water; Pulls State Trooper Father Down with Him

by Mark Wilson

Pendleton, Oregon boys pride themselves on their hunting abilities. Deep in the heart of Oregon's high desert, hunting is an age-old rite of passage and a way of life. Guards at Pendleton's Eastern Oregon Correctional Institution (EOCI) brag constantly about their hunting prowess, though they're probably doing so much more quietly these days.

Over the course of four conversations in September 2008, 22-year-old EOCI prison guard Timothy Charles Gallaher boasted to fellow guard Josh Mitchell about illegally poaching a branch-antlered 6-by-7 point bull elk on September 21, 2008 near his family's cabin. He stated that his father, Timothy Ernie Gallaher, a 28-year veteran with the Fish and Wildlife Division of the Oregon State Police (OSP), approved of the poach and offered to help retrieve and remove the downed elk.

Mitchell reported the conversations to his supervisor because he thought poaching was morally wrong and feared he could be fired for not reporting it. The supervisor notified OSP, which initiated an investigation.

OSP officials kept the Gallahers under surveillance and watched them meet at the family cabin. Afterward, Timothy altered his original story, telling Mitchell that he and his father had found the dead elk, without its antlers, on private property. He also said they found two dead elk calves with missing backstraps nearby. He claimed that his father believed a local poacher was involved.

In a search warrant signed two days later, investigators wrote that "[Gallaher] Junior told Mitchell that [Gallaher] Senior was going to make a case against (the local poacher) regarding the calf and that Senior would retrieve the 6 x 7 bull elk antlers in order to give them to Junior."

On October 1, 2008, teams of Fish and Wildlife investigators descended upon two Gallaher residences and seized GPS units, arrows, a camera and other items they hoped would tie them to the poaching. Police suspect that both Gallahers trespassed on private property when they killed the elk, severed its head for the antlers, and left the body to rot in the Umatilla National Forest.

Two months later, the senior Gallaher retired. OSP Captain Walt Markee stated

Gallaher was not getting a heavier hand because he was a trooper, and wasn't receiving special treatment. Umatilla County District Attorney Tim Thompson said he discussed the case with senior Gallaher's attorney (and brother) Dave Gallaher, who happens to be a former Umatilla County district attorney. At worst, the senior Gallaher faces two misdemeanor

charges, according to Thompson.

The junior Gallaher eventually admitted to killing the bull elk, and his father acknowledged that he concealed the incident from his OSP colleagues when he "was caught between his duty as an officer of the law and his paternal instincts." ■

Sources: *The Oregonian*, *Mail Tribune*

Utah Evaluates Drug Program Pilot; Recommends Further Evaluation

by David M. Reutter

A report by Utah's legislative Auditor General into the performance of the Drug Offender Reform Act (DORA) says that more time is needed to evaluate the program, and it makes several recommendations to assist in future evaluations.

DORA began as a three-year pilot program to identify and treat offenders who would benefit from substance abuse treatment rather than imprisonment. Utah's 2005 Special Session Legislature appropriated \$1.4 million to implement it in the Third Judicial District. In 2006, the Legislature expanded it to include all felony offenders, instead of limiting it only to drug offenders. The legislature appropriated \$8 million in 2007 to make the program statewide.

Three state agencies – Corrections, Human Services and the Commission on Criminal and Juvenile Justice – collaborate to make DORA work. It has several goals, which are broken down into process and outcome goals. In the process category, there are three goals.

The first is smarter sentencing by providing the judge with specific information about an offender's substance abuse problem and treatment needs prior to sentencing. Next, smarter treatment slots in the community and prisons, by conducting an assessment of the offender's substance abuse and determining the appropriate level of treatment.

The outcomes from these processes have the goal of reducing substance abuse and crime/recidivism, reduce future needs for prison and jail beds, create more law-abiding and taxpayer citizens and create safer neighborhoods.

It is hoped that treatment will avoid future crimes that would occur and result

in prison, saving up to \$838 million over 10 years when costs of victimization are included. The report did not find evidence of crime reduction but noted it was way too early to make a true assessment. "In criminal justice research, it is important to remember that failures generally happen quickly but successes require time and effort to achieve," said the three collaborating agencies' response to the report.

The report found discrepancies between those three agencies' data on DORA. This seriously inhibits a clear evaluation of the program that required correction. There are also differences in treatment of DORA offenders based upon location. In some instances this is due to treatment philosophy and other times it is based on the needs of the offenders.

In addition, Corrections used some DORA funds for non-DORA participants. This, as well as the failure to have clear guidelines for its agents' contact with offenders, needs to be rectified to establish the program's effectiveness.

It was recommended, further, that evaluation of the program continue. After a more sustained time of implementation, a guideline to treat all offenders and the availability to have correct information of spending, monitoring and treatment of offenders will render a clearer picture of whether the goals are being met. The collaborating agencies agreed to these recommendations and were working to put them in place.

The Utah Office of Legislative Auditor General's January 2009 report no. 2009-03, *A Performance Audit of the Drug Offender Reform Act* is available on PLN's website. ■

\$100,000 Settlement in Illegal Imprisonment Caused by Massachusetts' Failure to Implement Court Order

by David M. Reutter

A former Massachusetts prisoner has received \$100,000 to settle a claim of wrongful and illegal confinement. *PLN* previously reported on this incident, which stems from the failure of the Massachusetts Department of Correction (MDOC) and Parole Board to implement a court ruling that required time served on parole for consecutive sentences to be applied to each sentence. [See: *PLN*, Feb. 2008, p.14].

The plaintiff, Rommel Jones, was deprived of 1,513 days – more than four years – of sentence credit under the decision in *Crooker v. Chairman of the Mass. Parole Bd.*, 38 Mass.App.Ct. 915 (Mass. App. Ct. 1995). As a result, his release date was extended beyond the May 31, 2002 expiration of his sentence. It was not until a newspaper article highlighted the problem that MDOC officials took action to provide Jones with his *Crooker* credits.

Under the erroneous sentence calculation, Jones was not scheduled for release until July 22, 2006. The news article resulted in a quick recalculation, and Jones received a certificate of discharge on June 26, 2006. It was later learned that at least 13 other prisoners had been held beyond their release dates.

The calculation errors were well known to MDOC officials, who refused or failed to cure systematic problems related

to *Crooker* issues in sentence calculation. Rather than having a centralized authority to calculate release dates, MDOC relied upon staff at each prison to make the calculations. This practice was allowed despite MDOC officials being aware that errors in sentence calculation were common.

Although a court order mandated the award of credits for consecutive sentences while offenders were on parole, MDOC failed to explain the requirements of that order in its Date Computation Manual, failed to program its computers to recognize or flag *Crooker* issues, failed to train its sentence computation staff despite knowing they were making errors, and generally allowed the matter to fester while prisoners were held past their release dates.

For Jones, this resulted in serious consequences. He already had mental health problems, which deteriorated to the point that he “was placed on mental health watch, put in four point restraints, and was committed to Bridgewater State Hospital.” He was also unable to spend time with his mother during the last year of her life, and MDOC refused to allow him to attend her memorial service. Further, he

lost contact with his young daughter while he was illegally incarcerated.

In addition to the \$100,000 settlement, which was the state's maximum liability for negligence claims, Jones received a written apology from the MDOC. The matter was settled on May 28, 2008. “The main thing wasn't the money,” said Jones. “The main thing was to get the date computation system changed so they could work out a program so people get out when they're supposed to get out.”

Jones was represented by James Pingeon of Massachusetts Correctional Legal Services. See: *Jones v. Commonwealth of Massachusetts*, Suffolk County Superior Court (MA), Case No. 07-5083-C. ■

Additional source: *Boston Globe*

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Vermont Supreme Court: “Nutraloaf” Diet Is Punishment that Requires Hearing

On March 13, 2009, the Vermont Supreme Court held that placing a prisoner on a “Nutraloaf” and water diet constitutes punishment that requires a hearing before the punitive diet is imposed.

William Borden, Richard Pahl and Brian Pelletier, Vermont state prisoners, filed a declaratory judgment action in superior court seeking to have the imposition of a Nutraloaf and water diet by prison officials declared punishment. Under 28 V.S.A. §§ 851-853, the Vermont Department of Corrections (DOC) is required to conduct a fact-finding hearing before imposing punishment on prisoners; the plaintiffs argued that a hearing was necessary prior to implementing a Nutraloaf and water diet. The superior court held that such a diet did not constitute punishment, and the plaintiffs appealed.

The Vermont Supreme Court noted that Nutraloaf is “a compost of whole wheat bread, non-dairy cheese, carrots, canned spinach, raisins, canned Great Northern beans, vegetable oil, tomato paste, powdered milk, and potato flakes, mashed together and baked in a loaf pan.” Called “food loaf” or “meal loaf” in other prison systems, it is “designed to be ‘less appealing than normal food.’”

A Nutraloaf and water diet is imposed on prisoners who abuse food, utensils or bodily waste. Nutraloaf is high in fiber and requires the prisoner to drink a lot of water to avoid constipation. It is served without eating utensils.

DOC Directive 413.09 requires Vermont prison officials to determine whether guards have first attempted to end the offensive behavior by issuing warnings before a prisoner is placed on a Nutraloaf diet. It limits imposition of the diet to seven days, and requires a medical assessment following the week-long Nutraloaf regimen.

The Supreme Court held that the fact that Nutraloaf was designed to be unappetizing compelled the conclusion that its purpose was primarily deterrence. Since “‘retribution and deterrence’ are ‘traditional aims of punishment,’” the Court found that “the Nutraloaf-and-water regime is classic punishment deterrence.” It held that DOC officials must thus provide prisoners with a fact-finding hearing pursuant to 28 V.S.A. § 852, in which the prisoner is “en-

titled to notice of the charge, to confront the person bringing the charge, to testify, and to question witnesses.”

Accordingly, the superior court’s judgment was reversed. The plaintiffs were

represented by Defender-general Matthew F. Valerio, and Seth Lipschutz and Dawn Seibert of the Prisoner’s Rights Office in Montpelier. See: *Borden v. Hofmann*, 2009 VT 30 (Vt. 2009); 2009 Vt. LEXIS 23. ■

Ohio Parole Authority Ordered to Grant Hearings that Provide Meaningful Parole Consideration

by David M. Reutter

The Court of Common Pleas in Franklin County, Ohio has entered summary judgment finding the Ohio Adult Parole Authority (APA) denies “meaningful parole consideration when they assign an inmate to a proper guidelines category, but the lowest possible range in the guidelines chart is beyond the inmate’s earliest parole eligibility date.” The Court ordered the APA to re-hear and grant meaningful parole consideration to class members who had not had a parole hearing since June 2005.

This case arises from the decision in *Ankrom v. Hageman*, 2005 Ohio 1546 (Ohio Ct. App., Mar. 31, 2005) [*PLN*, Aug. 2006, p.39], which examined the parole eligibility of “old-law” prisoners who received indeterminate sentences prior to the changes associated with Senate Bill 2 that became effective on July 1, 1996. The *Ankrom* class consisted of “all parole-eligible Ohio prison inmates who pleaded guilty or no contest to lesser or fewer offenses than for which they were indicted.” The *Ankrom* court found the APA was denying “meaningful consideration” for parole, and that it was effectively disregarding sentences imposed by the trial courts.

The *Ankrom* decision resulted in the APA sending notices to all prisoners who were determined to be eligible for new parole hearings under that ruling. When North Central Correctional Institution prisoner David Hall’s name did not appear on the list, he filed a complaint seeking to compel the APA to immediately comply with *Ankrom* by granting him a meaningful parole hearing. The Court of Common Pleas entered an order in Hall’s case certifying a class of “all parole-eligible Ohio prison inmates whose conviction(s) were

obtained by a trial.”

The parties filed cross-motions for summary judgment. In addition to *Ankrom*, the Court of Common Pleas relied upon *Layne v. Ohio Adult Parole Authority*, 97 Ohio St.3d 456, 780 N.E.2d 548 (Ohio 2002) [*PLN*, May 2003, p.19], which held that in “any parole determination involving indeterminate sentencing, the Adult Parole Authority must assign an inmate the offense category score that corresponds to the offense or offenses of conviction.” Both the *Ankrom* and *Layne* decisions found the APA was effectively denying prisoners meaningful parole consideration.

While those cases dealt with prisoners who entered plea agreements, Hall’s case dealt with those who went to trial. The Common Pleas Court found the circumstances at the heart of Hall’s case were such that the class “may have been ‘flopped’ at their first hearing and consequently may be currently awaiting a hearing that complies with Defendants’ post-*Ankrom* policies and practices.” Thus, they were still serving sentences as a result of APA hearings that had denied meaningful consideration for parole.

The APA agreed this may have occurred. Consequently, the Court ordered immediate rehearings for the potential 633 prisoner class members. The Court said its June 2005 deadline did not mean that every class member who received a hearing after that date “necessarily received meaningful consideration for parole,” but it had no specific facts to make such a determination.

The Court entered its judgment in this case on February 9, 2009. See: *Hall v. Hageman*, Court of Common Pleas, Franklin County (OH), Case No. 05-CVH-05-5459. ■

Vendor Crushed by Seattle Jail Door Receives \$43,525 for Injuries

Washington State's King County Jail in Seattle has paid \$43,525 to settle a claim brought by a man delivering frozen food to the Jail.

While making his delivery on November 7, 2002, David Huntington was crushed by a heavy metal door operated remotely and from inside the building housing the Jail. Apparently, the employee operating the door failed to note Huntington, the large pallet he was delivering or the county-owned pallet jack he was using.

When he was crushed by the door against the pallet jack, Huntington "suffered severe and permanent lacerations and nerve injuries to his left hand, as well

as crush-related injuries to his abdomen, right thigh, left calf, left Achilles tendon and left ankle." As a result of these injuries, Huntington incurred medical costs, loss of work, a 10% impairment in his left upper extremity and loss of consortium with his wife.

He alleged that King County employees were aware that he was using the pallet jack and they had raised the hydraulic loading ramp to meet the level of his truck on the loading dock. Still, they negligently closed the door on him. Additionally, he claimed the loading dock was of "insufficient size and length, and too steep, to allow safe loading and unloading." It was

further alleged there were insufficient and improperly situated warning devices to warn vendors of impending door closure.

On February 7, 2007, Huntington accepted \$42,500 to settle his claim. He also received \$1,025 as reimbursement for the mediation fees. Huntington was represented by Everett attorney Bradford J. Fulton. The documents relevant to the case are available on PLN's website. See: *Huntington v. King County*, King County Superior Court, Case No: 05-2-35582-4.



\$250,000 Award in Mississippi False Imprisonment Suit

Last January, a Mississippi federal jury awarded a former prisoner \$250,000 for being falsely incarcerated by the Mississippi Department of Corrections (MDOC). The facts of the case exhibit an unbelievable abuse of power by MDOC officials.

After pleading guilty to burglary of an automobile, Will Terrance Porter was sentenced on October 22, 2004 to serve five years in prison. The court, however, suspended four of those years and ordered Porter to serve the remaining year in MDOC's Intensive Supervision Program, also known as house arrest.

On April 19, 2005, Porter was arrested on suspicion of a misdemeanor charge, which was later dropped. Nevertheless, Porter's probation officer, Mack E. Cox, placed a hold on him. The day after Porter's arrest, Cox issued a Rule Violation Report (RVR) that detailed the facts of the arrest.

A hearing was held in May 2005 on the RVR, after Porter was transferred to the Central Mississippi Correctional Facility. MDOC's hearing officer, Stephanie Jones, found Porter had violated his house arrest. Following MDOC policy, she reinstated the original five-year sentence and Porter was sent to the Mississippi State Penitentiary at Parchman.

Upon exhausting his administrative remedies, Porter filed a Petition for Post Conviction Relief in the Coahoma County Circuit Court. After a January 16, 2007 hearing, the court found that the MDOC lacked authority to reinstate the original sentence, because that was something only a judge could do. Porter was ordered to be immediately released, as MDOC had no authority to hold him.

Porter then filed a 42 U.S.C. § 1983 action alleging false imprisonment, unlawful seizure and due process violations. On January 15, 2009, the jury awarded him \$250,000 for the fifteen months he served in the MDOC prior to his release. He was represented by attorney J. Rhea Tannehill, Jr.

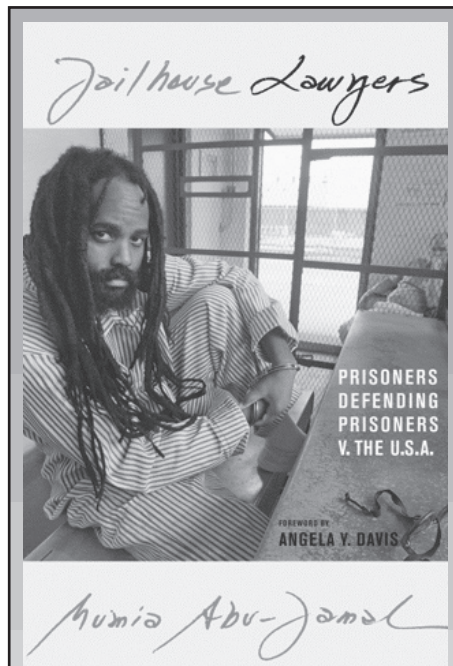
On April 1, 2009, the court granted Porter attorney fees of \$42,255 and expenses of \$2,821.57, with an additional \$2,105.40 in costs taxed against the defendants. The MDOC has since filed an appeal, which is pending. See: *Porter v. Mississippi Dept. of Corrections*, U.S.D.C. (N.D. Miss.), Case No. 4:07-cv-00070-M-D. ■

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Study Shows Few Texas Prisoners Transition Well to Community HIV Treatment

by Matt Clarke

On February 25, 2009, the *Journal of the American Medical Association* (JAMA) published an article which reported what percentage of Texas prisoners who were receiving Anti-Retroviral Therapy (ART) for HIV while in prison accessed ART drugs after release. The article showed that only half the prisoners applied for ART drugs within 90 days of being released from prison and only one-fifth of them did it in time to avoid treatment interruption.

Texas prisoners who are receiving ART are given a ten-day supply of ART drugs, a copy of their HIV lab report, a list of clinicians treating HIV in their home community, a Texas AIDS Drug Assistance Program (ADAP) application form and an ADAP medication certification form signed by a physician when released from prison. They are told to contact ADAP to receive at least another 30 days of ART drugs for free. To apply for drugs through ADAP requires filling out a 4-page ADAP application. The application and a 1-page form filled out by a clinician detailing current laboratory values must be submitted to the central ADAP office. Then the applicant contacts an ADAP caseworker via a toll-free phone number. The caseworker assigns the applicant to an ADAP-approved pharmacy that receives the ART drugs from ADAP. The whole process takes from five to ten days. Subsequent 30-day supplies of ART drugs are available from ADAP to applicants who meet the financial criteria for assistance. Almost all newly-released prisoners would qualify.

The article studied all 2,115 prisoners receiving ART released from the Texas Department of Criminal Justice (TDCJ) from 2004 through 2007. The authors checked ADAP records to see which of them had applied for ART drugs through ADAP and when they did so. Because the releasees are given only a 10-day supply of ART drugs and the ADAP process takes five to ten days, it is especially important for ADAP applications to be submitted quickly. However, only 5% of the releasees filled an ADAP prescription within 10 days of release. TDCJ has an ADAP application assistance program and prisoners who had that service were

much more likely to apply for ADAP and to do so in a timely fashion. However, the service was new, underfunded and not available to all the releasees. Overall, only 53.1% of the releasees filled an ADAP prescription within 90 days of release. Only 80% of the 53.1% filled a second ADAP prescription.

Releasees who were under 30 or over 50, belonged to a minority group, had detectable viral loads under 200 or were incarcerated less than a year were less likely to timely fill an ADAP prescription. Those receiving ADAP application

assistance, with undetectable viral loads and released on parole or mandatory supervision were more likely to timely fill an ADAP prescription. Notably, receiving ADAP application assistance resulted in a threefold improvement in timely filling an ADAP prescription and erased the twofold difference between racial/ethnic groups.

Source: *Accessing Antiretroviral Therapy Following Release From Prison*, JAMA, February 25, 2009--Vol. 301, no. 8, pp. 848-857, available at jama.com. ■

Highest Criminal Appeals Judge in Texas Faces Removal Hearing

by Matt Clarke

On February 19, 2009, the Texas Commission on Judicial Conduct charged Sharon "Killer" Keller, Chief Justice of the Texas Court of Criminal Appeals, the highest court in Texas over criminal matters, with five disciplinary charges – including bringing discredit on the judiciary and violating her duty as a judge.

The charges stemmed from Keller promptly closing the court clerk's office on September 25, 2007, so a prisoner facing execution could not file a last-minute after-hours appeal. As a result, the death row prisoner, Michael Wayne Richard, was executed that evening.

Richard's attorneys were experiencing computer difficulties and asked the court clerk's office to stay open 20 minutes late to facilitate the filing of a last-minute appeal based on the U.S. Supreme Court's grant of certiorari in two other death penalty cases that same day. Several judges stayed late at the courthouse, anticipating such a filing. Without telling them or the judge in charge of the case, Keller ordered the clerk's office not to remain open to receive the appeal. [See: *PLN*, July 2008, p.22].

Over 300 attorneys filed complaints against Keller due to her decision to prevent Richard's appeal from being filed, which led the Commission on Judicial Conduct to bring the five charges against her.

"Judge Keller's willful and persistent failure to follow [her court's] execution-day procedures on September 25, 2007, constitutes incompetence in the performance of duties of office..." the charging document stated.

Keller's behavior garnered international attention that faded little with time. An editorial in the *New York Times* the week before the Commission's announcement of the charges referred to her conduct relative to Richard's appeal, and questioned the fundamental fairness of Texas' criminal justice system.

The Commission held three informal hearings during its investigation, and Keller now faces a removal hearing. Austin attorneys Michelle Alcala and Mike McKetta were hired as special counsel to draft the charging document and prosecute Judge Keller. At the hearing Keller will be able to present evidence, call witnesses, cross-examine witnesses and voice objections.

"The judge can put on her case, and we can put on our case," said Seana Willing, the Commission's executive director. After the hearing the special master will submit findings to the Commission, which normally has 13 members but presently has two vacancies. If the Commission recommends removal, that decision would be reviewed by a seven-member special panel of appellate judges. The panel can

dismiss the case, censure Keller, or remove her from office. Orders of removal and censure may be appealed to the Texas Supreme Court.

Keller has retained Houston attorney Chip Babcock for her defense. "Judge Keller very much denies these allegations,"

said Babcock. "But as importantly, there are a number of facts which are omitted [in the charges] that would win the case for her if known."

Keller will have a chance to present her defense in court, where the special master who presides over her hearing will likely

be fairer than she was to Richard. Her removal hearing is scheduled for August 17, 2009 in San Antonio, before State District Judge David Berchermann, Jr. ■

Sources: *Austin American-Statesman*, *KPFT Radio*, *New York Times*

Audit Report Finds Michigan Prisoner Transportation System Wasteful

by David M. Reutter

Michigan's Auditor General has issued a report that criticizes the Michigan Department of Corrections (MDOC) prison transport system as inefficient and wasteful of taxpayer money. The report notes that MDOC has failed to implement recommendations made in a 1996 report.

To transport its prisoners, the MDOC has three regional hubs that employ 84 full-time Corrections Transportation Officers (CTOs). In addition to those hubs, 19 prisons employed 135 CTOs. There are four main reasons for prisoner transports: interfacility transfers, off-site medical appointments, court appointments and transportation for parolees and probationers.

While the Auditor found MDOC's efforts to manage prisoner transportation were moderately effective, it found five specific areas that represent an opportunity for improvement or a significant deficiency in management's ability to operate the program in an effective manner.

In fiscal year 2006-07, MDOC recorded \$23.6 million in transportation costs, which included salaries for CTOs, 4,601,300 vehicle miles and 102,000 overtime hours. Yet, MDOC had not developed a standardized method to identify, account for, document and report prisoner transportation activity.

Because MDOC failed to consistently or accurately monitor the costs or miles traveled to transport prisoners, its information cannot be relied upon. One prison did not report any transportation miles but it recorded \$429,000 in transportation costs. Another four prisons recorded 95,777 miles, costing \$29,576 for perimeter vehicles, produce trucks and other vehicles not used for prisoner transport. The Auditor also added \$21,352 in pay for 324 regular and 611 overtime hours to custody guards to transport prisoners that was not recorded as prisoner transport costs.

Another failure is that MDCO has not fully implemented its computerized transportation system to prioritize,

schedule, route and coordinate prisoner transport services. This tool could also be used to consistently report those services when implemented. In addition, MDOC has failed to establish a central transportation coordinator.

Currently, each prison has transfer coordinators, medical schedulers and records office staff prioritize and schedule their own prisoner transport needs. Over a 10-day period, 472 scheduled medical and court appointment runs cost \$31,094 in overtime.

The failure to centrally coordinate medical runs resulted in prisoners being scheduled for an appointment at the Charles Egeler Reception and Guidance Center only to have the prisoner transferred to another prison, sometimes across the state, requiring a special transport back for the appointment.

In addition, CTOs have inflexible hours and schedules that result in overtime. With flexible schedules for CTOs, the MDOC could have saved \$1,901 in overtime over a 10-day period. To accommodate those appointments, CTOs would come in early or stay late rather than having a scheduled run to fit in an eight hour shift.

The Auditor also found MDOC failed to fully utilize videoconferencing for medical and court appointments. Finally,

MDOC was criticized for failing to implement the Auditor's 1996 recommendations to recognize full cost of transportation statewide, establish a full-time central transportation coordinator position, to require all prisons to report its schedule to the regional transport lieutenant daily and to require all CTOs to be on a minimum of two hours of flex time.

It was recommended that MDOC implement these procedures to enable it to accurately assess and report its prisoner transportation costs. This report, *Performance Audit of Prisoner Transportation, Department of Corrections*, issued in December 2008 by Michigan's Office of the Auditor General is available on PLN's website. ■



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Seventh Circuit Reverses Dismissal of Suit Alleging Excessive Force, Retaliation and Inadequate Medical Care; Settles for \$15,000

The U.S. Court of Appeals for the Seventh Circuit reversed the dismissal of a lawsuit against Cook County Jail (CCJ) officials in Chicago, Illinois that alleged excessive force, retaliation and inadequate medical treatment.

Fredrick Lee Walker, a pre-trial detainee at CCJ for some eight years, sued CCJ and numerous guards for allegedly using excessive force against him four times during 2004, retaliating against him, and denying him medical care. After extensive discovery, the district court granted summary judgment to the defendants. Walker appealed.

The Court of Appeals first disagreed with the district court's decision to dismiss two of Walker's excessive force claims on statute of limitations grounds. A two-year statute of limitations applied to Walker's claims, but the limitations period should have been tolled during the pendency of the grievance process, the appellate court held.

The Seventh Circuit further disagreed with the district court's conclusion that Walker had failed to present sufficient evidence demonstrating a genuine issue of material fact as to one of his excessive force claims. Walker presented evidence that CCJ guards "hit him in the face, beat him with handcuffs, and stomped on him while he was on the floor." He also submitted medical records indicating that he suffered "trauma, bruises, and cuts on his face as a result" of the beating. Such evidence, the Court of Appeals held, was sufficient to take Walker's excessive force claim to trial.

The appellate court also took issue with the district court's treatment of Walker's retaliation claim. The district court had found "insufficient evidence" to support a claim of retaliation, but this argument was never advanced by the defendants. In effect, the district court had sua sponte granted summary judgment for the defendants on Walker's retaliation claim. This was error, the Court of Appeals explained, as Walker "had no notice that the adequacy of his retaliation evidence was being challenged."

Finally, the Seventh Circuit rejected the district court's dismissal of Walker's medical care claims. Walker had "consistently disputed that he received adequate medical care," and his medical records supported his allegations. Accordingly,

the judgment of the district court was reversed. See: *Walker v. Sheahan*, 526 F.3d 973 (7th Cir. 2008).

Following remand, the case settled on the day of trial, January 12, 2009, for

\$15,000. Although Walker later refused to sign the settlement papers, the district court dismissed the case based upon the "firm" settlement agreement between the parties. ■

Seventh Circuit Vacates Dismissal for Failure to Prosecute; \$50,000 + Fees Awarded Following Remand

The Seventh Circuit Court of Appeals has reversed a district court's dismissal of a prisoner's suit for failure to prosecute. The appellate court found the severe sanction of dismissal was not justified.

Illinois prisoner Amilcar Gabriel sustained second- and third-degree burns while working in the kitchen at the Big Muddy River Correctional Center. He then sued prison officials and Wexford Health Sources, Inc., the prison's private healthcare provider, in federal court. He alleged the defendants knowingly exposed him to dangerous work conditions and were recklessly indifferent to his serious medical needs.

Initial discovery closed on May 25, 2004, and a pretrial conference was scheduled for August 12, 2004. "Shortly before that conference, Gabriel disclosed Dr. Richard Lewan as his expert witness. Defendants ... then moved to bar Dr. Lewan's testimony on grounds that Gabriel had failed to provide the doctor's expert report in accordance with Rule 26(a)(2) of the Federal Rules of Civil Procedure." The magistrate judge granted the motion and barred Dr. Lewan's testimony, and the case was set for trial.

Two days later Gabriel moved to reopen discovery and permit additional time to provide his expert's report. The motion was based, in part, upon Dr. Lewan's inability "to complete his report because of difficulties scheduling the deposition of Dr. Garcia, Gabriel's treating physician, who had left his job in the Illinois Department of Corrections and now worked at a correctional facility in Missouri."

The district court granted Gabriel's motion and gave him until November 19, 2004 to provide the expert report. Gabriel timely provided Dr. Lewan's report, the defendants did not object, and trial was rescheduled for July 12, 2005. The trial

was continued twice to accommodate the court's schedule and once to accommodate the defendants' schedule, resulting in a September 19, 2005 trial date.

On September 14, 2005, Gabriel moved for a continuance, or in the alternative to voluntarily dismiss, because "Dr. Lewan had been scheduled to testify on ... September 27, and was unavailable to testify or give a deposition during the week of September 19. Because Dr. Lewan's testimony was necessary to demonstrate the deliberate indifference required to sustain a prisoner's § 1983 claim, Gabriel maintained his case would not survive a motion for directed verdict without it."

The district court denied Gabriel's motion and dismissed his suit with prejudice for want of prosecution. The court mistakenly concluded that Dr. Lewan's testimony remained barred, and incorrectly identified Dr. Garcia as Gabriel's expert. "The court concluded it 'might be more sympathetic to plaintiff's counsel's motion if it were not for the fact that the reason she seeks a continuance or dismissal without prejudice is due to the unavailability of Dr. Lewan, a witness whose testimony has been barred by this court.'"

Gabriel moved for reconsideration, asserting that the court was mistaken. Defense counsel did not defend the court's mistaken reading of the record and conceded that Dr. Lewan's testimony had not been barred. Regardless, the district court rejected Gabriel's motion and denied reconsideration. Gabriel appealed.

The Seventh Circuit noted that it reviews the "denial of a continuance and dismissal for want of prosecution for abuse of discretion and will reverse 'only if the decision [is] fundamentally wrong.'" See: *Moffitt v. Ill. State Bd. of Educ.* 236 F.3d 868, 873 (7th Cir. 2001). "Although this hurdle is admittedly high, it is not

insurmountable.”

The Court of Appeals also noted it had previously held that “dismissal for failure to prosecute is an extraordinarily harsh sanction” that should be used “only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing,” citing *Kruger v. Apfel*, 214 F.3d 784, 787 (7th Cir. 2000). Finally, the appellate court observed that dismissal for want of prosecution is improper in the absence of an explicit warning to the plaintiff. See: *Sharif v. Wellness Intern. Network Ltd.*, 376 F.3d 725 (7th Cir. 2004).

The Seventh Circuit agreed “that the record simply does not support the district court’s conclusion that Dr. Lewan’s testimony remained barred at the time of trial.” Accordingly, the Court concluded that “to the extent the dismissal sanction was premised on the district court’s mistaken impression that Dr. Lewan’s testimony was barred, it cannot stand.” Moreover, given that there was “no pattern of delay, missed deadlines, non-cooperation, or other litigation misconduct on the part of the plaintiff, and the imposition of sanctions is premised on a misreading of the record,” the Court of Appeals held the “dismissal is unwarranted and an abuse of discretion,” especially given that there was “no claim that a continuance would prejudice the defendants.” See: *Gabriel v. Hamlin*, 514 F.3d 734 (7th Cir. 2008).

On remand, Gabriel’s suit was reinstated and proceeded to trial in October 2008. The jury returned a verdict against

one of the defendants, Dr. Brian Ruiz, in the amount of \$50,000. On March 4, 2009, the district court awarded attorney fees to Gabriel in the amount of \$39,268.50 plus \$7,152.33 in costs and expert fees. The

court ordered that \$12,500 of the attorney fees be paid from the damages award, pursuant to the Prison Litigation Reform Act (PLRA). See: *Gabriel v. Hamlin*, 2009 U.S. Dist. LEXIS 17029 (March 4, 2009). █

Illinois Court of Appeals: Prisoner Has Standing to Sue Ameritech for Fraud

On July 1, 2008, an Illinois Court of Appeals held that a prisoner had standing to bring a claim against Ameritech for consumer fraud. Johnnie Flournoy, an Illinois state prisoner at the Joliet Correctional Center, filed suit against Ameritech in state court alleging the company had “deliberately terminated his collect calls prematurely,” forcing him to call the same party again.

As a consequence, his family members were charged multiple surcharges and fees for accepting his collect calls. Furthermore, because Flournoy sent his mother money to pay for the calls he made, he suffered damages personally. The trial court dismissed the complaint with prejudice.

The Court of Appeals reversed the dismissal, finding that Flournoy had stated a cause of action under the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq.* In doing so, it “settled a question of fact – did Flournoy sufficiently allege that he suffered actual damages as a result of Ameritech’s alleged deceptive practices.” See: *Flournoy v. Ameritech*, 351 Ill.App.3d 583 (Ill.App.Ct. 3d Dist. 2004), *appeal denied*. [PLN, Dec. 2004, p.31].

Upon remand, the trial court granted

Ameritech’s motion to dismiss for lack of standing to pursue a consumer fraud case. Flournoy appealed. The Court of Appeals held that its previous decision decided the issue in Flournoy’s favor under the law-of-the-case doctrine. The appellate court had previously found that Flournoy stated a claim under the Consumer Fraud Act, and that his allegation that he sent money to his mother to pay the Ameritech bills sufficiently established he had suffered actual damages.

“Given the fact that Flournoy actually paid the allegedly fraudulent billings, we find that the trial court erred in finding that he lacked standing to bring his complaint,” the Court of Appeals stated. The judgment of the circuit court was reversed and the case remanded. See: *Flournoy v. Ameritech*, Ill.App. 3d Dist., Case No. 3-07-0411 (unpublished). █

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AZ Sheriff Joe Arpaio Loses Three Public Records Cases

by Matt Clarke

The Maricopa County Sheriff's Office (MCSO) and Sheriff Joe Arpaio have lost three public records cases in the Arizona Court of Appeals, including one where they were ordered to pay over \$25,000 in attorney fees.

The first case arose when MCSO Lt. Paul Chagolla removed the *West Valley View* (WVV) from the list of media agencies that received routine MCSO e-mail press releases. Chagolla explained why he did so: "We like to see that our work is fruitful and we've sent [WVV] multiple story ideas, multiple releases and quite frankly don't see them covered." When WVV asked him to reconsider his decision, Chagolla said, "I'm not going to put you on the list because it is my prerogative to do so."

WVV discovered it had been removed from the e-mail list when it did not receive an MCSO press release that went out in late 2005 concerning the discovery of two murder victims at a construction site in a town covered by the suburban Phoenix newspaper. WVV's response to Chagolla's rebuff was to file a public records request for all future press releases under Arizona's public records law, A.R.S. § 39-121, *et seq.*

After being stonewalled by the MCSO for several months, WVV filed a special action petition in superior court. The court held that the MCSO had to make its press releases available to WVV at the same time it made them available to other media agencies. However, the court denied WVV's request for attorney fees, finding MCSO's actions had not been arbitrary, capricious or in bad faith as required by the statute authorizing attorney fees, A.R.S. § 39-121.02(B). MCSO appealed and WVV cross-appealed.

On August 16, 2007, the Court of Appeals affirmed the superior court's ruling that the MCSO had to provide WVV with press releases. The appellate court rejected the MCSO's arguments that public records requests could not be made for future documents, and that production on the same day that press releases were provided to other media agencies was unreasonably rapid. The Court of Appeals held that the MCSO's actions were arbitrary, capricious or in bad faith; the case was returned to the superior court for determination of whether attorney's fees should be awarded. See: *West Valley View v. Maricopa County*

Sheriff's Office, 216 Ariz. 225 (Ariz. Ct. App. 2007), *review denied*.

In a similar case decided on February 5, 2008, a unanimous panel of the Court of Appeals held that the MCSO had violated the public records law when it subjected nine records requests made by the *Phoenix New Times* to arbitrary delays, often exceeding 100 days, simply because it didn't like what the *New Times* had published. To say that Sheriff Arpaio and the *New Times* have had a contentious relationship would be a vast understatement. [See: *PLN*, Aug. 2008, p.12].

Following the excessive delays, the *New Times* filed suit under A.R.S. § 39-121 seeking to compel the MCSO to produce the requested records. Before the matter came before the court, the MCSO produced the records. The *New Times* then sought attorney's fees, which the trial court denied on the basis that there were no deadlines for production of documents in the public records law. The court also awarded costs to the MCSO, and the *New Times* appealed.

The Court of Appeals held that in order to prevail, the *New Times* had to prove that the requested records were public documents and they were denied access to the records in bad faith or in an arbitrary or capricious manner. The Court found that eight of the *New Times*' nine requests involved public documents, and that although no time period was specified in the public records statute, the law requires public records to be promptly produced and requests are deemed denied if the production is not prompt.

The appellate court noted that states with time limitations in their public records statutes specify three to ten days. It thus had no problem deciding that delays of months, regardless of the many reasons for the delays offered by the MCSO (most of which were due to employee inattentiveness), did not justify the failure to promptly produce the requested records.

The Court of Appeals observed that the trial court had found the MCSO did not wrongfully deny the documents, and thus didn't reach the question of whether the denial of the records was arbitrary, capricious or done in bad faith. The appellate court vacated the denial of attorney fees and the award of costs to MCSO, and returned the case to the superior court to

determine "whether MCSO's wrongful denial of public records was in bad faith or was arbitrary or capricious, and whether, under the circumstances, the *New Times* is entitled to an award of its attorneys' fees." See: *Phoenix New Times, L.L.C. v. Arpaio*, 217 Ariz. 533 (Ariz. Ct. App. 2008), *review denied*.

In a third case, on February 11, 2008, a superior court in Pima County, Arizona awarded \$25,241 in attorney's fees to the *Tucson Citizen* in a case involving public records requested from the MCSO in July 2007, but not received until five months later. The records were related to a dispute between Pima County officials and Maricopa County officials over how \$30 million in seized illegal assets should be divided.

Pima County was willing to produce the requested documents, but Dennis Wilenchik, a private attorney frequently employed by Arpaio, used his influence to block the release of the records until a court ruled they must be disclosed. The *Citizen* then moved for attorney fees. According to Phoenix attorney David Bodney, who represented the newspaper, "The message is that members of the public should not be obliged to litigate against Sheriff Arpaio whenever they hope to inspect public records – in this case, records that the Pima County Attorney wanted to disclose – but could not because of Sheriff Arpaio's objections."

MCSO appealed the attorney fee award, and lost yet again in the Court of Appeals. Arpaio argued that "A.R.S. § 39-121(B) does not permit the trial court to require him to pay *Citizen's* attorney fees," because he was not the custodian of the records and the statute does not specify who is liable for payment of the fees. However, the appellate court found the statute "does not prohibit a trial court from requiring a party other than the custodian of the requested records to pay attorney fees," and affirmed the lower court's order. See: *Arpaio v. Citizen Publ'g Co.*, 2008 Ariz. App. LEXIS 163 (Ariz. Ct. App., Dec. 18, 2008), *review denied*.

Given this string of losses in the Court of Appeals, perhaps MCSO and Sheriff Arpaio should consider simply complying with the state's public records law. Ironically, the MCSO has filed suit against Maricopa County to prevent the use of

a new form that restricts the method by which county employees file public records requests. This follows numerous records requests submitted by Sheriff Arpaio and the County Attorney's office, which "struck many hard-working employees as little more than harassment, intimidation and busy work," according to Maricopa County spokesman Richard De Uriarte.

Just one of Arpaio's records requests,

for every e-mail, calendar and phone record for 36 county workers, will cost taxpayers an estimated \$911,157. Sheriff Arpaio refused to explain why he was seeking such extensive information on county employees, saying it was part of a "criminal investigation." He also denied that the records request was a fishing expedition, stating "I don't know how to fish. I've never been fishing in my life."

Apparently Arpaio doesn't mind using the public records law for his own questionable purposes – he just has a problem complying with it when the sheriff's office is the subject of public records requests. ■

Additional sources: www.rcfp.org, *Arizona Republic*, *Phoenix New Times*, www.kpho.com

Colorado Florists Decry Prison Retail Flower Business

by David M. Reutter

Florists in Colorado are crying out against a prison program that is competing against them, undercutting their prices due to the help of prisoner slave labor. What started as a prison program to keep prisoners busy has now turned into a business that florists in Canon City cannot match with price.

"I absolutely believe in competition," said Katie Martin, owner of Touch of Love Florist. Despite that, she believes that the greenhouse program at the local prison is taking away customers with prices that she and other local florists cannot compete against. "Therefore putting a crunch on those of us that are trying to

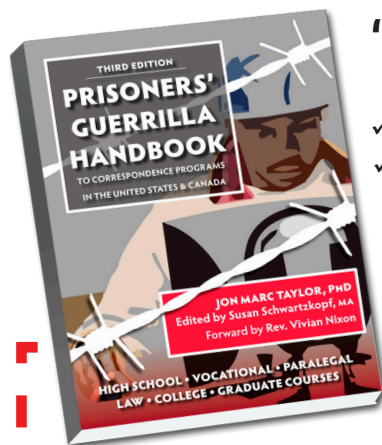
compete and have to stay with a pretty stable price so we can make a profit in our business."

The greenhouse program started at the local prisons, which is the largest employer in the Canon City area. Prison officials see it as a management tool. "We're trying to give [prisoners] real values, teach them to get up in the morning, go to work, work eight hours," said Colorado Corrections Industries Director Steve Smith. He says the industries are "self-supporting." A taxpayer savings of \$5,000 per prisoner. Smith provides no proof to support his claims. Since prisoner workers are paid only pennies an hour for their labor it

appears the main value being instilled is their labor is worth nothing.

Martin sees it as a threat to her livelihood. "It has to be affecting the jobs out here on the market. I know I don't have as many employees as I did ten years ago," she said. The other complaint is that the program started as a wholesale flower provider, but it has evolved into a retail seller that especially focuses on prison employees. The prison industry and local businesses have started a dialogue, where prison officials are being urged to scale back to solely wholesale. ■

Source: KOAA.



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OK Prisoners Released from Custody Despite Deportation Detainers

The Oklahoma Court of Criminal Appeals ordered two illegal aliens released from custody even though detainers for deportation had been filed with the county where they were being held, because the trial judge didn't have authority to order them detained and federal officials hadn't acted on the detainers within the allotted time period.

Luis Ochoa and Gregorio Robles, both Oklahoma state prisoners, were convicted of felonies. The trial judge gave them suspended sentences pursuant to plea agreements; he then questioned them about the legality of their presence in the United States. After discovering they were in the country illegally, he ordered

them held and federal officials notified for deportation purposes, in accordance with his reading of OK House Bill 1804 (2007).

The sheriff notified the Bureau of Immigration and Customs Enforcement (ICE), which filed detainers, but ICE didn't take custody of Ochoa and Robles within 48 hours. Attorney Joan Lopez then filed habeas petitions demanding their release.

The Court of Criminal Appeals first found that the trial judge was without authority to question Ochoa and Robles about the legality of their presence in the U.S. after he had already sentenced them; thus, he didn't have authority to order

them held for purposes of deportation. The appellate court suggested that if the trial judge had questioned them prior to imposing the suspended sentences, that might have been acceptable.

The Court of Criminal Appeals also found that since the law allowed the sheriff to hold prisoners for ICE for only 48 hours, and since ICE hadn't taken custody of Ochoa and Robles within that time frame, the sheriff was without authority to hold them any longer.

For those reasons the appellate court granted the prisoners' petitions for writs of habeas corpus and ordered their immediate release. See: *Ochoa v. Bass*, 2008 OK CR 11 (Okla. Crim.App. 2008). ■

Missouri Public Defenders Not Immune from Client Suits

In a case of first impression, the Missouri Court of Appeals held that state public defenders are not entitled to official immunity for acts committed during their representation of indigent criminal defendants.

Missouri public defender Arthur Allen represented Bernardo Costa, an indigent defendant, "in connection with a motion for post-conviction relief." Costa instructed Allen to secure various witnesses to testify at a post-conviction evidentiary hearing. Allen assured Costa that he would call the witnesses, but ultimately failed to do so. The failure was fatal to Costa's post-conviction claim.

Costa then filed an action for damages against Allen, asserting a claim "for breach of fiduciary duties (constructive fraud)." Allen moved to dismiss, arguing that he was entitled to official immunity and that Costa failed to state a cognizable damages claim because his action was premature. The trial court granted Allen's motion and dismissed the action with prejudice.

Observing that whether public defenders enjoy official immunity was a question of first impression, the Missouri Court of Appeals examined the decisions of several other states. The appellate court noted that "while most other jurisdictions find that public defenders are not protected by official immunity, the Supreme Court of Minnesota has extended such immunity to its public defender system. See: *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993). The Minnesota high court draws a distinction between public defend-

ers and other attorneys based on the fact that indigent defendants do not pay for their own defense."

However, the Missouri Court of Appeals noted the "vigorous dissent" in *Dziubak*, which rejected the majority's reasoning and joined Connecticut, Florida, Illinois, Nevada and Pennsylvania in refusing to extend official immunity to public defenders.

Quoting *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 764 (Mo. App. E.D. 1981), the court explained that "to be shielded by the doctrine of official immunity, a defendant must ... be 'invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.'" The court found that "a public defender, once appointed, does not exercise any portion of the sovereign's power, but instead provides professional services to a client.... As such, attorneys in the office of the public defender are not shielded from liability by the doctrine of official immunity, and the trial court's dismissal with prejudice must be reversed."

The court also rejected Allen's contentions that Costa had failed to state a claim for breach of fiduciary duty, and that Costa's legal malpractice claim was not ripe. Allen cited *Johnson v. Schmidt*, 719 S.W.2d 825 (Mo. App. W.D. 1986) for the proposition that a damage action is "premature 'until such time as appellant is successful in securing post-conviction relief upon a finding that he was denied effective assistance of counsel.'"

The court found *Johnson* distinguish-

able because it involved trial counsel while Allen was post-conviction counsel. "Because Allen did not serve as Costa's trial counsel, no further post-conviction proceeding is pending or can be brought that would address the effectiveness of Allen's representation of Costa." Rather, Costa need only establish "that Allen's breach prevented him from obtaining the relief sought in the post-conviction motion," the appellate court held. See: *Costa v. Allen*, 2008 Mo. App. LEXIS 8 (Mo. Ct. App. Jan. 2, 2008).

"Although the issue decided by the court was one of first impression, we weren't really surprised by the ruling in that it puts our attorneys in the same position as doctors who work for the state," said Greg Mermelstein, appellate division director of the Missouri Public Defender's Office.

The Missouri Supreme Court subsequently granted transfer, and ruled on Jan. 13, 2009 on the issue of whether the trial court had failed to properly allow Costa to amend his complaint. "On sustaining a motion to dismiss a claim ... the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed," the Supreme Court stated, citing Rule 67.06.

In this case, the trial court dismissed Costa's suit with prejudice just two days after the motion to dismiss was filed. "Ordinarily when a first pleading is ruled to be insufficient in a trial court, the party is afforded a reasonable time to file an amended pleading if desired," the Court

observed. "This is especially true in a case less than seven weeks old, and where Costa, a pro se plaintiff in prison, had no meaningful opportunity to respond to a dismissal motion filed and granted within

a two-day span."

Although the Court expressed doubt as to whether Costa had raised viable claims, the trial court's judgment was vacated and the case remanded for fur-

ther proceedings due to the improper dismissal. See: *Costa v. Allen*, 274 S.W.3d 461 (Mo. 2009). ■

Additional source: *Associated Press*

Allowing Others to Attack Prisoner, Making Credible Death Threats, Labeling Prisoner a Snitch Violate Eighth Amendment

The U.S. Court of Appeals for the Eighth Circuit affirmed in part a district court's denial of qualified immunity to four guards accused of violating a prisoner's Eighth Amendment rights.

William Irving, a Missouri prisoner, filed a 42 U.S.C. § 1983 action against Thomas Brigance, Ronetta Hyer, Warren Cressey and Leonard Neff, guards at the Jefferson County Correctional Center, for subjecting him to retaliation in response to a previous lawsuit he had filed against them.

Irving alleged that Brigance, Hyer, Cressey and Neff violated his right to be free from cruel and unusual punishment when they allowed another prisoner to attack him, made death threats against him, and falsely labeled him a snitch.

For example, Irving claimed that on November 4, 2004, Ephriam Prewitt, another prisoner, asked Hyer and Neff to "pop" the cell doors so he could assault Irving. In response to that request Hyer and Neff opened the doors and Prewitt attacked Irving, striking him in the face and causing injury to his jaw and nose. Irving was unable to breathe properly for two months as a result of the assault.

Irving also alleged that Brigance gave another prisoner a razor to use as a weapon in another attack. Irving overheard Brigance and the other prisoner planning the attack and reported it to Brigance's supervisor, which caused Brigance to retrieve the razor from the other prisoner before it could be used. Irving further alleged that Brigance offered money and cigarettes to three prisoners in exchange for assaulting him, made death threats on at least two occasions, and "repeatedly told other inmates that Irving was a snitch in an effort to incite them" to attack him. Cressey, Neff and Hyer reportedly made death threats against Irving or otherwise intimidated him.

Brigance, Hyer, Cressey and Neff moved for summary judgment on Irving's Eighth Amendment claims, which the

district court denied. They then took an interlocutory appeal challenging the district court's denial of their qualified immunity defense.

The Eighth Circuit began its analysis with Irving's claim that Hyer and Neff had failed to protect him by opening the cell doors to allow the attack by Prewitt. Such an action, if true, "portrays unjustifiable, actionable inmate-endangering conduct," the appellate court stated. Hyer and Neff attempted to minimize their conduct by arguing that Irving's injuries were too minor to warrant Eighth Amendment protection. The Court of Appeals disagreed, finding "a blow to the face that resulted in a two-month period of difficulty in breathing is greater than de minimis."

Turning to Irving's claims against Brigance, the appellate court held that making credible death threats and labeling a prisoner a snitch violate the Eighth Amendment. Brigance had argued that the law was not clearly established that making death threats or snitch labeling violated the Eighth Amendment. The court rejected those arguments.

Repeated and credible threats against a prisoner, if proved to be true, constitute "brutal and wanton acts of cruelty that serve no legitimate penological purpose and pose a substantial risk of harm to [a prisoner's] health," the appellate court explained. However, the court found that the death threats by Neff, Hyer and Cressey, although "reprehensible and unjustified," were not as credible and therefore did not rise to the level of a constitutional violation.

Further, the Court of Appeals held Brigance was on fair notice that to falsely label a prisoner a snitch was to "unreasonably subject [a prisoner] to the threat of a substantial risk of serious harm at the hands of ... fellow [prisoners]."

Accordingly, the judgment of the district court was affirmed in regard to the denial of qualified immunity to Hyer and Neff related to the Prewitt incident, and to Brigance related to death threats and labeling Irving a snitch. Qualified immunity was granted to Hyer, Neff and Cressey as to their less credible death threats. See: *Irving v. Dormire*, 519 F.3d 441 (8th Cir. 2008). ■

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Nebraska: Tape-Recorded, Restricted-Calling Prison Telephone System Passes Constitutional Muster

by John E. Dannenberg

The Nebraska Court of Appeals has upheld administrative regulation 205.3 (AR 205.3) of the Department of Correctional Services (DCS), which restricts prisoner phone calls to land-line, non-conference-call recipients and authorizes tape-recording of all non-attorney phone calls. In reversing an earlier district court injunction enjoining AR 205.3, the appellate court found that DCS's new telephone system was the least restrictive means of accomplishing DCS's goals of prison safety and security, and did not infringe upon prisoners' constitutional rights.

In August 1997, Barry McCroy and other Nebraska prisoners sued DCS in state district court under 42 U.S.C. § 1983 for both injunctive relief and damages in regard to DCS's new restrictive telephone program, the Inmate Calling System (IMS). The IMS established calling schedules and tape recording procedures for all prison phone calls except confidential attorney-client calls (defined as calls to court clerks, bailiffs and bar attorneys). Three-way calls, conference calls and call forwarding were prohibited. Additionally, the IMS limited prisoners to 20 pre-approved numbers and excluded all calls to cell phones, pagers, 800/900 numbers, 411 information numbers, state senators and the media.

In October 1997, the district court entered an injunction barring implementation of the IMS as it applied to the media, courts, attorneys and state senators, with particular attention to prohibiting the recording of any such privileged calls. The injunction also reinstated call-forwarding and conference calls, as well as calls to 800/411 numbers and cell phones. Additional injunctive relief was entered by the court on December 10, 2003 following motions for summary judgment [*PLN*, June 2004, p.20], and a final judgment ordering the injunction to remain in "full force and effect" was entered on Sept. 28, 2005.

Upon cross appeals, the state appellate court considered the question de novo, using the four-part test established in *Turner v. Safley*, 482 U.S. 78 (1987). The Court of Appeals noted that an injunction should not be granted unless the party requesting relief can demonstrate a clear right, irreparable injury and the absence

of an adequate remedy at law. Here, the Court found that as prisoners, the plaintiffs did not have a right to phone calls that would transcend DCS's valid security interests. DCS claimed that the IMS was needed to prevent gang and fraudulent phone communications, which the Court found to be reasonable penological interests. DCS related actual incidents of security breaches prior to implementation of the IMS as a result of phone calls that involved "fraud, drug trafficking, and harassment of victims and witnesses."

The appellate court balanced these concerns against prisoners' access to the courts (via phone calls to attorneys) and their rehabilitative need to maintain family contact, and found that when considered in conjunction with prison visitation

programs and mail, the IMS did not deny such communications. At worst, the IMS rendered them procedurally more difficult, which did not meet the prisoners' burden of showing an absence of such communications. As to the plaintiffs' claims that they were denied access to the courts due to the IMS, they were unable to show any actual denials of court access.

In sum, the Court of Appeals found the district court had erred in determining that the prisoners were entitled to injunctive relief. Accordingly, the permanent injunction entered by the district court was reversed and the case was remanded with instructions to dismiss the plaintiffs' claims with prejudice. See: *McCroy v. Clarke*, 2008 Neb. App. LEXIS 91 (Neb. Ct. App. May 6, 2008). ■

Absent Claim for Emotional Damages, Prisoner's Psychotherapist-Patient Privilege Remains Intact

The Second Circuit U.S. Court of Appeals has entered a detailed opinion on the issue of psychotherapist-patient privilege when a district court is confronted with a request by prison officials to obtain a prisoner's psychiatric records in discovery in a civil rights action. The appellate court concluded the privilege could not be overcome when the prisoner was not seeking damages for emotional harm in his lawsuit.

While imprisoned at New York's Sing Sing Correctional Facility on December 20, 1999, prisoner Nathaniel Sims was being strip searched when guards Mike Blot and Francisco Carballo allegedly assaulted him without provocation or justification. The guards, however, claimed that Sims started the altercation.

Sims filed a civil rights complaint; after he was denied counsel, the defendants took his deposition. The defendants subsequently served a demand for production of "all psychiatric records of [Sims] since [his] incarceration in 1993." Sims was appointed counsel after the deposition, and his attorney objected to the production request.

The district court ordered Sims to

produce the documents. After the case was initially dismissed for failure to exhaust administrative remedies, an amended complaint was filed. The production order was reinstated and Sims filed a motion with the Second Circuit for mandamus relief.

The Court of Appeals held it had jurisdiction to review pretrial discovery orders on mandamus in cases that involve "the extension of an established principle to an entirely new context." The loss of a plaintiff's privilege related to psychiatric records pending final judgment in a lawsuit was deemed problematic because "a remedy after final judgment cannot unsay the confidential information that has been revealed...." Further, the Court's review was necessary to prevent discovery practices that have "potentially broad applicability and influence of the privilege ruling under attack." Sims' mandamus petition presented all of these factors.

The Second Circuit found that the district court's order allowing production of Sims' psychiatric records would make the confidentiality of psychotherapist-patient communication uncertain – if

not extinguished – in a great number of cases. The appellate court held that *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923 (1996) was controlling precedent. *Jaffee* required federal courts “to recognize that confidential communications between a licensed psychotherapist – including a licensed social worker engaged in psychotherapy – and his or her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”

The *Jaffee* ruling noted that “[l]ike other testimonial privileges, the patient may of course waive the protection.” Fairness principles require waiver to apply so “a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party.” Moreover, “[p]arties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict.”

The district court had found that despite the fact that Sims’ complaint only sought damages for the physical harm he suffered due to the guards’ excessive use of force, and although his attorneys had explicitly stated he abandoned, did not claim and would not present evidence for any mental or emotional damages,

that Sims had waived privilege when he testified at the deposition concerning his mental health issues.

The appellate court held that since the pleadings filed by Sims’ attorneys only sought damages for physical injuries, he did not waive his psychotherapist-patient privilege. As the deposition was without the assistance of counsel, leniency applied as to the waiver issue. Moreover, even had Sims asserted damages for mental or emotional harm, he was permitted to voluntarily withdraw those claims in a civil action to protect his privileged psychiatric records.

The Second Circuit also rejected the defendants’ argument that the privilege should be overcome to allow them to prove that Sims had masochistic or suicidal tendencies that led him to start the fight. The Court held that if Sims had such tendencies, that was “a far better reason to deny disclosure than to grant it.” The public interest “in securing psychiatric help for a patient who has suicidal tendencies” would be chilled if an accused assailant was allowed to transcend the privilege of confidentiality by arguing that the “existence of such tendencies indicates that the patient started the fight.” The appellate court held that the “suicidal tendencies’ rationale exceeded appropriate bounds of discretion.”

The defendants further argued that the privilege should not apply when it is alleged or implied that an attack on

the plaintiff was unprovoked. However, this would lead to the plaintiff and defendants being required to disclose their respective mental health records in any assault or excessive force case. Furthermore, the Court of Appeals rejected the contention that a plaintiff who requests damages for pain and suffering has waived privilege “because the psychiatric records might conceivably disprove the experiencing of pain and suffering”; that any claim of “garden-variety injury” waives the privilege; and that a plaintiff’s mental health is placed in issue whenever he makes a claim for “unspecified damages,” which might “include some sort of mental injury.”

In conclusion, the Second Circuit held that a plaintiff does not forfeit his psychotherapist-patient privilege merely by asserting a claim for injuries that does not include emotional damages, or by merely stating that he suffers from a condition such as depression or anxiety for which he does not seek damages. Additionally, a plaintiff may withdraw or formally abandon all claims for emotional damages in order to avoid forfeiting the privilege, and a party’s privilege is not overcome when his mental state is put in issue only by another party.

The Court of Appeals therefore granted mandamus relief and vacated the district court’s order requiring production of Sims’ psychiatric records. See: *Sims v. Blot*, 534 F.3d 117 (2d Cir. 2008). ■

Prolonged Bench Restraint and Excessive Pepper Spraying Requires Trial

The Eighth Circuit Court of Appeals has reversed a grant of summary judgment to prison officials in a prisoner’s lawsuit alleging Eighth Amendment violations when guards restrained him on a bench for 24 hours for refusing to accept a cell mate, and for pepper spraying him for refusing orders.

Before the appellate court was the appeal of Darrin Scott Walker, a prisoner at Missouri’s South Central Correctional Center. After Walker was handcuffed and moved from a one-man cell to a two-man cell, he slipped out of the handcuffs and refused to be recuffed because he did not want to be celled with the other prisoner.

The Court of Appeals found it was undisputed that Walker was restrained in an upright position on a bench for 24 hours. During that period he was denied

water (except when he was allowed to use the bathroom at 1 p.m. one day and at 9:30 a.m. the next day), and denied food. The Court found that this treatment, which was designed to force Walker to agree to cell with another prisoner, was trial-worthy to determine if it was an excessive and disproportionate use of force.

The Eighth Circuit further found a jury should determine whether the use of pepper spray on Walker constituted excessive force. In a separate incident, Walker had refused three orders by guard Marc Knarr to surrender his cell mate’s food tray, and had refused to move away from the food port. Without warning, Knarr sprayed pepper spray around the port with a super-soaker used for riot situations. Walker was sprayed in the face as he was moving away from the food port, and his entire cell was soaked with pepper spray.

Afterwards, the undisputed facts showed that Walker was not allowed to shower and was not given clean clothes or bedding for three days. He could only wash in his cell sink; this caused him to suffer red, peeling and itchy skin, which required the use of hydrocortisone cream for months.

The Eighth Circuit held that the district court had improperly granted summary judgment against Walker on these claims, which required a trial. The case was remanded for further proceedings and the district court was ordered to consider appointing counsel to assist Walker in obtaining access to videotapes and reports, and to identify a John Doe defendant. See: *Walker v. Bowersox*, 526 F.3d 1186 (8th Cir. 2008).

The trial in this case is scheduled for November 9, 2009. ■

Fifth Circuit Reinstates Prisoner's Environmental Tobacco Smoke Suit

by Matt Clarke

The Fifth Circuit Court of Appeals has reversed a district court's order granting summary judgment to prison officials in a prisoner's environmental tobacco smoke (ETS) lawsuit.

Getzell Johnson Murrell, Sr., a federal prisoner incarcerated in Beaumont, Texas, filed a pro se complaint against prison officials pursuant to *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971). Murrell alleged that he suffered serious health problems after being exposed to excessive levels of ETS between 12 and 24 hours a day at his prison workplace and housing area. The ETS was allegedly so thick that he had to hold a wet towel over his face to breathe. Murrell also claimed he had advised the defendants that a smoking ban was not being enforced and that the ETS was causing him serious health problems.

The district court initially dismissed his lawsuit for failure to state a claim upon which relief could be granted, and Murrell appealed. The Fifth Circuit reversed the dismissal and remanded the case for further proceedings, finding that Murrell's ETS complaint stated a claim. See: *Murrell v. Chandler*, 109 Fed.Appx. 700 (5th Cir. 2004) (unpublished). On remand, the district court granted summary judgment to the defendants and Murrell again appealed.

The Fifth Circuit held that pursuant to *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475 (1993), exposure to excessive ETS that seriously harms a prisoner's health violates the Eighth Amendment and entitles the prisoner to relief if he can prove that prison officials were deliberately indifferent. The appellate court noted that Murrell's sworn declaration included allegations of excessive exposure to ETS in his housing area and prison workplace; that the ETS was causing him serious health problems, including migraines and respiratory difficulty; and that he had advised the defendants that the prison's smoking ban was not being enforced.

"This evidence creates genuine issues of material fact regarding whether Murrell objectively proved that he was exposed to unreasonably high levels of ETS and whether the defendants were subjectively deliberately indifferent to his plight," the Court stated. Murrell allegedly informed some of the supervisory defendants of the

ETS and health issues verbally or through grievances. That created a genuine issue of material fact as to whether the supervisory defendants were personally involved in violating Murrell's Eighth Amendment right to be free of cruel and unusual punishment.

Therefore, the Fifth Circuit held the district court had erred in granting summary judgment to the defendants on Murrell's ETS claim. The judgment

was reversed and the case returned to the district court. See: *Murrell v. Chandler*, 277 Fed.Appx. 341 (5th Cir. 2008) (unpublished).

This suit is still pending before the U.S. District Court for the Eastern District of Texas, following a stay in the proceedings after Murrell was transferred to a different federal prison. He has since moved to have the case reinstated on the active docket. ■

Federal Prison Guards' Convictions Affirmed in Sex Scandal

by David M. Reutter

The Eleventh Circuit Court of Appeals has upheld the convictions of two guards convicted in a sex-for-contraband scheme at the Women's Federal Correctional Institute in Tallahassee, Florida. *PLN* previously reported the arrests and indictments in this case. [See: *PLN*, Aug. 2007, p.38; Oct. 2006, p.12].

Before the court was the appeal of former prison guards Alan Moore and Gregory Dixon. While they had proceeded to trial, their four co-defendants pleaded guilty, assisted federal investigators and testified against them. Moore and Dixon were found guilty of conspiracy to accept an illegal gratuity. Moore was also found guilty of witness tampering, while Dixon received additional convictions for bribery. Both were sentenced to twelve months in prison followed by three years supervised release.

On appeal, they argued there was insufficient evidence to prove a conviction of conspiracy to accept an illegal gratuity and an "official act." The appellate court noted that the elements of conspiracy are (1) an agreement between the defendant and one or more persons, (2) the object of which is to do an unlawful act or a lawful act by unlawful means. A "formal agreement" need not be demonstrated, as an agreement may be demonstrated by circumstantial evidence of a meeting of the minds to commit an unlawful act. Proof that the accused committed an act to further the purpose of the conspiracy can be used to prove the existence of an agreement.

The testimony of guard Alfred Barnes showed the existence of such an agree-

ment. Barnes testified that "there was a mutual unstated understanding to switch [job] assignments" so Dixon could meet with prisoner "Sabrina B." and Barnes could avoid prisoner "Shonnie D." in order to prevent the sex-for-contraband scheme from being discovered.

Shonnie D. testified that Moore gave Barnes the key to the staff office area so he could meet with her in the middle of the night to have sex. She also testified that Moore allowed her to leave her unit to visit Barnes. Moore knew Barnes had engaged in sexual intercourse with Shonnie D., and Barnes testified they had an "understanding" that they would not turn each other in.

The Court of Appeals held that this constituted a conspiracy, as the guards' actions fit within the definition of "official act" under precedent. Five specific incidents demonstrated sufficient evidence to uphold the convictions: (1) Dixon and Barnes switched unit assignments; (2) Dixon permitted Sabrina B. to telephone Barnes to request contraband; (3) Moore telephoned Barnes on Shonnie D.'s behalf; (4) Moore permitted Shonnie D. to leave her unit to meet with Barnes for sex; and (5) Moore gave Barnes the key to the staff offices to rendezvous with Shonnie D. in the middle of the night.

The evidence demonstrated there was an overall scheme. The actions all took place within the same prison location. Further, the guards achieved the common goal in the same manner – they gave contraband to prisoners in exchange for sexual acts. There was considerable over-

lap between those involved: Dixon had sex with prisoners Sabrina B., Letishe M. and Demetrius C., while Moore had sex with Sabrina D. and Latoya B.

As to Dixon's bribery conviction, the

appellate court found the jury instructions properly defined sex as a "thing of value." The witness tampering charge was properly substantiated by Moore's act of giving cigars to prisoner Shirley B. for "not tell-

ing" that she had witnessed him having sex with prisoner Sabrina B. The convictions of Moore and Dixon were therefore affirmed. See: *United States v. Moore*, 525 F.3d 1033 (11th Cir. 2008). ■

First Circuit Upholds BOP's Discretion to Limit Halfway House Placement

The U.S. Court of Appeals for the First Circuit upheld the authority of the federal Bureau of Prisons (BOP) to limit halfway house placements.

In 2005, the BOP promulgated formal rules categorically limiting halfway house placement to the last ten percent of a prisoner's sentence, not to exceed six months. [See, e.g.: *PLN*, Feb. 2006, p.10].

Richard Muniz and Victor Gonzalez, both federal prisoners, challenged the rules via petitions for writs of habeas corpus. They argued that the rules conflicted with the BOP's statutory obligation to consider, on an individual basis, certain factors when making halfway house placements. The district court agreed and granted their petitions; the BOP appealed.

The First Circuit began its analysis with the text of the statute. Under 18 U.S.C. § 3621(b), the BOP is required to consider five factors when making halfway house placements. Several of those factors require individualized assessment. Unlike the Second, Third, Eighth and Tenth Circuits, though, the appellate court found the BOP's use of categorical rulemaking to be an appropriate exercise of discretion. Accordingly, the First Circuit reversed the judgment of the district court. See: *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008), *cert. denied*.

The Court of Appeals noted, however, that if Congress was unhappy with the BOP's categorical exclusion rule, it

could easily correct it. With the passage of the Second Chance Act, it appears that Congress has taken steps to do so.

The Second Chance Act, signed into law on April 9, 2008, amended § 3621 to explicitly require individualized assessment of all BOP halfway house placement decisions. The Act further

requires that the BOP give prisoners enough time in halfway houses to "provide the greatest likelihood of successful reintegration into the community." The Act authorizes, but does not require, the BOP to place prisoners in halfway houses for up to one year. [See: *PLN*, Feb. 2009, p.8]. ■

\$150,000 Settlement In Missouri Jail Suicide Suit

On May 21, 2008, the Sheriff of Adair County, Missouri agreed to settle a wrongful death suit brought by the family of a prisoner who committed suicide while at the Adair County Detention Center (ACDC). The settlement requires the county to pay \$150,000 to the family of the prisoner, and up to \$15,000 in costs.

From December 25, 2003 to December 29, 2003, Chris Maheu was incarcerated at the ACDC. Maheu, who suffered from depression, was placed on suicide watch after other prisoners and monitored telephone calls revealed that Maheu was suffering from suicidal tendencies.

While on suicide watch in a single cell, staff at the ACDC failed to properly monitor Maheu in accordance with jail policies, and failed to ensure that Maheu's cell was not equipped with means for Maheu to commit suicide. Maheu hung himself on December 29th.

Maheu's family sued the Sheriff of Adair County and other ACDC staff alleging violations of Maheu's 8th and 14th Amendment rights. Maheu's family alleged that the defendants were "grossly negligent, reckless and callously indifferent" to the suicide risk posed by Maheu.

The defendants agreed to settle the case for \$150,000. Half of the settlement proceeds, \$75,000, were paid to the attorney representing Maheu's family, with the other half split between Maheu's mother and surviving child. An additional \$9,334.61 in court costs were paid by the defendants along with the attorney's fees and expenses for the court appointed Guardian Ad Litem for Maheu's child. Maheu's family was represented by Daniel Miller of Columbia, Missouri. See: *Maheu v. Clark*, USDC ND MO, Case No. 2:06-CV-00069-ERW. ■



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Fourth Circuit Upholds Prisoner Exclusion in Virginia FOIA

The Fourth Circuit Court of Appeals upheld the constitutionality of excluding prisoners from the right to obtain public records under Virginia's Freedom of Information Act (FOIA), Va. Code Ann. §§ 2.2-3700 to 3704 (2005).

Joseph M. Giarratano, a Virginia state prisoner, filed a FOIA request with the Virginia Department of Corrections (VDOC) for copies of treatment protocols for prisoners with Hepatitis C, to aid him in potential litigation related to his medical care. The request was denied because prisoners are specifically excluded from Virginia's FOIA.

Giarratano then filed a civil rights action pursuant to 42 U.S.C. § 1983 in federal court, alleging that the statutory exclusion of prisoners from the FOIA violated the Due Process and Equal Protection clauses of the Fourteenth Amendment, both facially and as applied, and violated the First Amendment as applied. The U.S. District Court granted the VDOC's motion to dismiss and Giarratano appealed.

On appeal, Giarratano claimed that the exclusion of prisoners from Virginia's FOIA violated the Equal Protection clause unless the court determined that prisoners were more prone to filing frivolous FOIA requests than the general public. He also claimed that the exclusion violated the Equal Protection clause as applied to him, as he had no history of filing frivolous FOIA requests and was willing to pay the costs associated with his request.

The Fourth Circuit held that a restrictive classification in a statute such as the FOIA has a strong presumption of validity so long as it is related to any legitimate state interest. Under the applicable standard, the plaintiff bears the burden of negating "every conceivable basis which might support" the restriction. Merely claiming that there is no legitimate state interest, as Giarratano did, is conclusory and insufficient to overcome the presumption of validity. Giarratano might have been able to disprove some of the "state interests" by, for example, submitting statistics to the district court showing that prisoners were not more prone to filing frivolous FOIA requests than the general public, but he failed to do so.

Even Giarratano's assertion that he had no history of filing frivolous FOIA requests and was willing to pay the costs of his request did not state a plausible claim

that the FOIA exclusion denied him equal protection. Where some reasonable basis exists, a restrictive classification "does not offend the Constitution simply because ... [it] 'is not made with mathematical nicety or because in practice it results in some inequality.'" The appellate court found that Giarratano's situation was the result of the general restriction on freedoms inherent in lawful incarceration and the inequality inherent in "imperfect" laws.

Finally, the Court of Appeals ruled that the denial of Giarratano's FOIA request for Hepatitis C treatment protocols did not hinder his ability to file a lawsuit alleging inadequate medical treatment for Hepatitis C. Thus, his First Amendment access-to-the-courts claim also failed, and the Fourth Circuit upheld the district court's dismissal of his lawsuit. See: *Giarratano v. Johnson*, 521 F.3d 298 (4th Cir. 2008). ■

Ninth Circuit: Orange County Jail Violated Ad Seg Prisoners' ADA, Religious and Exercise Rights

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals ruled that restrictions on prisoners in administrative segregation (ad seg) at the jail in Orange County, California, related to exercise and group religious programs, violated their federal rights. The appellate court further held that inadequate physical facilities at the jail and reduced programs for disabled prisoners violated the Americans with Disabilities Act (ADA).

Fred Pierce and three other disabled ad seg prisoners at the Orange County jail had filed a 42 U.S.C. § 1983 complaint in U.S. District Court (C.D. Cal.) against Orange County and then-sheriff Michael Carona. Following a six-day bench trial, the district court found the plaintiffs had failed to demonstrate any constitutional injury under § 1983; the court further terminated a prior consent decree against the jail [See: *Stewart v. Gates*, 450 Fed.Supp. 583 (C.D. Cal. 1978)], pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626(b)(3).

The plaintiffs appealed, and the Ninth Circuit affirmed in part and reversed in part. The Court of Appeals reversed the lower court's termination of consent decree provisions related to ad seg prisoners' access to exercise and religious programs, because violations of those provisions were still ongoing. It also found that because bathrooms, showers and some common areas had physical barriers that prevented access by disabled prisoners, the County was in violation of the ADA. But the Ninth Circuit affirmed the termination of eleven *Stewart* provisions dealing with mailed reading materials,

law book access, mattresses and beds, meals, population caps, telephone access and visitation, because no evidence was presented that showed ongoing violations in those areas.

The ruling focused on the district court's termination of the 1978 *Stewart* order related to religious worship in ad seg. That order provided for weekly group services and individual visits to the chapel or meetings with a prisoner's bona fide personal spiritual advisor. However, two plaintiffs alleged that they were denied access to such religious activities solely due to their ad seg status. The Ninth Circuit found that the County's bare assertion of "security concerns" was insufficient to extinguish all access to group religious programs for ad seg prisoners, and reversed the lower court.

As to regular exercise, the Ninth Circuit found that was a right guaranteed by the Eighth Amendment and could not be summarily dismissed under the County's blanket "security" argument. Therefore, based upon their pleadings, the plaintiffs had established a violation of § 1983. The appellate court held that a minimum of two hours of exercise per week, as set forth in the *Stewart* consent decree, was required. Since this was not being provided, termination of that provision was erroneous.

Likewise, the *Stewart* provision for accommodation of disabled prisoners could not be terminated. The plaintiffs demonstrated repeated examples of substantial barriers to access in the jail that unfairly impeded mobility-impaired and dexterity-impaired prisoners. Those same prisoners were thereby denied access to

rehabilitative programs enjoyed by non-disabled prisoners at the jail. At the very least, the existing facilities utterly failed the ADA's requirement of having "readily accessible" features.

Accordingly, the Ninth Circuit reversed the district court's termination of three of the *Stewart* provisions based upon evidence of continued violations. On remand, the district court was also ordered

to consider two prisoners' claims of mental and emotional harm related to the ongoing constitutional violations. See: *Pierce v. County of Orange*, 526 F.3d 1190 (9th Cir. 2008) (as amended), *cert. denied*. ■

Eleventh Circuit Reverses Dismissal of Challenge to Florida DOC Ban on Pen Pal Requests

The Eleventh Circuit Court of Appeals has reversed a district court order dismissing a Florida prisoner's civil rights action that challenged a prison policy which prohibited him from sending letters to churches and ministers requesting prayer partners and pen pals.

The federal lawsuit was filed in the Northern District of Florida by state prisoner R. Casper Adamson, who is "a converted Southern Baptist." Adamson attempted to mail thirteen letters to Baptist churches and ministers to request "prayer partners and religious pen pals."

Prison officials intercepted the letters and refused to mail them. They contended that Florida Dept. of Corrections (FDOC) policy prohibited the use of "correspondence privileges to solicit or otherwise commercially advertise for money, goods, or services," which "includes advertising for pen pals." See: FL Admin. Code, Chapter 33.210.101(9).

Adamson argued the policy violated his First Amendment right to freedom of religion and freedom of speech. He also alleged it infringed on his "right to marry by preventing him from looking for a girlfriend and fiancée."

The U.S. District Court found the FDOC policy constitutional, holding that it furthered "an important or substantial governmental interest unrelated to the suppression of expression." That interest was identified as "the security and the prevention of inmate fraud and harassment of the unwitting public that has resulted in money order scams and other criminal activities."

The Eleventh Circuit, however, found the FDOC's motion to dismiss provided no explanation for the challenged policy. Instead, the district court relied on authorities from jurisdictions other than Florida to support what it perceived to be the governmental interest served by the policy. While that conclusion might ultimately prove correct, the appellate court held that without the benefit of discussion of the policy's purpose by the parties or Florida-based authority, dismissal was premature at this early stage of the litigation.

As such, the district court's order of dismissal was reversed and remanded for further proceedings. Adamson had also challenged the FDOC policy on the grounds it was an "invalid exercise of legislative author-

ity" under state law. The Eleventh Circuit affirmed the holding that the policy was permitted under § 944.09, Fla. Statutes. See: *Adamson v. McDonough*, 259 Fed. Appx. 206 (11th Cir. 2007) (unpublished). ■

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Ohio Supreme Court Rules Sex Offender Residency Restrictions Not Retroactive

by Matt Clarke

The Supreme Court of Ohio held that a state statute restricting sex offenders from residing within 1,000 feet of a school (R.C. 2950.031) did not apply to sex offenders whose home purchase and offense occurred before the statute's enactment.

Gerry R. Porter was convicted of sexual imposition in 1995 and sexual battery in 1999. He and his wife had bought a house in 1991. In 2003, the General Assembly enacted R.C. 2950.031 (later amended and recodified at 2950.034), stating that no registered sex offender "shall establish or occupy a residential premises within one thousand feet of any school premises." 150 Ohio Laws, part IV, 6657.

Francis M. Hyle, chief legal officer of Green Township, initiated an action against Porter alleging that portions of Porter's property were within 1,000 feet of the premises of a school. Hyle sought and was granted a permanent injunction that barred Porter from living in his home. Porter appealed.

The First District Court of Appeals affirmed the lower court, but certified its judgment as being in conflict with *Nasal v. Dover*, 169 Ohio App.3d 262, 862 N.E.2d 571 (Ohio Ct. App. 2006), as to whether the residency restriction was an unconstitutional *ex post facto* law if applied to residences established prior to the law's enactment date.

The Ohio Supreme Court agreed to hear the case and held that a two-part test was used to establish the constitutionality of a retroactively-applied law. "Under this test, we first ask whether the General Assembly expressly made the statute retroactive. If it has, then we determine whether the statutory restriction is substantive or remedial in nature."

The Court noted that "[t]o overcome the presumption that a statute applies prospectively, a statute must 'clearly proclaim' its retroactive application," not merely infer retroactivity. The Supreme Court found that the challenged statutory language did not meet the test of clearly proclaiming retroactivity. It rejected the argument that the language stating the statute applied to anyone who "has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to" the covered

offenses required retroactive application. It also rejected the argument that the statutory language "shall establish a residence" and "occupy residential premises" should be interpreted as forbidding sex offenders from occupying pre-existing residences.

Thus, the Supreme Court held that the statute did not apply to Porter because he bought his home and committed the sex offenses of which he was convicted prior to the enactment of the residency restrictions. The judgment of the appellate court was reversed on the basis of the law not being retroactive as applied to Porter, and the Court expressly refused to rule on the constitutionality of the statute. See: *Hyle v. Porter*, 117 Ohio St. 3d 165, 882 N.E.2d 899 (Ohio 2008).

Based upon its ruling in *Hyle*, the

Ohio Supreme Court resolved the certified question regarding the appellate conflict with *Nasal*, and affirmed the judgment of the Court of Appeals in that case on April 9, 2008. See: *Nasal v. Dover*, 117 Ohio St. 3d 531 (Ohio 2008).

The *Cincinnati Enquirer* opined that the General Assembly should not merely amend the law to make it retroactive, but should consider the unfair impact of the residency restrictions on the 550,000 registered sex offenders in the U.S., 1,000 of whom reside in the Cincinnati area. The newspaper suggested that mandatory post-release treatment would be more effective than imposing blanket residency restrictions. ■

Additional sources: www.cincinnati.com, *Cincinnati Enquirer*

Eleventh Circuit Unpublished Decision on PLRA Administrative Exhaustion Requirements Trumped by Published Ruling

In an unpublished ruling, the Eleventh Circuit Court of Appeals held that summary judgment, rather than a motion to dismiss, was the proper procedure to determine whether a prisoner had exhausted administrative remedies under the Prison Litigation Reform Act (PLRA). However, that ruling was superceded by a published decision from the same appellate court.

In its first ruling the Eleventh Circuit considered the appeal of Georgia prisoner Benjamin R. Singleton, whose civil rights complaint stemmed from a February 19, 2004 incident in which a bus transporting prisoners caught fire. Singleton claimed that he suffered injuries and loss of property as a result of prison officials' wrongdoing.

Two days after the accident Singleton filed an informal grievance; he then proceeded to a formal grievance, which was denied by the warden on March 30, 2004. Under Georgia Department of Corrections policy, Singleton had four business days to appeal the warden's response by submitting it to his assigned counselor or the Grievance Coordinator.

The defendants argued that Singleton had filed his grievance appeal one day late, referring to a form signed by prison officials that indicated it was received on April 6, 2004; they filed a motion to dismiss, which the district court treated as an "unenumerated Rule 12(b) motion." In response, Singleton filed an affidavit that said he gave the appeal to his counselor on April 1, and the counselor assured him he would place it in the chief counselor's box.

Finding the "best evidence" of when Singleton had submitted his appeal was the "Date Appeal Received" entry on the grievance appeal form, the district court dismissed Singleton's complaint under the PLRA for failure to exhaust. On appeal, the Eleventh Circuit found the PLRA's exhaustion requirement was not jurisdictional, but was an affirmative defense to be raised by the defendants and subject to the usual procedural practice under Supreme Court precedent.

The appellate court noted that affirmative defenses may be clear from the face of the pleadings, and are ordinarily handled on summary judgment motions under Rule 56. "Furthermore, the burden

of establishing an affirmative defense lies on the defendant, not on the plaintiff as the district court seems to suggest.”

The Court of Appeals also reminded the district court that summary judgment is not appropriate where a genuine issue of material fact exists about an affirmative defense. Because the dismissal was based on an erroneous application of the PLRA's exhaustion requirement, the matter was reversed and remanded. See: *Singleton v. Department of Correction*, 277 Fed.Appx. 921 (11th Cir. 2008) (unpublished).

On remand, the defendants filed another motion to dismiss based on failure to exhaust administrative remedies under the PLRA. Although the district court noted that the Eleventh Circuit had held the issue of exhaustion was a matter for summary judgment and the burden of proof should not be shifted to the plaintiff, it stated “Courts across the country are divided on both of these questions.”

Further, the district court observed that the subsequent, published Eleventh Circuit decision in *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008), which “held that it is proper for a judge to resolve factual disputes unconnected to the merits in deciding whether a prisoner has properly exhausted administrative remedies,” was “in direct conflict with the unpublished appellate decision issued in this case.”

Following the ruling in *Bryant*, the court required the defendants to “bear the burden of proof on all elements of exhaustion.” In finding that prison staff had signed Singleton's grievance appeal form as being received five business days after the response to his formal grievance – one day past the deadline – the district court held that Singleton had failed to properly exhaust his administrative remedies.

Accordingly, the court again dismissed his suit. See: *Singleton v. Johnson*, 2008 U.S. Dist. LEXIS 73923 (S.D. Ga. 2008). The dismissal was upheld on appeal on April 17, 2009, with the Eleventh Circuit approving the district court's decision to follow *Bryant* rather than the prior conflicting, unpublished decision in this case.

The Court of Appeals also held that

the district court “did not clearly err in making the factual finding that Singleton failed to satisfy the PLRA's exhaustion requirement,” based on the date that his grievance appeal was received as indicated by prison staff, despite Singleton's affidavit that he had filed his appeal in a timely manner. See: *Singleton v. Department of Correction*, 2009 U.S. App. LEXIS 8093 (11th Cir. 2009). ■

Denial of Bedding, Clothes to Florida Prisoner States Claim

Florida's First District Court of Appeal held that a prisoner's civil rights complaint alleging that a guard denied him blankets, bed sheets and clean clothing for four-and-a-half months, causing illness and injury, stated a claim that was sufficient to withstand summary dismissal.

The Court's ruling came in an appeal filed by Florida state prisoner Wendall Hall after his complaint was dismissed by a Leon County Circuit Court under § 57.085(6), Florida Statutes (2006), which is Florida's prisoner indigency statute.

The Circuit Court held that Wendall's claim for monetary damages against the Florida Department of Corrections (FDOC) was barred by sovereign immunity, and the First District agreed with that holding. However, the Court of Appeal found that a claim against defendant “Officer Knipp” had been improperly dismissed.

Hall's complaint stated a claim under § 768.28(9)(a), Florida Statutes, by alleging that Knipp had acted “in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” In effect, Hall claimed that Knipp “was acting

outside the scope of his employment – in the sense of not exercising power lawfully vested in him ...” when he allegedly refused to provide bedding and clean clothing.

Prison guards have a duty to exercise reasonable care to persons in their custody. Hall alleged that Knipp had breached that duty. Thus, the First District held that Hall's complaint was sufficient to withstand summary dismissal as to the claim against Knipp in his individual capacity.

Further, the Court of Appeal rejected the FDOC's argument that Hall's claim should be dismissed due to his failure to serve process on Knipp, since the trial court's initial review of the complaint under the indigency screening statute precluded service of process. Accordingly, the case was remanded for further proceedings. See: *Hall v. Knipp*, 982 So.2d 1196 (Fla. Dist. Ct. App. 1st Dist. 2008). ■

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News in Brief:

Alabama: On May 25, 2009, Ashton Mink, 22, and Joshua Southwick, 26, escaped from the Perry County Corrections Center in Uniontown. The facility is owned and operated by LCS Corrections Services. The prisoners escaped when Ashton's sister, Angela Mink, 25, and Jacquelin Mink, 25, his wife, cut holes in the perimeter fence. All four were caught in North Dakota on June 6 following a shootout with officers and a 14-hour standoff. Dick Harbison, LCS vice president of operations, said two shift captains and five guards were fired for not adequately supervising the prisoners.

Arizona: On June 18, 2009, at approximately 9:00 PM, a guard at the Arizona State Prison Complex-Perryville shot and killed himself while on duty patrolling the outside perimeter of the facility. The guard's name has not been released. An investigation is underway.

Arkansas: On June 2, 2009, five unnamed guards were placed on unpaid leave following the escape of two prisoners from the maximum security Cummins Unit in Grady. Jeffrey Grinder, 32, and Calvin Adams, 39, walked out of the prison on May 29 wearing guard uniforms made at the facility. Video surveillance shows the men putting on the uniforms in the library and walking out unchallenged. Their absence was noticed during the 10:00 PM headcount. The five guards, who were responsible for monitoring the prison's entrance and exit points, were later fired. Gov Mike Beebe called the escape inexcusable. "We don't know whether it was a breakdown at the gate where they left, we don't know if it's a breakdown with whoever was watching the cameras, we don't know whether it was a breakdown within the library. We don't know how much of it was inside in terms of cooperation," Beebe said. Grinder and Adams, who drove off in a car left for them by an unknown accomplice, were captured in New York on June 2.

California: On June 21, 2009, a riot between two prison gangs, the Norteños and the Sureños, broke out in the Facility-C Maximum Security general population yard at the California Substance Abuse Treatment Facility. The altercation involved approximately 75 prisoners, some of whom used shanks or other weapons. Eleven prisoners were transported to area hospitals for medical treatment, but none faced life threatening injuries. Guards used pepper spray and

fired both rubber bullets and live rounds to quell the riot. No guards were injured. Prison officials believe the fighting was premeditated because the riot broke out in five different locations at the same time.

Florida: On June 22, 2009, Osceola County Jail prisoner Angel Santiago, 28, drew a pistol from beneath his jail uniform and took a guard hostage. Santiago forced the guard into a medical bay and ordered the man to exchange uniforms with him. According to official reports, the guard said Santiago threatened to "blow my head off." Santiago, who is serving two life sentences for a robbery and shooting, was confronted by other guards and eventually disarmed. Although no shots were fired, Santiago didn't go down without a fight. He now faces multiple charges for the incident, including assault, kidnapping and attempted escape. On June 26, jail guard Michelle Hung was charged with 13 felonies for smuggling the gun to Santiago and assisting with the attempted escape. She is being held at the Orange County Jail on \$1 million bail.

Georgia: On May 16, 2009, a riot broke out at the Hays State Prison. The disturbance began around noon and continued until approximately 2:30 PM. Guards relinquished control of sections of the prison during the riot. Prisoners caused extensive damage: Various items were burned, cells were flooded, walls were painted, control room windows were shattered and furniture was smashed. No one was killed or injured. Twenty of the prisoners involved in the incident will be transferred to the HiMax facility in Jackson.

Maryland: On May 12, 2009, Kevin Dorsey, 26, and Rodney Lockett, 25, were charged with an armed robbery in which two people were shot and one died. The charges stem from an investigation in which a cell phone was planted by police and guards in Baltimore's Supermax prison. The cell phone was used to record multiple conversations, including Dorsey and Lockett's home invasion plot. More charges are likely as a result of the investigation, dubbed "Operation Dial-a-Cell," said U.S. Attorney Rod J. Rosenstein. Gov. Martin O'Malley recently asked for permission to test jamming equipment that could make prison cell phones useless, but in the meantime authorities are turning them against prisoners. A seven-month investigation that included

wiretaps on illegal prison cell phones recently led to the federal indictment of 24 people believed to be members of the Black Guerrilla Family gang.

Mississippi: On April 30, 2009, William Rogers, 56, and his son Jeffrey, 35, both former Tippah County sheriff's deputies, were sentenced for depriving a prisoner of his civil rights. The father and son duo arrested Jimmy Hunsucker, Jr. on a DUI charge in June 2007. They shocked him with stun guns in a holding cell until he defecated on himself, because Hunsucker allegedly cursed at and threatened guards during booking. Hunsucker and his lawyer reported the assault to the FBI. Both deputies were indicted on felony civil rights charges in late 2008, but pleaded guilty to misdemeanors in early 2009. The elder Rogers was sentenced to three months in jail and one year supervised release. Jeffrey received a far more lenient sentence—five days in jail with no post-release supervision. Both men are prohibited from ever working in law enforcement again, but Jeffrey was allowed to continue his career in the armed forces. U.S. District Judge Michael Mills, who sentenced the pair in separate hearings, said of the younger Rogers' sentence, "[Five days] is not as bad as getting tasered till you defecate."

Netherlands: The Dutch Ministry of Justice recently purchased 40,000 rolls of specialty toilet paper printed with recommendations for good hygiene, safe sex and coping with aggression. Ministry officials hope messages such as "wash your hands" and "always use a condom" will positively affect prisoners' behaviors. The toilet paper received mocking reviews in the Dutch press. "Boldly printed toilet paper is supposed to keep inmates from jumping one another without protection," wrote *de Telegraaf*.

New Jersey: On June 11, 2009, Sgt. Eric Williams of the Union County Jail was permitted to return to work despite being convicted for assaulting a prisoner. Williams pleaded guilty to a reduced charge and signed a statement saying he witnessed guard Alvin White punch prisoner Edwin Reyes and break his jaw on July 15, 2008. Williams also admitted he slapped Reyes and did not notify his supervisors about the altercation. Typically, such convictions prevent guard from ever working in corrections again, but prosecutors waived that provision because Williams agreed to testify against

his co-worker. Williams also avoided a mandatory 5-year prison sentence by taking the plea deal. He was suspended for 180 days without pay and demoted from sergeant to line guard. White is still awaiting trial on charges of aggravated assault and official misconduct.

North Carolina: On May 11, 2009, prisoner Woody Chavis, 47, died at a prison work farm near the Tillery Corrections Center in Halifax County. Chavis and another prisoner were attempting to hitch a trailer to a tractor when it backed over Chavis. Prison medical staff administered CPR and first aid until paramedics arrived to airlift Chavis to Pitt County Memorial Hospital in Greenville, where he died at 11:15 AM. Both the North Carolina DOC and the Halifax County Sheriff's office are investigating, though no foul play is suspected.

Ohio: On May 26, 2009, a Hamilton County grand jury indicted Cincinnati police officer Julian Steel, 46, on ten criminal charges that included rape, extortion, intimidation and abduction. A woman said Steele made her perform a sex act after her teen son was booked into the county's juvenile detention center during a robbery investigation. The indictment also alleges that Steele falsely accused and imprisoned the juvenile. Steele has been suspended pending trial. If convicted, he faces a 70-year prison sentence.

Poland: Polish authorities announced in May 2009 that they will begin sending prisoners to the infamous Auschwitz camp, where the German government murdered millions of people during World War II. "Our mission is to teach them the terrible history, which will be an element in their reform program," said a spokesman for the Auschwitz-Birkenau museum. The prisoners will get a guided tour of the gas chambers and cells, just as thousands of tourists do every year. "It will be shock therapy," said Major Luiza Salapa, of the prison services program.

Texas: On May 18, 2009, prisoner Joseph Ebron, 30, was sentenced to death for assisting in the murder of fellow prisoner Keith Barnes. This was Ebron's third murder conviction in the last 15 years. Ebron and Barnes were both confined at the federal prison in Beaumont at the time. Ebron allegedly restrained Barnes while another prisoner, Marwin Mosley, stabbed Barnes in the chest 106 times for reportedly testifying against a mutual associate. Mosley later killed himself in prison. Ebron received a death sentence despite substantial mitigating

evidence presented to the jury; prosecutors surmised that Ebron's past crimes contributed significantly to the jury's verdict.

Virginia: On May 10, 2009, Navy veteran and former prison guard Brian Cramer was found hanging in his cell at the Henrico Jail East in Richmond. Cramer had been arrested on multiple drug charges, including delivery of cocaine within 1,000 feet of a school, in March 2009. Jailers claim they checked Cramer's cell just 20 minutes before his body was discovered. Henrico County officials are investigating.

Wisconsin: On June 25, 2009, John Champion, 40, formerly a guard at the Racine Correctional Institution (RCI) in

Sturtevant, pleaded guilty to state charges of conspiracy to deliver illegal articles to a prisoner. Prosecutors alleged that Champion was recruited into the Simon City Royals gang during his employment at the prison. He smuggled pornography, alcohol, tobacco and marijuana into RCI and gave them to Anthony Lubrano, 43, who was allegedly running the gang from inside the facility. Champion was able to smuggle nearly \$30,000 worth of contraband to the gang before his activities were revealed by informants. Sixteen Simon City Royals gang members were also charged with various offenses related to this case. Champion will be sentenced on August 3. ■

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Alabama Raises Rates Charged for Prisoner Labor

In October 2007, the Alabama Department of Corrections (DOC) began charging other government entities for prisoner labor, such as work crews that pick up highway trash. With the start of the next fiscal year on October 1, 2009, the DOC will raise the rate from \$10 per prisoner per day to \$15. An exception is the Alabama Department of Transportation, which has been paying \$20 per prisoner per day – a rate that increased to \$50 last February.

The driving force behind the rate in-

crease is a \$43.3 million shortfall between the DOC's annual budget and the amount it actually takes to run the state's prison system. "What we've been trying to do with this is ... raise revenue to meet our operational costs," said DOC spokesman Brian Corbett.

The prisoners who do the work apparently will not receive a raise above the \$2 per day they are paid for their labor. Why do they toil for such meager compensation? "It's a better feeling compared to being inside the prison," said Childersburg Work Release Center prisoner Samuel Grayson.

In FY 2007, the DOC provided other government agencies with 103,000 man hours of prisoner labor per month. That spring, DOC Commissioner Richard Al-

len received permission from Governor Bob Riley to start charging for prisoner work crews. The DOC collected about \$15,000 in the year's last quarter.

In FY 2008, the DOC made almost \$1.2 million for the more than 1.3 million hours of prison labor it provided at the rate of \$10 per prisoner per day. Paying minimum wage for that amount of work would have cost \$6.9 million.

"An idle mind is the devil's workshop," said Childersburg Warden Rodney Huntley. "So work in and of itself helps to keep the camp calm and keeps issues down." Plus, as the state has found, charging \$15-50 per day while paying prisoners \$2 per day is also quite profitable. ■

Source: *Birmingham News*

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Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

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National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

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Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

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District Court Erred in Sua Sponte Dismissal of Prisoner's Challenge to Conditions of Confinement

The U.S. Court of Appeals for the Second Circuit reversed a district court's sua sponte dismissal of a prisoner's challenge to his conditions of confinement.

Sala-Thiel Thompson, a federal prisoner, filed a habeas petition under 28 U.S.C. § 2241 alleging that his conviction was entered without jurisdiction and that several of his conditions of confinement were unlawful. The district court sua sponte dismissed Thompson's suit.

According to the district court, Thompson should have pleaded a civil rights action rather than a habeas petition under § 2241; the court could not decide a habeas petition containing claims for relief under § 2241 and civil rights law; and Thompson's claims concerning the jurisdiction of his sentencing court were not cognizable under § 2241. Thompson appealed.

The Second Circuit quickly disposed of Thompson's jurisdictional challenge to his conviction, agreeing with the district court that it was not cognizable under

§ 2241. The appellate court disagreed, however, with the lower court's handling of Thompson's conditions of confinement claims.

First, the Court of Appeals was puzzled by the district court's conclusion that Thompson's conditions of confinement challenge had to be brought in a civil rights action rather than in habeas. "This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence," the Second Circuit explained, "including such matters as the administration of parole, ... prison disciplinary actions, prison transfers, type of detention and prison conditions."

Nevertheless, the appellate court did not base its decision to reverse the dismissal of Thompson's claims on this ground. Instead, the Court of Appeals emphasized that as Thompson was a pro se litigant, the lower court was required to construe his claims liberally. In doing so, even if the claims were mislabeled as a habeas petition, the district court should have treated his allegations "as properly

pleaded, or at least given the petitioner leave to file an amended pleading identifying the proper source of law without dismissing the action."

Finally, the Second Circuit dismissed out of hand the district court's belief that a petition for habeas corpus may not be joined in the same pleading with a civil rights claim, remarking that it was unaware of any basis for such a conclusion.

Accordingly, the judgment of the district court was affirmed in part and reversed in part.

See: *Thompson v. Choinski*, 525 F.3d 205 (2d Cir. 2008), *cert. denied*.

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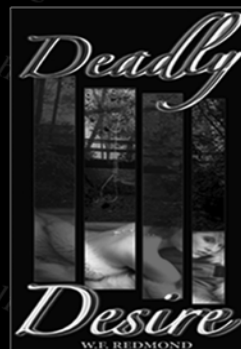


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PRISON

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Dedicated to Protecting Human Rights

September 2009

Anatomy of the Modern Prisoners' Rights Suit: A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner-Plaintiffs*

by Alphonse A. Gerhardtstein†

Ed. Note: This article is written with the aim of assisting attorneys who are litigating prison-related lawsuits; however, it is also very helpful for pro se plaintiffs and for parties represented by counsel who want a better understanding of the legal process and procedures in their case. The information included below does not apply to any specific or particular case.

I. Introduction

This article is designed to serve as a practice guide for attorneys representing prisoners in civil rights jury trials. In the past, the vast majority of prisoner litigation, including cases pursued by this author,

focused on injunctive relief to improve conditions of confinement and we therefore did bench trials. However, the 1996 Prison Litigation Reform Act (PLRA)¹ has changed our focus. As will be explained, the PLRA forces practitioners to sue for substantial damages.² This article should help a prisoner-plaintiff's attorneys do just that. From case selection through verdict, I provide guidance on the practical and legal aspects of prisoner representation.

In the first part of this article we will address case and client selection. We will then work backward from our desired verdict. Litigators must stay focused on the result that they want. They must know what question the jury will be answering and go about advocating for the right answer. Therefore, this article is largely organized backward from the verdict, similar to the manner in which you would prepare for trial.

II. Trying Prisoner Cases to Win

A. Client Selection, Case Selection and Discovery

Jurors hate prisoners. Most are shocked to learn that prisoners have the right to sue corrections officials and even more shocked to learn that they will be asked to award damages to those prisoners. If the prisoner has a long record of assaults while in prison, has thrown human waste at staff or has attempted escapes, and if counsel cannot keep these prior "bad acts" out of evidence, this prisoner may be a challenging plaintiff in a civil rights case. But, even the most obnoxious prisoner can be a winning plaintiff if the case is presented well and

the need for professionalism and law abiding conduct by the defendants is thoroughly established.

In order for the prisoner-plaintiff's attorney to accurately assess the prospects for success, thorough fact investigation and research should precede a formal retainer. A simple checklist of prefilings activities that should be undertaken in most cases includes:

1. Send the client a questionnaire.
2. Obtain a medical release from the client.
3. Request medical records from the prison(s) and any outside hospital(s).
4. Obtain public portions of the client and witness (discipline) file from the prison(s).
5. Interview the client by telephone, for a brief assessment of the case.
6. Obtain all paperwork that the client has related to: a. Grievances; b. Kites; c. Medical forms; and d. Computer information.
7. Determine if the client has any outstanding restitution orders or unpaid filing fees, etc., that might be deducted from a verdict³ and advise the client.
8. Interview family members by telephone (someone who knows the facts and can testify to humanize the client).
9. Interview any outside witnesses by telephone.
10. Grievances: a. Was one filed? b. Appealed? c. Get the paper trail.
11. Send an investigation only retainer.
12. Write to prisoner witnesses and notify them that you will be interviewing them (if you request a written version of

Inside

From the Editor	14
Taxing Imprisonment Damages	16
Texas Parole Condition X	20
Florida Pepper Spray Enjoined	22
\$14 Million Verdict Upheld	24
Pennsylvania Legal Mail Rule Upheld	26
Hurricanes Hit Prisoners	30
Rampant Texas Guard Smuggling	32
California Prison Population Capped	36
Washington Felon Voting Law Passed	40
Supreme Court Qualified Immunity Rule	42
Angola 3 Book Review	45
News in Brief	50

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Prisoners' Rights Suit (cont.)

events will it be discoverable or remain work product?).

13. Call the police/state patrol trooper (if the incident was investigated) and chat.

14. Obtain the police/state patrol file (after the criminal investigation is over) and request photos.

15. Request personnel records on all personnel involved in the incident.

16. Visit and interview the client, decide whether to accept the case and sign a retainer.

17. If the prisoner is deceased an estate may need to be opened; some probate courts will authorize subpoenas for prisoner files and other records that could assist with an investigation of a potential claim.

All issues arising under the PLRA must be identified and addressed before the case can move forward.⁴ The PLRA is mainly codified at 42 U.S.C. § 1997e and 28 U.S.C. § 1915, but additional requirements are codified at 18 U.S.C. § 3626 and 28 U.S.C. § 1914. The PLRA was designed to reduce prisoner litigation and it has certainly been effective. Unfortunately, among those cases dismissed under the PLRA many have been meritorious.⁵

The requirement that a prisoner exhaust administrative remedies, under § 1997e(a), has been the most daunting for prisoner complaints since the passage of the PLRA.⁶ A prisoner must fully exhaust all administrative remedies through the prison's grievance system before proceeding as a plaintiff in a lawsuit.⁷ Typically, this requires securing a decision from the chief inspector or the decision maker who hears the last administrative appeal.⁸

If a prisoner has three or more prior lawsuits dismissed as "frivolous, malicious, or [for] failure to state a claim," that prisoner is not allowed to file another lawsuit or appeal a judgment in a civil action unless the prisoner "is under imminent danger of serious physical injury."⁹ The court, "notwithstanding any filing fee,"¹⁰ may dismiss the action or appeal if it is "frivolous or malicious ... fails to state a claim on which relief can be granted" or if it "seeks monetary relief against a defendant who is immune from such relief."¹¹ A prisoner cannot bring a claim for mental or emotional injury suffered while in prison without first proving physical injury.¹²

There are also limitations on attorney fees.¹³ A portion of the damage award

must be used to pay the prisoner-plaintiff's attorney fees.¹⁴ The damage award is also subject to any debt or restitution payments that the prisoner might owe.¹⁵ Additionally, if the judgment is against the prisoner, the court can require that prisoner to pay costs, regardless of his or her financial status.¹⁶

In addition to the PLRA, plaintiff's counsel must also understand and properly apply prisoner rights law and basic § 1983 principles.¹⁷ Defendants must be identified based on investigation and legal research. Limit the number of defendants. Each defendant adds a greater burden with no increase in compensatory damages.¹⁸ Similarly, claims should be reduced to those which are necessary. Redundant claims with confusing, overlapping jury instructions covering the same conduct can backfire. At the same time a plaintiff does not want an "empty chair" across the well – a clearly culpable, missing defendant. Make sure there is solid evidence against each defendant supporting each claim and dismiss any defendants that do not meet this test.

A case plan should be drafted that sets out the necessary discovery. Depositions should be pursued with a clear idea of the theory of the case. As set out below, much of the trial presentation involves testimony from prison officials.¹⁹ The deposition transcripts are crucial tools in maintaining witness control. Now we are ready to plan the trial itself.

B. The Final Pretrial Conference

The final pretrial conference typically results in the approval of the final pretrial statement which has been prepared jointly by the parties. In one portion the plaintiff is invited to provide a short statement of the claim. This statement is often read to the jury during the voir dire and again as part of the jury instructions. The statement should use short, simple sentences and convey the core of the case.

The joint final pretrial statement also lists the uncontroverted facts. These are often read to the jury as stipulations and deserve careful attention. They offer the prisoner-plaintiff an opportunity to set out facts which will prepare the jury to focus on the real issues of the case. Remember, jurors are skeptical of prisoner claims. It is very helpful to learn that on February 24th the prisoner was escorted by the defendant prison guards, the prisoner was in restraints, force was used on the prisoner and the prisoner suffered a

Prisoners' Rights Suit (cont.)

broken arm. Such stipulations reassure the jury that the defendants did cause harm to the plaintiff and focus their attention on the need for and degree of force. Stipulations eliminate any notion that the prisoner fabricated the entire story.

The final pretrial conference should be used to clarify:

- * The level of inquiry that will be permitted at voir dire.

- * When drafts of the jury instructions and the verdict form will be due from the parties.

- * The schedule that will be set for motions in limine.

- * The security provisions that will be needed for prisoner witnesses.

- * What, if any, "cross-examination" the court will permit if the plaintiff calls detention facility employee witnesses as hostile witnesses during the plaintiff's case in chief.

- * The questioning that the court will permit regarding the prisoner-plaintiff's criminal background.

C. The Verdict Form

In a jury trial everything comes down to how the jury completes the verdict form. Counsel therefore must think backwards from that point. All decisions, from defendant selection to witness order, should reflect a course of action most likely to result in a successful verdict. Questions on the verdict form should be simple and undiluted with legal baggage.²⁰ Save all legalese for the jury instructions.

Plaintiffs must have their burden of proof described with utmost simplicity, so that a juror who believes that a guard beat the prisoner-plaintiff can see immediately what must be done on the verdict form.

There is no need, or obligation, to repeat all of the definitions, cautions and barriers that the juror waded through in the jury instructions. Plaintiff's counsel should argue that any such attempt is necessarily incomplete, and gives undue weight to the partial instructions the defendants seek to repeat on the jury form. Jurors need punch lines. Simple questions that sum up the critical points for determining liability against each defendant. As you can see, advocating for a simple verdict form is extremely important.

D. Jury Instructions

Plaintiffs should focus on the critical civil rights issues in the case and make sure that the jury instructions on those issues can be applied to the proof that will be presented to support a verdict.

The following are sample jury instructions in prisoner civil rights cases:

i. *All Persons Equal Before The Law*

The fact that the plaintiff is a prisoner and that the defendant is a state official must not enter into or affect your verdict. "This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons, including prisoners and state officials, stand equal before the law and are to be treated as equals"²¹ in a court of justice.

ii. *Credibility of Witnesses*

I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

"You, as jurors, are the sole and exclusive judges of the credibility [or 'believability'] of each of the witnesses ... and only you determine the ... weight [to be given to each witness' testimony]."²² In weighing the testimony of a witness you should consider the witness' relationship to the plaintiff or to the defendant; the witness' interest, if any, in the outcome of the case; his or her manner of testifying; the witness' opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness' candor, fairness, and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.²³

The fact that a witness comes before you as a correctional official should not affect the way you judge his or her credibility. Such testimony does not deserve

either greater or lesser believability simply because of the official status of a witness. Similarly, the fact that a witness is or was a prisoner does not automatically suggest that less weight be given to that testimony. Whether or not you believe a witness must be determined from his or her testimony, not his or her occupation or status outside the courtroom. You should form your own conclusions as to whether or not a witness is believable.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.²⁴

iii. *42 U.S.C. § 1983*

The plaintiff has asserted his claims under a federal law, 42 U.S.C. § 1983. "Section 1983 ... provides that a person may seek relief in this court by way of damages against any persons or persons who, under color of any state law or custom, subjects such person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."²⁵

In this case the defendant acted under color of state law.

iv. *Obligation to Protect Prisoners*²⁶

State actors are obligated to protect those whom the state government is punishing by incarceration from known risks of serious physical harm. A prisoner must rely on prison authorities for such protection because he is not free to protect himself from all potential harms. Failure to protect a prisoner from such risks constitutes cruel and unusual punishment and is proscribed by the Eight Amendment.

v. *Failure to Protect*²⁷

The Eighth Amendment to the United States Constitution imposes upon prison officials an affirmative obligation to protect prisoners from being assaulted by other prisoners. A prison official's deliberate indifference to the safety of a prison inmate constitutes cruel and unusual punishment.

Deliberate indifference requires something more than mere negligence. It is a recklessness standard. That is, the plaintiff need not "show that the [prison] official acted or failed to act believing that harm actually would befall an inmate; it is sufficient that the official acted or failed to act despite the official's knowledge of a substantial risk of harm."²⁸

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To find the defendant liable in this case, you must first find that the defendant knew of a substantial risk of harm to the plaintiff's health or safety and disregarded that risk. You may infer that the risk was known if you find that the risk was obvious.

Second, to find a defendant liable, you must find that given all of the facts known to the defendant, that the defendant's conduct was not a reasonable response to the risk of harm.

A prison official who knows that a prisoner is at risk of harm from another prisoner but does not take reasonable steps to guarantee the safety of that prisoner will thus be held liable to the prisoner even though the official did not actually strike blows or otherwise commit acts against the prisoner.

vi. Excessive Force Defined²⁹

The Eighth Amendment to the United States Constitution provides that "cruel and unusual punishments"³⁰ shall not be inflicted.

Plaintiff claims that he was subjected to excessive force or cruel and unusual punishment while he was incarcerated at [prison]. The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments"³¹ upon prisoners.

To prevail on an excessive force claim, the plaintiff must prove by a preponderance of the evidence that one or all defendants applied force to him maliciously and sadistically for the purpose of causing harm rather than in a good faith effort to maintain or restore discipline. The plaintiff need not show that he suffered a significant physical or mental injury for you to find he suffered cruel and unusual punishment. You should consider the following factors in making this determination:

- a. The need for the application of force;
- b. The relationship between the need and amount of force used;
- c. The extent of the threat to the safety of staff and prisoners as reasonably perceived by the responsible officials on the basis of facts known to them; and
- d. Any efforts made to limit the amount of force.

E. Jury Selection

Jurors are taxpayers, voters, victims of crime and often next of kin or friends of law enforcement officers. Jurors are challenged by a legal system that would award a prisoner damages when the

victim of the prisoner's crime may never be compensated for the brutality of that prisoner. Jurors likely have bought into the "tough-on-crime" agenda. Equally important, most jurors are white and far too many prisoners are black.³² Because of these realities, jury selection is the most important aspect of the trial.

Plaintiff's counsel must seek an opportunity to question jurors. No amount of canned questions posed by the court can replace the role of counsel in exposing bias; jury panel members always assure the court that they will be fair. Counsel-directed voir dire can be effective at exposing bias, establishing challenges for cause³³ and identifying jurors that are actually willing to be fair to the plaintiff. The prisoner's crimes that are going to be revealed during trial should be named during the voir dire. Prospective jurors should be asked questions that will expose those who harbor prejudices too deep to overcome and reveal those jurors who are truly open to following the instructions of the court. What follows is an outline of a voir dire in which the plaintiff, Jane Doe, a transsexual, was attacked by another prisoner. The defendants, officials in a protective custody unit, were sued for failure to protect.³⁴

i. Law Enforcement

Attorney: I see that several of you have been in law enforcement jobs or have relatives who are police officers, prison guards or prison staff, probation or parole officers. Q: Mr. X, you have worked as a teacher for Ohio Department of Youth Services (DYS) – you are aware of instances when managing prisoners can be difficult, correct? Q: You work with a security staff, who keep order? Q: Security staff must protect civilian staff like teachers? Q: Security staff must also protect prisoners from other prisoners? Q: Did you have any positive experiences with DHS prisoners? Q: Did you have any negative experiences? Q: You have had no prior experiences with Ms. Doe? Q: Now, can you set that experience aside – approach this with open mind? Q: Here's what I mean by that. The judge

will instruct you that all people are equal under the law. This means that no one is assumed to be telling the truth just because he wears a uniform or a badge. Can you set aside your tough experiences with convicts and follow that instruction? When you hear facts from officers can you give their testimony no more or no less weight simply because they are officers?

ii. Victim of Crime

Attorney: Many of you have also been the victim of a crime. Q: Mr. X, tell us briefly what happened? [Get the facts] Q: Frightening? Q: You felt violated? Q: You probably remember those events often? Q: Think about it when you're in unfamiliar settings? Q: It would be normal to do

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that; to still be angry about it. Q: You still have feelings about it? Q: The person who committed that crime was not Jane Doe? Q: What I will ask you is not easy. Can you honestly set aside that awful experience and listen to Jane Doe testify without bringing that terrible episode to mind?

iii. *Convicts Can Sue*

Attorney: Members of the panel, in this case a former convict is suing two prison staff members for failing to protect her. That is, she claims that the defendants failed to protect her from an assault by another prisoner. Does anyone have a problem; is anyone uneasy with the idea that a convict can even do this – come into court and make such accusations against her jailers? Q: Does it bother anyone that such cases can even be heard? Q: Does anyone feel that it is a waste of your time to hear this type of case? Q: Now, if the judge tells you that Jane Doe has a right to be in this court and a right to make these allegations, will you follow the law and serve on this case with an open mind?

iv. *Plaintiff Criminal Record*

Attorney: I will also tell you that this former convict – Jane Doe – is not just any convict. You will learn that she was serving time from 1993 to 1997. She has been a free, employed citizen for over four years. But, previously, she was serving time in Ohio for felonious assault, misuse of a credit card, forgery, and receiving stolen property. You will also learn that, in 1997, she served several months in Arizona for two counts of forgery, and that she was on probation for fraud and theft in Colorado in 1992. You will learn that she has used other names – aliases – in the commission of some of these crimes. Q: How many of you are troubled by that criminal record? Q: That's natural. Will that natural feeling of disgust make it hard for you to accept that Jane Doe has a right to use the courts to pursue these claims that her civil rights were violated? Q: And what if you do believe that the defendants failed to protect Doe, will any disgust at ex-convict Doe for all of these crimes keep you from following the law and ruling in her favor? I mean, is this just too great a stretch for you?

v. *Conclusion*

Attorney: Okay, there's more. This is not just a swearing match between a former convict and law enforcement officers. The judge will instruct you that the Eighth Amendment to the United States Constitu-

tion prevents prison staff from inflicting cruel and unusual punishment on prisoners and that it requires staff to protect prisoners. If you hear all of the evidence and law in this case and decide based on the evidence and law that the former convict should win and that the prison staff members did fail to protect the prisoner will you be open to awarding money damages to the prisoner as compensation for her injuries? Q: Or is that just too much? Money damages to a person who committed so many crimes? Can you clear your mind enough and accept as a jury the duty to be open to that result? Or does that just push you too far? Please raise your hands if I am asking too much of you. [Show of hands]

There is no script for an effective voir dire. The key is to establish rapport with the jury and to make them respond honestly. Once a jury is empanelled the focus turns to the actual testimony, telling the story effectively.

G. Trial Presentation: Tell an Honest Tale

i. *Excessive Force*

Each case has its own story and the presentation theme must arise from that story. Some general comments are appropriate based on the type of claim. In excessive force cases the plaintiff must prove actions that are "malicious and sadistic."³⁵ In reality the guard probably acts appropriately 99% of the time. On the day in question, the guard "went-off," "snapped," or otherwise acted out. Obviously a pattern of similar conduct will help to tell the story, but even a single incident can result in a verdict if the story is relayed in a manner that answers all of the obvious questions. What triggered the incident? What portion of the force was excessive? Does the medical proof confirm the story? Was the matter supposed to be videotaped but was not? Was the officer disciplined?

A typical excessive force case involves an incident provoked by the prisoner. For example, the prisoner is using abusive language toward the escort guard who decides to retaliate with force rather than to simply write a disciplinary ticket. Guards may feel that the disciplinary process is too slow or too lenient and they may occasionally "supplement" formal discipline with an "attitude adjustment" for a prisoner who acts out against the guard. In such a case the prisoner should testify fully. He should agree that he was indeed speaking disrespectfully and that he deserved a ticket and discipline for his act. He was in

restraints and did not "head-butt" or use force. The video and/or medical reports do not support the story of the guard. The point is not to pretend that all prisoners are angels and all guards are evil. The plaintiff need only prove that at that time and place excessive force was used. That burden is most easily met if accurate stories that reflect the true prison environment are set forth for the jury.

ii. *Medical Claims and Failure to Protect*

Allegations that defendants denied a prisoner adequate medical care or failed to protect the prisoner do not require proof of evil, sadistic or malicious conduct. Rather, the plaintiff will prevail if the defendant was deliberately indifferent to the serious medical³⁶ or security³⁷ needs of the plaintiff. The legal standard is lower, but as a practical matter these cases are more difficult to win. The defendant typically does not cause the harm, but rather just does not do his job well enough. The defendant may be an overworked doctor; a staff member supervising an overcrowded block; or an onlooker who saw the violation but failed to act quickly. The jury must not be promised evil. The presentation must anticipate the instruction³⁸ – focusing on the seriousness of the risk; the obviousness of the risk; the alternative courses of action that were open; the decision to proceed with a course of action that ended with predictable injury. The defendant is a trained professional, and when he acts causing injury in the face of an obvious risk that makes him liable.

In many failure to protect cases the defendant argues he had no knowledge of the risk of harm. Therefore, the focus at trial is to prove the obviousness of the risk.³⁹ However, when the defendant admits knowledge of the risk the focus at trial is on the response by that defendant. Here you may be able to demonstrate that the actions taken actually increased the risk of harm.

In deliberate indifference cases it is often helpful to have expert testimony. A classification expert can reassure the jury that housing an assaultive prisoner with the plaintiff violates all reasonable standards. A medical expert can similarly explain that the defendant acted beyond all reasonable boundaries for the delivery of medical care.

H. Witness Order, Topics

i. *Prison 101*

The walls that keep prisoners in, keep others out. Prison for most people is a

foreign place, known only from various media presentations. Prisons appear to be dark structures where prisoners are expected to fend for themselves. Most jurors expect that violence is common and deprivations routine. Jurors need to learn from corrections witnesses that prisons are expected to be safe; that staff is professional and that policies, procedures and routines govern all activities which are recorded on contemporaneous logs and reports and, at times, on video. Only by learning the norm may jurors appreciate the deviation related to the incident portrayed in the trial.

The first witness, therefore, is typically a relatively neutral corrections employee whose questions and answers result in a "Prison 101" course for the jury. Terms, procedures, equipment, post orders and the like will all be quickly explained and then used when framing the important facts leading up to the violation of the prisoner's rights. It is often effective to show a video of the scene and have the first witness narrate that video.

ii. Calling Defendants as Hostile Witnesses

It may also be very effective to call the defendant during the plaintiff's case, as if on cross-examination.⁴⁰ This examination should be carefully scripted and thoroughly anchored in the deposition transcript. It should commence with a review of the defendant's conduct as it should have occurred based on post orders or other policies and it should move to challenge the defendant on the core facts of the case. At the final

pretrial conference ask the judge to require that direct examination be delayed until the defendant's case, thus allowing your story into evidence without interruption.

iii. Plaintiff and Other Prisoner Witnesses

Counsel should aggressively argue to present the prisoner-plaintiff live, in court. The plaintiff should also be present during the entire trial, including the voir dire. Some practitioners seek to have the client dressed in street clothes, provided at the courthouse and worn at all times the prisoner is in the presence of the jury. It is enough that the client is in clean clothes that fit appropriately. If some restraints are required a black box is less noticeable than handcuffs.⁴¹ If at all possible the client should be permitted to attend the trial without restraints. This should be resolved at the final pretrial conference. Similarly, at the final pretrial conference the court should direct that the prisoner be housed close enough to the courthouse to avoid exhaustion during trial.

Testimony from the plaintiff should flow easily. This is worth as many pretrial trips to the prison as it takes to get it right. Give the client his deposition testimony and all of the statements he has given during any investigations. Practice cross-examination. The story should not change but the prisoner should relate the story in terms the jury can follow and it should be free of all expletives. If the criminal record will come into evidence it, and any inappropriate conduct by the prisoner on the day in question, should all be brought out

on direct, demonstrating that the plaintiff has nothing to hide. Some prisoners claim to remember the sequence of each blow and kick in excessive force cases. Even if true, such testimony is rarely credible to juries. It is better practice to simply have the prisoner state, for example, that he was repeatedly kicked and punched. Injuries should not be overstated but it is important to present injury testimony so that the jury has some sense of what the beating or other harm was like. If the juror can visualize the events, the prospects for damages for pain, suffering and mental anguish are more likely

Use as few prisoner witnesses as possible. Prisoner witnesses may be subject to some level of cross-examination about their crimes, under the Federal Rules of Evidence (Federal Rules),⁴² which can be a distraction to the jury. Many prisoner witnesses also have discipline records that may be admissible under the Federal Rules.⁴³ It is simply more persuasive to prove the case primarily through prison records, the absence of expected prison records and corrections officials.

Nonetheless, a prisoner witness often is needed to offer crucial facts. Under the PLRA a federal judge may permit

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prisoner testimony to be presented by trial deposition.⁴⁴ Many prisons have teleconference equipment available for their medical specialty consultations. That same equipment may be available for real-time trial testimony. If the prisoner testifies live the court should set the ground rules. Counsel should make sure that the prisoner is dressed in clean, pressed prison blues and not in some baggy coveralls. Male witnesses should be permitted to shave and all witnesses should be permitted a timely shower. Transport should be set so as not to have the prisoner awake from 2:00 a.m. for testimony at 3:00 p.m. These matters should be discussed at the final pretrial conference and, if necessary, addressed in the writ of habeas corpus ad testificandum. Prisoner testimony should be short and focused directly on the matter for which the testimony is needed. In a beating case, testimony from a prisoner eyewitness may be as brief as ten minutes. One technique for enhancing the credibility of prisoner witnesses is to use witnesses that were relied upon by the state in disciplinary proceedings and, if possible, make this fact known to the jury.

I. Admissibility of a Prisoner's Criminal Record and Other Bad Acts

When the plaintiff or witness is a prisoner most judges will allow the criminal conviction leading to incarceration to be admitted into evidence. The best practice is simply to get a stipulation or ruling on exactly what will be permitted. Typically the type of crime and the sentence imposed are admitted. Permitting the defendant to explore the details of the crime would be very prejudicial and is not generally permitted.

i. Criminal Record of the Prisoner-Plaintiff

The use of the criminal record for impeachment of a witness, other than the accused, is subject to a weighing of the probative value versus its prejudicial effect.⁴⁵ Conduct more than ten years old is rarely admitted for impeachment purposes, except for under extraordinary circumstances.⁴⁶ Even if within the ten-year period, the plaintiff's criminal record cannot be used for impeachment purposes if the potential for prejudice substantially outweighs its probative value under Federal Rule 403.⁴⁷ For example, in *Lewis v. Velez*, the court excluded the prisoner-plaintiff's

prior assault conviction when the present claim was one of excessive force.⁴⁸ The court found that the assault conviction did not relate to the elements of the excessive force claim and that admitting it was too prejudicial.⁴⁹ However, if the criminal record does not result in unfair prejudice under Federal Rule 609(a)(1),⁵⁰ and falls within the narrow definition of those convictions listed under Federal Rule 609(a)(2),⁵¹ it can be admitted for purposes of assessing credibility. In *Young v. Calhoun*, the court admitted the fact that the prisoner-plaintiff was a felon as well as the amount of time imposed through sentence.⁵² The nature of the conviction and the details of the crime were not admitted.⁵³

Even if prior criminal convictions are inadmissible for impeachment they can still become admissible evidence "if [they are] relevant to a material issue and if [their] probative value outweighs the possibility of unfair prejudice," per Federal Rules 401 and 403.⁵⁴ Under this standard, courts have allowed facts beyond that of the charge, the date and the conviction to enter the record. Although defendants cannot use these facts to shift the focus of the trial, they can use some of the facts surrounding the criminal record, under Federal Rule 401, in so much as they are relevant to elements of the claim, such as defendant's state of mind.⁵⁵ The specific details of the crime should not be admitted as they are minimally relevant, especially in a cumulative presentation because it will shift the focus of the civil trial to that of re-trying the criminal case.⁵⁶

ii. Prior Bad Acts of the Prisoner-Plaintiff

In *Huddleston v. United States*, the Supreme Court set out a test for the admissibility of prior bad acts, such as a prisoner's disciplinary record.⁵⁷ While evidence "of crimes, wrongs, or acts [are] not admissible to prove the character ..." or criminal propensity of a prisoner, they may be admissible to prove motive, intent or plan under Federal Rule 404(b). However, in order to be admissible for these purposes the evidence must be relevant to the factual inquiry in the case.⁵⁹ This applies to a prisoner-plaintiff's disciplinary records and criminal records.⁶⁰

There is another relevance inquiry required by *Huddleston* that applies to a prisoner's disciplinary records in particular. This is the requirement, under Federal Rule 104(b), that a jury can "reasonably conclude the act occurred and that the [prisoner] was the actor."⁶¹ This is the preponderance of

the evidence standard,⁶² and it allows for the admission of such evidence as prisoner disciplinary records or rule infraction board (RIB) files.⁶³ This evidentiary standard means that the "government must at least provide some evidence that the [prisoner] committed the prior bad act."⁶⁴ Prior to admission, the evidence should be subject to a balancing test, weighing its probative value against its potential prejudice to the prisoner;⁶⁵ the strength of the evidence is also considered in the balancing test.⁶⁶ Once the evidence is admitted it must be accompanied by a limiting instruction.⁶⁷

The Seventh Circuit, in *Young v. Rabideau*, upheld as admissible general questions about a prisoner's past discipline in a § 1983 excessive force claim where the past discipline was probative of the plaintiff's intent.⁶⁸ In that case the plaintiff testified that he pointed a finger in the guard's face by accident.⁶⁹ The defense argued that this action was not an accident, but rather that his actions were intended to provoke the officer and to start a fight.⁷⁰

The Seventh Circuit established a four-part test for the admissibility of such prior misconduct: "Admission of evidence of prior or subsequent acts will be approved if (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue ... , (3) the evidence is clear and convincing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."⁷¹

The court found that "admission of past misconduct is proper when presented in rebuttal to [the prisoner-plaintiff's] main defense that he did not intend to poke the prison guard in the face..."⁷² Having found that the evidence established plaintiff's intent, a matter in issue other than propensity to commit the act, the court also found that the "record clearly and convincingly shows that his other actions were similar enough and close enough in time to be relevant to the matter in issue."⁷³ The court then determined that because the evidence was limited to general questions about the plaintiff's disciplinary record, "the danger of unfair prejudice was minimized and the probative value of the evidence dominated."⁷⁴

Federal Rule 608(b) prohibits the introduction of extrinsic evidence of specific instances of conduct to attack the

credibility of a witness, except for criminal convictions. Therefore, counsel can ask questions about whether a particular instance occurred, if the instance goes to the truthfulness or untruthfulness of the witness, but cannot introduce any evidence surrounding that incident.⁷⁵ Federal Rule 608(b) may keep the disciplinary file out of the record, but the defendant may still be able to inquire into plaintiff's conduct for impeachment purposes.⁷⁶

J. Admitting a Prison's Internal Investigation into Evidence

The plaintiff's presentation will be even more persuasive if investigations of the incident that are favorable to the prisoner-plaintiff can be introduced into evidence. A use of force committee or other internal investigation may actually contain information and findings that are helpful to the prisoner-plaintiff in his civil rights case. Objections to prison reports will usually be on the basis of Federal Rule 801, the hearsay rule, as the reports will contain statements from officers, employees or prisoners that are not present to testify.⁷⁷ However, there are a number of exceptions under Federal Rule 803 that are applicable to prison reports or investigations which can be cited to support the admissibility of such reports

Federal Rule 803(6) contains a "record of regularly conducted activity"⁷⁸ or a business records exception and Federal Rule 803(8) contains a public records exception to the hearsay rule.⁷⁹ The documents that fall under these exceptions have

been defined quite broadly.⁸⁰ It is important to note, however, that the business records exception requires that a person with knowledge transmit the reports.⁸¹ Therefore, in order to admit a report under this exception a foundation must be laid showing that the person who wrote the report had actual, first-hand knowledge or that the sources cited therein were the actual, first-hand sources for those facts cited.⁸² The business records exception can be used to admit the standard reports that an institution generates following an incident, such as "use of force."⁸³

In order for a report to be admitted under the public records exception it must relate to "matters observed pursuant to [a] duty imposed by law ..." ⁸⁴ or contain "factual findings resulting from an investigation made pursuant to authority granted by law..." ⁸⁵ Reports can also be admitted under the public records exception as extrinsic evidence, to show motive or intent in an excessive force case.⁸⁶ In *Combs v. Wilkinson*, the Sixth Circuit relied on the public records exception to allow an investigative committee's report, detailing facts, conclusions and opinions, into evidence.⁸⁷ Portions of a report that contain interview transcripts or other statements of third parties may be excluded as "hearsay within hearsay," which is not covered by the public records exception,⁸⁸ and there can be additional exclusions based on prejudice, relevance and trustworthiness.⁸⁹

An investigative report could also be admitted under the general residual exception of Federal Rule 807. Federal Rule

807 requires trustworthiness and sufficient notice of the intent to offer the statement in advance of trial.⁹⁰ In addition, the court must find that the evidence fulfills the following three factors:

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.⁹¹

A report resulting from the investigation of an incident can be admitted as it is reasonable to infer that the investigators who prepared the report relied on the first-hand knowledge of prison officials who have a duty to be accurate.⁹² Even though the report may have been prepared in preparation for litigation, the evidence is being offered against the party for whom it was prepared so the report is circumstantially trustworthy.⁹³

K. Damages

The PLRA restricts damage awards.⁹⁴ The availability of compensatory and/

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Prisoners' Rights Suit (cont.)

or punitive damages depends on the constitutional claim brought by the prisoner-plaintiff and on the PLRA. Section 1997e(e) provides that "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."⁹⁵ The definition of "physical injury" is generally more than de minimis, although it does not have to be substantial.⁹⁶

The constitutional claims to which § 1997e(e) apply are currently under debate, although Eighth Amendment claims are certainly covered. Courts have reached different conclusions on whether § 1997e(e) bars an award of mental or emotional damages under First and Fourteenth Amendment claims. The Ninth and Seventh Circuits, along with some district courts, have held that the First and the Fourteenth Amendment entitle a prisoner-plaintiff to judicial relief completely separate from any physical injury that they can show.⁹⁷ Other circuits have barred compensatory damages for emotional injury on non-Eighth Amendment constitutional injury claims that do not result in actual, physical injury.⁹⁸

However, the physical injury requirement of § 1997e(e) does not necessarily preclude the collection of nominal or punitive damages.⁹⁹ Nominal and punitive damages are not barred under the rationale that their preclusion would allow prison officials to intentionally harass or harm the rights of prisoners and, without inflicting physical injury, be allowed to escape suit.¹⁰⁰ In some circuits this is also true for Eighth Amendment violations that do not result in physical injury.¹⁰¹ The Supreme Court's decision in *Carey v. Phipps*¹⁰² dictates that nominal damages should be recoverable on pure constitutional injury claims.

Punitive damages are awarded under § 1997e(e) when the defendant has an evil motive or intent or when the behavior involves reckless or callous indifference.¹⁰³ Under this standard, punitive damages may be recovered under constitutional claims that do not result in physical injury.¹⁰⁴ In alleging and proving punitive damages, care should be taken not to base the award of punitive damages on the extent of emotional injury to the prisoner or the amount of compensatory damages

awarded; rather, damages should be based on the malicious behavior of the prison officials.¹⁰⁵

It is also important to note that a portion of any damage award collected, up to twenty-five percent, is to be used to pay for attorney's fees.¹⁰⁶

Despite the many burdens imposed by the PLRA, there have been significant damage awards, although most such awards stem from Eighth Amendment claims with serious physical injury.¹⁰⁷

L. Attorney Fees

Attorney fees in civil rights actions are governed by 42 U.S.C. § 1988. However, the PLRA adds hurdles to obtaining attorney fees in prisoners' rights litigation. Under § 1988, attorney fees are awarded to the plaintiff when he is the prevailing party.¹⁰⁸ A prevailing party is defined as one that "succeeds on any significant issue in litigation."¹⁰⁹ A significant issue is one which achieves some of the benefit or the primary benefit that the parties sought in bringing suit.¹¹⁰ When success is partial or limited, the court compares the product of hours reasonably expended on the litigation as a whole and a reasonable hourly rate to the overall relief obtained by the plaintiff. The court then determines if attorney fees are excessive.¹¹¹ An hourly rate for attorney fees is that which is comparable to other attorneys in the community of similar background and experience.¹¹²

The PLRA caps the hourly rate awardable to prisoner-plaintiff attorneys at 150%¹¹³ of the fee for court appointed criminal defense attorneys.¹¹⁴ Fees are also limited by the amount of damages awarded. Attorney fees cannot exceed 150% of the award.¹¹⁵ The court will then look at the lesser of the two calculations.¹¹⁶ Additionally, the PLRA requires up to twenty-five percent of the damages to go to attorney fees. If twenty-five percent of the damages are less than the amount of attorney fees that the court finds reasonable, then the defendant pays the remainder.¹¹⁷

In order to obtain attorney fees on a preliminary injunction or a temporary restraining order, counsel should ask that the court decide the injunction or restraining order on the merits. A decision on the merits can result in an award of attorney fees even if no final judgment is obtained.¹¹⁸ A simple procedural win is not enough to award fees.¹¹⁹

So far, efforts to challenge the constitutionality of the PLRA fee caps have been largely unsuccessful.¹²⁰

M. Using Verdicts to Solve Problems

Most prison litigators have used litigation as a vehicle to improve conditions, including safety and medical care. Such prison reform cases are severely restricted under the PLRA. In fact, the PLRA causes litigation to focus on money.¹²¹ The cases that counsel will likely pursue most vigorously are death claims and suits based on severe physical injuries. These have the greatest potential to generate the large damage award needed to finance the case and support adequate fees.

So what about prison reform? Settlements may still be employed to improve conditions. The best time is after verdict or after the court has denied summary judgment and the matter is clearly headed for trial. If the client is willing, non-economic terms can be included in the goals the prisoner seeks to achieve through alternative dispute resolution. In one recent case, a prisoner-plaintiff sued a warden at a reception center following a brutal attack by his cellmate. The plaintiff was a minimum security prisoner doing a flat one-year sentence for selling marijuana and his cellmate was a mass murderer. The attack was terrorizing but there were no severe physical injuries. After losing his bid to dismiss based on qualified immunity, the warden agreed to settle for \$50,000 in damages and fees, and included plaintiff's counsel in the dialogue that resulted in a new classification policy at the reception center.¹²²

III. Conclusion

The PLRA is forcing prison reform activists to press for large damage awards as a vehicle to trigger institutional reform. This article has hopefully helped the practitioner focus the trial presentation in a way that will make a plaintiff verdict more likely. When the state or local government must pay a large verdict, conditions may return to the taxpayer agenda. There is no serious political lobby for prisoners. Often the only way their concerns will be addressed is through litigation. By keeping cases lean and presentations effective as recommended in this article, we can help prisoners secure at least a safe environment with adequate medical care. ■

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published in the *Pace Law Review* (24 *Pace L. Rev.* 691) in 2004, and is reprinted with permission of *Pace Law Review* and the author. It has been slightly edited, and the reader should research the caselaw cited herein to ensure it still represents the current state of the law.

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ENDNOTES

1. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. 523; 18 U.S.C. 3624, 3626; 28 U.S.C. 1346, 1915, 1915A; 42 U.S.C. 1997-1997h).

2. See *infra* Part II.K.

3. See 18 U.S.C. 3682 (1986).

4. In this section I will simply summarize the law since there are already several excellent and comprehensive materials available to help the practitioner with compliance.

5. See, e.g., *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003) (holding that the prisoner failed to exhaust his administrative remedies under the PLRA by failing to name the observing officers in the griev-

ance). Ed. Note: The U.S. Supreme Court rejected this approach in the subsequent case of *Jones v. Bock*, 127 S.Ct. 910 (2007); see also, *Woodford v. Ngo*, 548 U.S. 81 (2006).

6. See Margo Schlanger, *Inmate Litigation*, 116 *Harv. L. Rev.* 1555, 1628 (2003).

7. See, e.g., Mass. Gen. Laws ch. 127, 38E (2002); Ohio Rev. Code Ann. 2969.26 (Anderson 2004); Tenn. Code Ann. 41-21-817 (2004); Tex. Gov't Code Ann. 501.008 (Vernon 2004); Ariz. Dep't of Corr., Department Order Manual, Department Order 802 (2000) (detailing the procedures involved in Arizona's "Inmate Grievance System") [hereinafter *Order Manual*]; see also *supra* note 5.

8. But see *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989 (6th Cir. 2004), cert denied (failure of prison administrator to timely respond to grievance accepted as compliance with exhaustion requirement).

9. 28 U.S.C. 1915(g) (2004).

10. Id. 1915(e)(2).

11. Id. 1915(e)(2)(B)(i)-(iii).

12. 42 U.S.C. 1997e(e) (2004).

13. See *infra* Part II.L.

14. 42 U.S.C. 1997e(d)(2).

15. See 18 U.S.C. 3626 (2004).

16. 28 U.S.C. 1915(f)(2).

17. While this article focuses on trial practice and not substantive law, a clear understanding of prisoners' rights law and of 1983 is essential to success.

18. See *Weeks v. Chaboudy*, 984 F.2d 185, 189 (6th Cir. 1993) (liability for compensatory damages is joint and several in a 1983 prisoner case).

19. See *infra* Part II.H.

20. For example ask, "Did the defendant Ashcroft use excessive force on the plaintiff?" not "Did the plaintiff prove by a preponderance of the evidence that the defendant Ashcroft engaged in acts constituting cruel and unusual punishment under the Eighth Amendment of the United States Constitution?"

21. Kevin O'Malley et al., *Federal Jury Practice and Instructions* Civil 103.11 (5th ed. 2000).

22. Id. at 15.01.

23. See id.

24. Id. at 14.16.

25. Id. at 165.10.

26. See generally O'Malley et al., *supra* note 20, at 166.20.

27. See generally id. at 166.

28. Id.

29. See generally id. at 166.23.

30. U.S. Const. amend. VIII.

31. Id.

32. See Dennis Schrantz & Jerry McElroy, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (Jenni Gainsborough & Marc Mauer eds., 2000), available at http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

33. The author has been involved in jury selections that have resulted in one-third of the panel being excused for cause.

34. *Doe v. Bowles*, 254 F.3d 617 (6th Cir. 2001).

35. *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

36. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

37. See *Farmer v. Brennan*, 511 U.S. 825, 830-32 (1970).

38. See generally O'Malley et al., *supra* note 20, at 166; see also *supra* note 19 and accompanying text.

39. See *Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994).

40. Fed. R. Evid. 611(c) permits the court to authorize the examination of a hostile witness by leading questions.

41. Several cases have addressed the issue of restraining the civil prisoner-plaintiff. The courts look first to whether the prisoner-plaintiff's history deems restraint necessary and, if so, if the restraints would be unduly prejudicial given the nature of the case or the role credibility would play in its outcome. The decision must be one made by the court; it is impermissible for the court to delegate its authority to the security personnel or to the court marshals. If restraints are found necessary the court should still use the least restrictive restraints and take steps to further minimize any prejudicial effect, including instructions to the jury. See *Illinois v. Allen*, 397 U.S.



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Prisoners' Rights Suit (cont.)

337 (1970); see also *Davidson v. Riley*, 44 F.3d 1118, 122-23 (2d Cir. 1995); *Woods v. Thieret*, 5 F.3d 244, 247-48 (7th Cir. 1993); *Lemon v. Skidmore*, 985 F.2d 354, 358 (7th Cir. 1993); *Holloway v. Alexander*, 957 F.2d 529, 530 (8th Cir. 1992).

42. See Fed. R. Evid. 609. 43. See Fed. R. Evid. 404(b); see also *infra* Part II.I.ii.

44. See 42 U.S.C. 1997e (f)(1) (2004).

45. See Fed. R. Evid. 609. After the 1990 amendment to Rule 609 evidence that a witness, other than the accused, has been convicted of a crime shall be subject to Fed. R. Evid. 403. Prior to the 1990 amendment, prejudice to the defendant was the only consideration and a civil plaintiff's felony record was compelled. Compare *Earl v. Denny's, Inc.*, No. 01- C5182, 2002 U.S. Dist. LEXIS 24066, 2002 WL 31819021 (N.D. Ill. Dec. 13, 2002), with *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); see generally *Donald v. Wilson*, 847 F.2d 1191 (6th Cir. 1988).

46. See *Zinnman v. Black & Decker, Inc.*, 983 F.2d 431, 434 (2d Cir. 1993) (quoting S. Rep. No. 1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7062). The ten-year period runs either from the date of conviction or the date of release from confinement, whichever is later. Fed. R. Evid. 609(b).

47. See Fed. R. Evid. 609(a)(1); see also *Miller v. Hoffman*, No. 97-7987, 1999 U.S. Dist. LEXIS 9276, 1999 WL 415402 (E.D. Penn. June 22, 1999) (specifically defining the balancing test of Federal Rule 403 in the context of Federal Rule 609).

48. *Lewis v. Velez*, 149 F.R.D. 474, 483 (S.D.N.Y. 1993).

49. *Id.*; see *Essick v. Debruyne*, No. 3: 94-CV-804-RP, 1995 U.S. Dist. LEXIS 18458, 1995 WL 729313 (N.D. Ind. Nov. 22, 1995).

50. "Four factors when balancing probative weight and prejudicial effect under 609(a)(1): [include] 1) the nature (i.e., impeachment value) of the prior conviction; 2) the age of the conviction; 3) the importance of credibility to the underlying claim; and 4) the potential for prejudice from admitting the convictions." *Miller*, 1999 U.S. Dist. LEXIS 9276, at 6, 1999 WL 415402, at 2; *Daniels v. Loizzo*, 986 F.Supp. 245, 250 (S.D.N.Y. 1997).

51. This list is limited to those crimes "involving dishonesty or false statement," and is interpreted narrowly. Fed. R. Evid. 609(a)(2); see *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977).

52. *Young v. Calhoun*, No. 85 CIV 7584 (SWK), 1995 U.S. Dist. LEXIS 4555, at 12, 1995 WL 169020, at 4 (S.D.N.Y. Apr. 10, 1995).

53. *Id.*

54. *Gora v. Costa*, 971 F.2d 1325, 1331 (7th Cir. 1995).

55. *Geitz v. Lindsey*, 893 F.2d 148, 151 (7th Cir. 1990) (the names and ages of the victims of a sexual assault and the physical evidence found at the crime scene was allowed to show the defendants' state of

mind when using a gun to prevent plaintiff's escape from the police station).

56. *Walker v. Mulvihill*, No. 94-1508, 1996 U.S. App. LEXIS 14397, at 8-10, 1996 WL 200288, at 2-4 (6th Cir. Apr. 24, 1996) (admitting repetition of the hysteria of the crime victim by four witnesses – at least one of which was not witness to the arrest – a detailed account by the victim herself, an admission by the prisoner-plaintiff of his crime and repeated details of the victim and the crime by the defense counsel constituted reversible error).

57. 485 U.S. 681 (1988). The Court found, "that the protection against unfair prejudice emanates ... from four ... sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 – as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." *Id.* at 691-92 (citations omitted).

58. Fed. R. Evid. 404(b).

59. See Fed. R. Evid. 401; see also *Eng v. Scully*, 146 F.R.D. 74, 77-78 (S.D.N.Y. 1993) (a fact of consequence or relevance was the amount of force applied; plaintiff's intent or motive will not aid in this inquiry); *Lombardo v. Stone*, No. 99 Civ. 4603 (SAS), 2002 U.S. Dist. LEXIS 1267, 2002 WL 113913 (S.D.N.Y. Jan. 29, 2002) (prior assaults were excluded because they were offered to show propensity and the defendants were unaware of the prior assaults at the time of the incident, so they were inadmissible to show state of mind; the recent assault on an aide was admissible because it went to defendants' state of mind and provided an explanation for their response).

60. *Scully*, 146 F.R.D. at 77-78.

61. 485 U.S. at 689.

62. *United States v. Ramirez*, 894 F.2d 565, 569 (2d Cir. 1990).

63. *Id.*

64. *United States v. Gonzalez*, 936 F.2d 184, 189-90 (5th Cir. 1991).

65. 485 U.S. at 691-92; see also Fed. R. Evid. 403.

66. 485 U.S. at 689 n.6.

67. *Id.* at 692; *Loizzo*, 986 F.Supp. 245, 248 (S.D.N.Y. 1997) (admitting bond warrants but not the crimes for which they were issued).

68. 821 F.2d 373, 379 (7th Cir. 1987).

69. *Id.* at 377.

70. *Id.* at 379.

71. *Id.* at 378 (quoting *United States v. Shackelford*, 738 F.2d 776, 779 (7th Cir. 1984)).

72. *Id.* at 379.

73. 821 F.2d at 381.

74. *Id.*; see *Hynes v. Coughlin*, 79 F.3d 285 (2d Cir. 1996) (where defendants were unaware of the prison record it was inadmissible); see also *United States v. Bunch*, No. 91-6309, 1993 LEXIS , 1993 WL 5933, at 2 (6th Cir. Jan. 13, 1993) (affirming decision not to admit prior acts); *Harris v. Davis*, 874 F.2d 461, 465 (7th Cir. 1989) (discipline record inadmissible to impeach credibility); *Lataille v. Ponte*, 754 F.2d 33, 37 (1st Cir. 1985).

75. *Hynes*, 79 F.3d at 293-94 (since case hinged on credibility, questions to truthfulness of corrections officer should have been admissible, assuming there was a good faith basis).

76. *Eng v. Scully*, 146 F.R.D. 74, 78 (S.D.N.Y. 1993).

77. See Fed. R. Evid. 801(c).

78. Fed. R. Evid. 803(6).

79. Both the business records and public records exceptions have a "trustworthiness" requirement.

80. *Stone v. Morris*, 546 F.2d 730, 738 (7th Cir. 1976).

81. Fed. R. Evid. 803(6).

82. *Hynes v. Coughlin*, 79 F.3d 285, 294-95 (2d Cir. 1996). This showing can contribute to the trustworthiness of the report as well.

83. *Id.*

84. Fed. R. Evid. 803(8)(B); see *Combs v. Wilkinson*, 315 F.3d 548, 554-56 (6th Cir. 2002) (using Fed. R. Evid. 803(8)).

85. Fed. R. Evid. 803(8)(C); see *White v. United States*, 164 U.S. 100, 103 (1896).

86. *Eng v. Scully*, 146 F.R.D. 74, 80 (S.D.N.Y. 1993).

87. See *Combs*, 315 F.3d at 554-56 (using Fed. R. Evid. 803(8)); see also *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) ("As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report.").

88. Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* 803.10 n.21 (Joseph M. McLaughlin ed., 2002).

89. See *Evans v. Dugger*, 908 F.2d 801, 809 (11th Cir. 1990).

90. See Fed. R. Evid. 807.

91. *Id.*

92. *Moffett v. McCauley*, 724 F.2d 581, 584 (7th Cir. 1984).

93. *Id.* at 584 n.1.

94. If possible, file the lawsuit after the prisoner is released from custody to avoid the PLRA completely.

95. 42 U.S.C. 1997e(e) (2004).

96. See, e.g., *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002); *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).

97. See, e.g., *Calhoun v. Detella*, 319 F.3d 936, 941 (7th Cir. 2003) (citing *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999)); *Canell v. Lightner*, 143

F.3d 1210, 1213 (9th Cir. 1998); *Mason v. Schriro*, 45 F.Supp.2d 709, 717 (W.D. Mo. 1999).

98. *Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000).

99. *Id.* at 251.

100. 319 F.3d at 940.

101. *Id.*

102. 435 U.S. 247, 266 (1978).

103. *Allah v. Al-Hafeez*, 226 F.3d, 247, 251-52 (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).

104. See, e.g., *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002); *Doe v. Delie*, 257 F.3d 309, 314 n.3 (3d Cir. 2001).

105. See *Allah*, 226 F.3d at 252; *Searles v. Van Bebber*, 251 F.3d 869, 879 (10th Cir. 2001). It should be noted that the corrections defendant may often have a spouse or family members in the courtroom. The prisoner-plaintiff should do likewise. Jurors need to be reminded that even prisoners have loving families.

106. 42 U.S.C. 1997e(d) (2004).

107. *Gregory v. Shelby County*, 220 F.3d 433 (6th Cir. 2000) (compensatory damages in the amount of \$778,000; punitive damages totaling \$2,275,000; where a guard allowed a violent prisoner into the cell of the plaintiff who died as a result of the beating, prior to which there was evidence that the officer forced the now deceased to perform oral sex and then left the prisoner in his cell for ten hours before get-

ting him medical attention); *Johnson v. Howard*, No. 1:96-CV-662, 2001 U.S. App. LEXIS 1317, 2001 WL 1609897 (6th Cir. Dec. 12, 2001) (Eighth Amendment claim under which plaintiff was attacked without provocation and the beating was covered up resulting in \$15,000 in actual or nominal damages and \$300,000 in punitive damages); *Williams v. Patel*, 104 F.Supp.2d 984 (C.D. Ill. 2000) (deliberate indifference to medical needs resulting in loss of prisoner-plaintiff's eye; compensatory damages \$1 million and punitive damages \$1 million); *Miller v. Shelby County*, 93 F.Supp.2d 892 (W.D. Tenn. 2000) (deliberate indifference to prisoner safety, where the plaintiff was injured in an attack which resulted in damages of \$40,000); *Beckford v. Irvin*, 60 F.Supp.2d 85 (W.D.N.Y. 1999) (Eighth Amendment claim and ADA claim resulting in a total of \$25,000 in punitive damages and \$125,000 in compensatory damages, resulting in attorney fee award of \$50,899, \$6,250 of which to be paid from damage award); *Perri v. Coughlin*, No. 90-CV-1160(NPM), 1999 U.S. Dist. LEXIS 20320, 1999 WL 395374 (N.D.N.Y. June 11, 1999) (\$50,000 plus attorney fees and costs for deficient treatment of mental illness and cell conditions); *Trobaugh v. Hall*, No. C97-0125, 1999 U.S. Dist. LEXIS 23107, 1999 WL 336557 (N.D. Iowa Dec. 6, 1999) (\$100 a day for each day plaintiff was put in isolation in retaliation for his filing of grievances, but no punitive damages).

108. 42 U.S.C. 1988(b) (2003).

109. *Hensley v. Eckerhart*, 461 U.S. 424, 433

(1983).

110. *Id.*

111. *Id.* at 436. (2,557 hours is reasonable in light of the fact that they succeeded on five of the six claims).

112. *Blum v. Stenson*, 465 U.S. 886, 900 (1984).

113. 42 U.S.C. 1997e(d)(3) (1996).

114. 18 U.S.C. 3006A (2000).

115. 42 U.S.C. 1997e(d)(2); *Foult v. Charrier*, 262 F.3d 687, 704 (8th Cir. 2001).

116. Schlanger, note 6, at 1654.

117. 42 U.S.C. 1997e(d)(2).

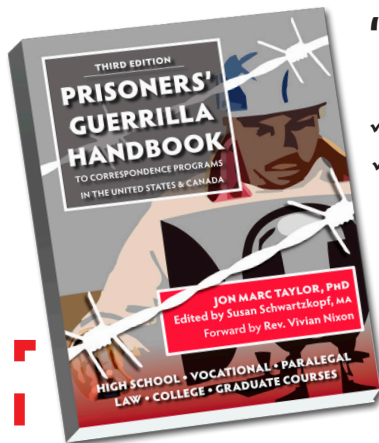
118. *Haley v. Pataki*, 106 F.3d 478 (2d Cir. 1997); *Fitzharris v. Wolff*, 702 F.2d 836 (9th Cir. 1983); *Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981).

119. *Hanrahan v. Hampton*, 446 U.S. 754 (1980).

120. *Morrison v. Davis*, 88 F.Supp.2d 799 (S.D. Ohio 2000) (attorney fee caps do not violate equal protection); *Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001) (same).

121. Alphonse A. Gerhardstein, PLRA Can Affect Private Practitioner's Ability to Represent Inmates, Correctional L. Rep. (Civic Research Institute, Kingston, N.J.), Feb.-Mar. 2002.

122. *Crutcher v. Edwards*, No. C2-01-1159 (S.D. Ohio Mar. 2003) (settlement).



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From the Editor

by Paul Wright

The cover story this month, on the nuts and bolts of winning a prisoner rights case is by Alphonse Gerhardtstein, one of the top civil rights lawyers in the country. His invaluable advice applies equally to pro se prisoner litigants as it does to the best attorneys. There are things that prisoner plaintiffs can do to successfully litigate claims whether they have counsel or not.

One of the most common reasons for prisoners' lawsuits to be dismissed these days is failure to exhaust administrative remedies. No matter how meritorious the case or how serious the injury, if the case is not first exhausted through the grievance system the federal court routinely dismiss the cases. Prison officials have quickly realized that by failing or refusing to process grievances they can effectively immunize themselves from suit. This requires perseverance on the part of prisoner plaintiffs to utilize the prison or jail grievance system and if they don't to show why they could not.

The recent ruling by the three judge panel in *Plata v. Schwarzenegger* ordering the California prison system to reduce its prison population in order to be able to provide constitutionally adequate health care is long overdue and a landmark ruling. The case now goes to the supreme court. *PLN* has reported extensively on the case and the conditions of confinement in California. In many ways, California exemplifies the problems with the American criminal justice system which is the total lack of legislative and executive branch leadership in effectively carrying out either one of two policies: fully funding the American police state or absent that, reducing reliance on imprisonment as a tool of social control to whatever taxpayers are willing to fund. Instead, we have mass imprisonment on the cheap with overcrowded, violent and disease infested prisons and nowhere in the political lexicon could one discern there is any type of alternative available.

The proposal by Senator Jim Webb of Virginia to create a criminal justice commission has roused a lot of interest among some sectors yet the proposed legislation itself would merely create a commission to study the problems in the

criminal justice system, not actually do anything about them. And none of the proposed members of said commission would include current or former prisoners, arguably the ones with the most first hand experience on how well the current system does or does not function.

My office bookshelf groans under the weight of criminal justice commission reports. Modern ones like the Deukmejian report from California and the Hershberger report from Massachusetts and the Commission on Prison Safety and Violence and older ones going back to the Attica report of 1973. These reports all have one thing in common: their recommendations were soundly ignored by the legislators and government officials and executive branch officials who could have made a difference and changed policies. Arguably if the Deukmejian reports' very sensible recommendations had been followed a few years ago the judges in *Plata* would not have had to order the release of tens of thousands of prisoners and the prison system would not be in receivership. I don't know if my bookshelf can handle yet another government report on what is wrong with the American prison system.

Rather than yet another report what is needed is a reversal of course on what has led to America's exponentially expanding prison population of the past 30 years: start shortening sentences. It wasn't just that more people came to prison, it is that they stayed longer. The federal government led the way and the states followed. This is a simple issue but one that is deemed virtual politi-

cal suicide for any politician to discuss much less enact. Until that fact is addressed the American prison population will continue to expand. The second issue that expands the prison population are parole systems that do nothing to help prisoners or protect public safety and with endless technical parole violations that merely churn the prison/parolee population and ensure prison beds remain filled and prisoners cannot reintegrate into society. Over the years I have personally known hundreds if not thousands of prisoners around the country released on parole. I have yet to hear anyone tell me their parole officer helped them find a job, find housing, etc. Far better to have true determinate sentencing where convicts do their time, even if it is a full sentence (discretionary parole release is largely non existent in most jurisdictions that still have parole systems, especially for lifers), and then are dumped out of prison to make their way in life without the albatross of parole or "supervised release" on their necks. The savings to the government from the suddenly thousands of unemployed parole officers would be enormous. But unlikely to happen.

As my overburdened bookshelf and former governor Deukmejian can attest, the problem isn't a lack of reports and recommendations; rather we lack government officials with the will or interest to implement them. And why should they? No one ever lost their job locking up too many people.

Enjoy this issue of *PLN* and encourage others to subscribe. 🐻

Innocent Georgia Man Receives \$500,000 as Compensation for Rape Conviction

The State of Georgia paid \$500,000 to a man who spent 28 years in prison for a rape he did not commit. John Jerome White was arrested in 1979 after an elderly woman identified him during a police line up as her attacker.

In 2007, DNA evidence cleared White and implicated the actual attack, James Parham. As White was released, Parham was arrested. Both White and Parham were in the police line up that

resulted in the elderly woman identifying White.

White, 48, had initially been set to receive \$709,000 as compensation, but lawmakers reduced it because he had a separate conviction on a burglary charge. Georgia has paid out \$3.9 million to four other people cleared through DNA evidence. 🐻

Source: *Atlanta-Journal Constitution*

Former Prisoner Convicted of Impersonating Criminal Defense Attorney

On April 15, 2009, a federal jury convicted a former prisoner who impersonated a lawyer on charges of mail fraud and making false statements, and the U.S. District Court subsequently imposed a 51-month prison sentence.

Howard O. Kieffer, 54, served time in federal prison from 1989 to 1993 on felony counts of defrauding the government and filing false tax returns. He did not learn his lesson, apparently, because following his release he began posing as a lawyer. Over the course of several years Kieffer represented at least 16 clients in ten states, mostly in post-conviction proceedings.

Kieffer was able to get away with his impersonation with the help of unsuspecting attorneys who vouched for him to be admitted *pro hac vice* to practice before local courts. Other attorneys thought Kieffer was a lawyer based on his knowledge of the federal court system and attendance at attorney training seminars. He also operated his own legal consulting firm, Federal Defense Associates, that used a mail drop address in Santa Ana, California, and ran an Internet listserv called BOPWatch that dealt with federal prison-related issues [See: *PLN*, Jan. 2009, p.44].

Among his unsuspecting clients, Kieffer represented Gwen Bergman in a murder-for-hire prosecution in federal court in Colorado, where he lost at trial. He was also hired by prisoners' family members – including Ken Henderson, who paid Kieffer to file an appeal on behalf of his wife, who had been convicted of lying to federal officials.

Kieffer's scam unraveled after one of his clients contacted U.S. District Court Judge Dan Hovlan in Bismarck, North Dakota and questioned whether Kieffer was a licensed attorney.

Natasha Caron of Naples, Florida, who paid Kieffer \$20,000 to appeal her son's drug conviction, later learned that he was not a licensed attorney after searching prison websites. "I put my son's case in this man's hands and he was not an attorney," she said. Caron testified at Kieffer's trial that his handling of her son's case resulted in her "health and emotional collapse."

Kieffer did not take the stand during his federal trial, and his attorney did not call any witnesses. "They thought he was a lawyer and they trusted him," said David Hagler, the Assistant U.S. Attorney handling the case. "A lot of people made that mistake."

Kieffer was sentenced on August 14, 2009 to serve 51 months in federal prison, followed by three years on supervised release. He was also ordered to pay a total

of \$152,750 in restitution to six clients he had represented under the guise of being an attorney. Kieffer did not make a statement at his sentencing hearing; he is scheduled to report to prison on or before September 14. See: *United States v. Kieffer*, U.S.D.C. (D. ND), Case No. 1:08-cr-00054-PAC. ■

Sources: *wcco.com*, *Denver Post*, *Los Angeles Times*

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Why False Imprisonment Recoveries Should Not Be Taxable

by Robert W. Wood¹

Claims for false imprisonment may be brought in various ways under federal or state law. An individual who has been wrongfully incarcerated may sue under 42 U.S.C. Section 1983 for a violation of his constitutional rights. The individual may also sue under state tort law, making claims for the traditional torts of false imprisonment, malicious prosecution, or abuse of process. Furthermore, many states now expressly provide a statutory scheme for addressing false imprisonment claims.

At the root of all of these causes of action is a fairly common fact pattern: a plaintiff is arrested or convicted, spends time behind bars, is later exonerated, and then seeks redress for his injuries. There may or may not be prosecutorial misconduct. Although there may well be nuances between the differing legal bases upon which such a claim may be brought, I have argued that the commonality of this fact pattern should mean that such recoveries should be excludable from income under Section 104 of the Code.² I will not re-state all of those arguments here, but will endeavor to summarize them briefly. [Editor's Note: The reasoning used in this argument may also be successful in challenges to the physical injury rule of the Prison Litigation Reform Act as well.]

Section 104 Authorities

The Internal Revenue Code has excluded personal injury damages from income for eighty years. For most of this time, damages for any personal injury (or for sickness) could be excluded from income, whether or not the injury or sickness was physical. In 1996, the statute was narrowed, with the new requirement that the personal injuries or sickness must be "physical" to give rise to an exclusion.

Since 1996, Section 104 has excluded from gross income damages paid on account of physical injuries or physical sickness. The IRS has interpreted this rule as requiring observable bodily harm in order for an exclusion to be available.³ In appropriate cases, however, the IRS is willing to presume the existence of observable bodily harm.

Thus, in Chief Counsel Advice Memorandum 200809001,⁴ the IRS considered the tax treatment of a settlement with an institution for sex abuse. The abuse had

occurred while the plaintiff was a minor, and the settlement was paid many years later, by which time the abuse victim had reached the age of majority. Not surprisingly, by that time there were no physical signs of any abuse, injury or sickness.

Nevertheless, the IRS ruled that the entire settlement was excludable under Section 104. Although the taxpayer had failed to demonstrate any signs of physical injury, the IRS found it reasonable to presume there had (at some point) been observable signs of physical injuries in such case.⁵ It is unclear how important it was to the reasoning of the ruling that the victim was a minor at the time of the abuse, and had reached the age of majority when he received a settlement. Arguably, it should be irrelevant, as the situation could be just as compelling without the age factor. Yet one senses that the Service was trying to eke out a narrow exception from its "we must see it" mantra.

Significantly, the Service failed to back off on the notion that Section 104 requires an outward sign of injuries. Nevertheless, it still gave the taxpayer relief on an unquestionably sympathetic fact pattern. In essence, the IRS ruled that at least under some circumstances, while it would not dispense with its view that one must be able to observe the bodily harm, one could occasionally presume the injuries. That is clever. It may appear to be a tiny step, but it is also a significant step.

Is False Imprisonment Physical?

It is hard to imagine a more obvious degree of physicality than being physically confined behind bars. Even if no bruises or broken bones befall the plaintiff while behind bars, it seems axiomatically physical to be physically confined. But is it a physical injury or physical sickness?

I argue yes. First, I note that it is almost a certainty that there will be ancillary claims in any long-term false imprisonment case. Whether characterized as assault, battery, medical malpractice, etc., most long-term prisoners have had altercations that can provide the proverbial physical hook on which one can hang the more general deprivation of liberty claim. Invariably, the presence of such ancillary claims makes the case easier for treating the recovery as excludable under Section 104.

Yet even in the hypothetical case of someone who is wrongfully incarcerated and claims no abuse, battery, or medical malpractice, in my opinion, Section 104 should clearly apply. If a taxpayer is raped, that physical trauma may or may not be visible. Even if tears or bruising do not appear, in my opinion a recovery for that rape should be excludable under Section 104. The act itself manifests injury. False imprisonment, at least serious and long-term cases thereof, should be the same.

Historically, helpful authority can be found concerning the tax treatment of payments made to Japanese-Americans placed in internment camps during World War II. There are also authorities regarding payments made to survivors of Nazi persecution, to U.S. prisoners of war in Korea, etc. At one time or another, all of these types of recoveries were held to be nontaxable as payments for a deprivation of liberty.⁶

In all of these historic cases, these persons were treated as receiving damages for a loss of personal liberty. The payments in each case were therefore held to be nontaxable. There was no wage loss claim or anything else to make the payment in such circumstances appear even arguably to be taxable. The IRS can be forgiven for being skeptical of personal physical injury allocations in many employment cases, where the nature, severity, and consequences of the physical contact and resulting physical injuries are often modest. Long-term false imprisonment is entirely different.

After all, we ended up with the 1996 changes to Section 104 precisely because of abuses in employment cases, where the wage versus non-wage dichotomy was patent. In employment cases preceding the 1996 amendments, the emotional distress moniker was added to virtually every situation. It was no secret that most damages seemed to be labeled as "emotional distress" in view of the obvious tax advantages such nomenclature imported.

The Service's rigidity in its view today may be explained by taxpayer sins of the past. That is unfortunate, for there is nothing whatsoever abusive about a recovery for long-term wrongful incarceration being afforded tax-free treatment. Taxable or not, no amount of money can ever make such victims whole.

Nevertheless, the IRS appears to have concluded that the authorities dealing with recoveries by civilian internees or prisoners of war (which we might collectively call the “internment authorities”) should no longer be relied upon. Indeed, in the Service’s view, the “physical” requirement interposed into Section 104 in 1996 undercuts these internment authorities. In Revenue Ruling 2007-14, 2007-12 IRB 747, the IRS “obsoleted” all of these revenue rulings, ostensibly due to the 1996 statutory change to Section 104. The IRS does not state publicly exactly why it obsoleted these internment rulings.

However, my off the record understanding is that the Service felt that the 1996 legislation said “physical” and meant “physical.” Being wrongfully locked up -- by itself anyway -- just isn’t physical. Yet I believe wrongful imprisonment is by its very nature physical. The fact that the internment rulings pre-date the 1996 statutory change should be irrelevant.

General Welfare Exception

Quite apart from Section 104 of the Code, it is independently arguable that the general welfare exception (GWE) shall apply to false imprisonment recoveries. The GWE exempts from taxation payments that are:

Made from a governmental general welfare fund;

For the promotion of the general welfare (that is, on the basis of need rather than to all residents); and

Not made as a payment for services.⁷

The GWE is intended to exempt from taxation amounts the government pays for the general welfare. The IRS has applied the GWE to various government payments, ranging from housing and education to adoption and crime victim restitution.⁸ It is reasonable to believe that payments from the government to make a victim of false imprisonment whole should be within the scope, purpose, and terms of the GWE.

Recent Case

Despite my arguments, there has been no tax case discussing the application of either Section 104 or the general welfare exception to a significant false imprisonment case in which the plaintiff spent years wrongfully behind bars. There is, however, a recent case involving a type of false imprisonment that could well skew the law in an inappropriate direction. The

case is Daniel J. and Brenda J. Stadnyk v. Commissioner.⁹

In Stadnyk, the taxpayer received a settlement of \$49,000 in 2002, and the question was whether that settlement was excludable from her income. The settlement resulted from a rather involved set of facts relating to the purchase of a used car. When the taxpayer was unhappy with the car and could not obtain satisfaction from the dealership, she placed a stop payment order on the check she tendered to pay for the car.

Although the stop payment order listed the reason for the stop payment as “dissatisfied purchase,” the bank (Bank One, which later would become a defendant) incorrectly stamped the check “NSF” – the customary label for a check with insufficient funds – and returned it to the used car dealer. The dealership filed a criminal complaint against the taxpayer for passing a worthless check. Several weeks later, at 6:00 PM one evening, officers of the Fayette County, Kentucky Sheriff’s Department arrested the taxpayer at her home. They did so in the presence of her husband, her daughter and a family friend. She was taken to the Fayette County detention center, handcuffed, photographed, and confined to a holding area.

Several hours later, she was handcuffed and transferred to the Jessamine County Jail, where she was searched via pat-down and with use of an electric wand. She was required to undress to her undergarments, to remove her brassiere in the presence of police officers, and to don an orange jumpsuit. At approximately 2:00 AM the next morning, she was released on bail. Several months later, she was indicted for theft by deception as a result of the check, but the charges were subsequently dropped.

Most of us would be pretty upset by such a course of events. Not surprisingly, the taxpayer eventually filed suit against the dealership and its owners for breach of fiduciary duty. She also sued the bank. She sought compensatory damages and special damages, including damages for lost time and earnings, mortification and humiliation, inconvenience, damage to reputation, emotional distress, mental anguish, and loss of consortium. She also sought punitive damages, and alleged counts for malicious prosecution, abuse of process, false imprisonment, defamation and outrageous conduct.

After a mediation, the taxpayer

settled her case. At the mediation, everyone seemed to agree that the modest \$49,000 settlement would not represent income to the plaintiff and would not be subject to tax. Indeed, the attorney for the taxpayer, the mediator and the attorney for the defendant Bank One all stated rather definitively at the time that the settlement proceeds would not be taxed. Nevertheless, the taxpayer received a Form 1099 for the payment. She did not report the payment on her 2002 tax return, and eventually landed in Tax Court.

Pure Confinement

In considering the appropriate tax treatment of the payment, Judge Goeke of the Tax Court noted that the plaintiff did not suffer any physical injuries as a result of her arrest or detention, save that she was physically restrained against her will and subjected to police arrest procedures. Indeed, the taxpayer stated that she was not grabbed, jerked around, bruised or physically harmed as a result of her arrest or detention. She did visit a psychologist approximately eight times over two months as a result of the incident. The costs of these visits were covered by her insurance. She did not have any out-of-pocket medical expenses for physical injury or mental distress suffered as a result of her arrest and detention.

In analyzing the applicability of Section 104, the Tax Court recited the usual authorities and the nature of the claims that had to be reviewed. One of the inevitable discussions was over the two-tier requirement of *Schleier*,¹⁰ which imposed two thresholds in order to bring an amount within the exclusion provided by Section 104. First, the payment must be made to satisfy a claim for tort or tort-type rights. Second, the payment must be made on account of personal physical injuries

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or physical sickness. Despite its Supreme Court provenance, this test has proven to be more tautological than helpful.

The Tax Court in *Stadnyk* lamented the fact that although there had been a mediation, there was no record of the mediation to show precisely what the parties were focusing on during the mediation process. Indeed, the court looked primarily to the complaint, and to the fact that in Tax Court, the taxpayer was relying heavily on the false imprisonment claim as a way to support her claim of excludability under Section 104. Yet this complaint – like so many others in the real world – contained multiple claims.

Indeed, the Tax Court pointed out that the taxpayer had also alleged the torts of negligence and breach of fiduciary duty against Bank One. The IRS argued that those claims were based on contract, and were simply not tort claims. The Tax Court seemed to be favoring the taxpayer, noting that it was not as clear as the IRS postulated that a lawsuit relating to a bank and customer relationship was based on contract alone. Admitting of the possibility of tort claims, the Tax Court even noted that it was possible that the bank's actions with respect to the check had proximately caused her arrest.

To the Tax Court, that made it incorrect to view the woman's complaint against Bank One as solely a contract claim. The Tax Court also didn't view it solely as a claim over the wrongful dishonor of a check. In fact, the Tax Court pointed out that the taxpayer was suing Bank One not merely because of the alleged mishandling of her check. Rather, she sued Bank One because of the ordeal she suffered as a result of her arrest and detention.

This kind of approach sounds rooted in common sense. It seems to recognize that cutting through the formalities of multiple causes of action, this was a suit over one incident and one set of damages. Although Bank One did not initiate the criminal proceedings against her, its erroneous marking of her check had actually precipitated her arrest. Moreover, the Tax Court found that when Bank One settled the case, it entered into a settlement agreement with an intent to resolve her claims for tort or tort-type rights. The Tax Court therefore concluded that the first prong of the *Schleier* test was met.

Physical Injury or Physical Sickness?

Unfortunately, Mrs. *Stadnyk* was not so lucky with respect to the physical injury or physical sickness requirement enunciated by *Schleier*. The Tax Court commenced its analysis with a discussion of the legislative history to the 1996 statutory change. The terms "physical injuries" and "physical sickness" do not include emotional distress (except for damages not in excess of the cost of medical care attributable to that emotional distress).

In fact, Mrs. *Stadnyk* had admitted that she did not suffer any physical harm during her arrest or detention. Although she is to be commended for her honesty, she did not try to spin her story as involving even a technical battery. She was not grabbed, jerked around, or bruised. While she argued that physical restraint and detention by itself constitutes a physical injury, the Tax Court disagreed. It said baldly that:

"Physical restraint and physical detention are not 'physical injuries' for purposes of Section 104(a)(2). Being subjected to police arrest procedures may cause physical discomfort. However, being handcuffed or searched is not a physical injury for purposes of Section 104(a)(2). Nor is the deprivation of personal freedom a physical injury for purposes of Section 104(a)(2)."¹¹

The Tax Court found language from a Kentucky state court case to the effect that the tort of false imprisonment protects one's personal interest in freedom from physical restraint.¹² The same Kentucky court went on to say that the injury from false imprisonment is "in large part a mental one," and that the plaintiff can recover for mental suffering and humiliation. The Tax Court therefore concluded that the alleged false imprisonment against Mrs. *Stadnyk* did not cause her to suffer any physical injury, which a Section 104 exclusion would require.

The court nevertheless found that Mrs. *Stadnyk* was not liable for Section 6662 penalties. The Tax Court acknowledged that Mr. and Mrs. *Stadnyk* had not sought tax advice concerning the recovery. It nevertheless seemed reasonable to rely upon the parties to the mediation and the various lawyers. All of them said with little equivocation that they expected the recovery to be tax-free. Thus, although Mrs. *Stadnyk* had to pay the tax and the interest, there were no penalties.

Bad Case; Bad Law

Stadnyk is an unfortunate case, whether or not one views it as correct. It can certainly be argued that the Tax Court was right to analyze this particular recovery as taxable. I do not agree with this argument, but reasonable minds can differ. But are the Tax Court's platitudes about false imprisonment correct?

I believe one must answer that question with a resounding "no." Whatever a Kentucky state court may have said about the nature of a false imprisonment claim, there is nothing mental about being locked behind bars and subjected to the physical confinement it entails. Put another way, although it may well lead to mental damages, the primary thrust of a false imprisonment claim is not mental. Even if you are handled with kid gloves, confinement is physical.

Yet even if we acknowledge that Mrs. *Stadnyk's* recovery is not physical enough to be tax free, one must be able to draw lines. Clearly, no one would want to spend from 6:00 PM to 2:00 AM in jail as Mrs. *Stadnyk* did. Nevertheless, that period of eight hours (during some part of which she was being processed and transported, and thus apparently was not confined in a cell), hardly compares with spending months or years locked behind bars.

Can anyone seriously compare Mrs. *Stadnyk's* experience to that of an ex-honoree who is wrongfully convicted and wrongfully imprisoned in a penitentiary for, say ten years? I think not. I recognize that qualitative decisions are not easy.

Arguing that serious false imprisonment cases should be treated differently than non-serious ones is analytically difficult and perhaps impracticable. Exactly where you draw the line between trivial and serious false imprisonment is subjective. Indeed, one could reasonably conclude that Mrs. *Stadnyk's* recovery too should be tax-free.

Yet I do not think it is silly to agree that Mrs. *Stadnyk's* recovery can be taxable, and yet to argue forcefully that a serious and long-term ex-honoree should receive tax-free treatment. Line drawing may not be easy, but even if one agrees that Mrs. *Stadnyk's* recovery should be taxed, it does not follow that all false imprisonment recoveries should be taxed. The Tax Court's broad and unnecessary dicta in *Stadnyk*, blathering on about all false imprisonment recoveries is, to my mind, simply wrong. One way to distinguish the serious false imprisonment case involving

long tenure in prison from a case such as Mrs. Stadnyk's relates to ancillary claims. Mrs. Stadnyk herself indicated that she experienced no roughing up and no physical injuries, no medical claims, etc. She suffered indignities, but she was not bruised, pushed or manhandled.

In my experience, a true long-term incarceration case is vastly different. There are almost always incidents of physical trauma, often leaving permanent scars. There are often battery claims, medical malpractice claims, and more. Yet as a matter of analytical purity, it is worthwhile to ask what would happen if the tax consequences of a payment in settlement of a wrongful long-term incarceration case were considered in isolation.

That is, consider the rare (and perhaps even unimaginable) case in which a person is wrongfully incarcerated for ten years, but is fortunate enough to be able to state (as Mrs. Stadnyk) did that he endured no pushing, no shoving, no bruising, no rapes, no assaults, no batteries, no medical malpractice, etc.

In my view – even without the presence of the customary ancillary claims for separate torts, and even without the customary damages usually accompany-

ing those torts – such a false imprisonment recovery should itself be tax-free.

In my opinion, Stadnyk is an unfortunate and probably an incorrect decision, even on its facts. As a technical matter, of course, a Tax Court memo decision is non-precedential.¹³ Quite apart from that, neither taxpayers nor the government should put too much stock in the broad statements made by Judge Goeke in Stadnyk. ■

Endnotes

1 Robert W. Wood practices law with Wood & Porter, in San Francisco (www.woodporter.com), and is the author of *Taxation of Damage Awards and Settlement Payments* (3d Ed. 2008) and *Qualified Settlement Funds and Section 468B* (2009), both available at www.taxinstitute.org. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

2 See Wood, "Are False Imprisonment Recoveries Taxable?," *Tax Notes*, April 21, 2008, p. 279.

3 Perhaps the best illustration of the Service's view on this point is the so-called "bruise" ruling, Letter Ruling 200041022.

4 Nov. 27, 2007.

5 See further discussion in Wood, "IRS Allows Damages Exclusion Without Proof of Physical

Harm," *Tax Notes*, March 31, 2008, p. 1388.

6 See Civil Liberties Act of 1988, P.L. 100-383, Section 101-109, 102 stat. 903, 903-911 (1988). See also Rev. Rul. 56-462, 1956-2 C.B. 20 (dealing with Korean War payments); Rev. Rul. 55-132, 1955-1 C.B. 213 (exempting from tax payments made to US citizens who were prisoners of war during World War II). See also Rev. Rul. 58-370, 1958-2 C.B. 14 and Rev. Rul. 56-518, 1956-2 C.B. 25 (providing tax-free treatment for payments by Germany and Austria for persecution by the Nazis).

7 See ITA 200021036. See also Wood and Morris, "The General Welfare Exception to Gross Income," *Tax Notes*, October 10, 2005, p. 203.

8 See Rev. Rul. 76-373, 1976-2 C.B. 16; Rev. Rul. 74-205, 1974-1 C.B. 20; Rev. Rul. 76-395, 1976-2 C.B. 16; Rev. Rul. 75-271, 1975-2 C.B. 23; Letter Ruling 200409033 (Nov. 23, 2004); Rev. Rul. 74-153, 1974-1 C.B. 20; Rev. Rul. 74-74, 1974-1 C.B. 18.

9 T.C. Memo 2008-289.

10 *Commissioner v. Schleier*, 515 U.S. 323 (1995).

11 *Stadnyk*, T.C. Memo 2008-289 at page 17.

12 See *Banks v. Fritsch*, 39 S.W. 3d 474 (Ky. Ct. App. 2001).

13 See *Nico v. Comm'r*, 67 T.C. 647, 654 (1977), *aff'd in part, rev'd in part on other grounds*, 565 F.2d 1234 (2d Cir. 1977): "we consider neither Revenue Rulings nor Memorandum Opinions of this Court to be controlling precedent."



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Texas' Parole Condition X Violates Due Process

by Gary Hunter

Texas' parole Condition X has come under scrutiny in a federal court case. On December 12, 2008, a U.S. magistrate judge issued a 30-page order granting partial summary judgment in favor of parolee David Brian Jennings, after concluding that the Texas Board of Pardons and Paroles had illegally imposed "conditions on his parole without providing him sufficient process." The court granted declaratory and injunctive relief.

On August 28, 1979, at age 15, Jennings was convicted of kidnapping with the intent to facilitate indecency with an 8-year-old. Seven years later, as an adult, he was sentenced to 3 years on a forgery charge. In April 1989 Jennings pled guilty to debit card abuse for withdrawing \$800 on his roommate's debit card. Due to his past record the charge was enhanced to "habitual," and Jennings was sentenced to 25 years in the Texas prison system. He was released on parole 16 years later on May 23, 2005.

In July 2003, the Texas Parole Division implemented a Policy and Operation Procedure (PD/POP) for Condition X, which "establishe[d] the procedures for sex offender special conditions, supervision guidelines, and sex offender treatment." (PD/POP 3.6.2) [See: *PLN*, March 2009, p.46]. The court noted that according to PD/POP rules, "[i]f special condition X had not been imposed on an offender at the time of their release on parole, the policy requires that the supervising officer request its imposition."

On June 14, 2005, an unidentified parole officer requested that Condition X be applied to Jennings' parole supervision. This initial request was denied. However, two months later Jennings' parole officer petitioned the board to impose Condition X. This time the request was granted.

Jennings filed suit pursuant to 42 U.S.C. § 1983, alleging denial of due process because he was subjected to Condition X restrictions without notice. However, in his suit Jennings attacked only three provisions of Condition X: 1) that he enroll in a sex offender treatment program; 2) that he obtain written permission from his parole officer before dating, marrying or having a platonic relationship with anyone with children 17 years old or younger; and 3) that he have written permission from his parole officer before

being allowed to maintain or operate any computer equipment. In regard to the third requirement, even with permission Jennings had to agree to extensive invasive monitoring of his computer activity.

The defendants countered that a Fifth Circuit opinion required notice to a parolee that Condition X was being imposed only "[a]bsent a conviction of a sex offense," citing *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004) [*PLN*, July 2006, p.27]. Since Jennings had been previously convicted of a sex offense (in 1979), the defendants argued he was not entitled to notice.

The district court rejected this argument and ruled that Jennings had a liberty interest in the imposition of Condition X. The court then addressed the three challenged Condition X restrictions.

While there was no question that Jennings' sex offense at age 15 qualified him as a sex offender, the court centered its analysis around the recurring theme that each of the Condition X provisions constituted "a dramatic departure from his sentence."

The district court cited *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988), which held that a 15-year-old cannot be held as culpable as an adult. The court also reasoned that under federal law, "eventually a conviction is so old that it is no longer appropriate to consider in certain situations." Because Jennings' two adult convictions were not sex-related, the court held that the imposition of Condition X, 26 years after his sex offense, constituted "a dramatic departure from his sentence."

Further, the court found "the Fourteenth Amendment protects the right to personal activities ... [one of which] is the freedom to marry ... [and to engage in] consensual sexual relationships," referencing *Washington v. Glucksberg*, 117 S.Ct. 2302 (1997) and *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). To deprive Jennings of the right to enter into personal relationships based on his current conviction for debit card abuse "constitutes a dramatic departure from his sentence."

Finally, the district court held that use of a computer had become so fundamental in the 21st century that to prohibit its use was unreasonable. "Given that Plaintiff has never used a computer to commit

a crime, this condition is a dramatic departure from his sentence."

The court emphasized more than once that its ruling did not affect Condition X restrictions specifically, only the fact that they were imposed without giving Jennings an opportunity to challenge their imposition. While the court granted Jennings injunctive relief from the three challenged Condition X restrictions, it declined to specify what exact measures the defendants should take to comply. See: *Jennings v. Owens*, 585 F.Supp.2d 881 (W.D. Tex. 2008).

On January 9, 2009, the district court denied the defendants' motion to amend the judgment, in which they asked for 120 days to comply with the order, observing that "Defendants have not provided an analysis, reasoning or substantiation to support the request." The court also denied a motion to stay the judgment pending resolution of an appeal to the Fifth Circuit. On January 29, 2009, the court awarded \$38,338 in attorney fees and \$12,243 in costs to Jennings' counsel; however, the award of fees and costs was stayed pending an appeal by the defendants.

Two of the attorneys who represented Jennings have battled against Condition X for years. "I'm not at war trying to defend sex offenders. I'm at war trying to protect our Constitution," said Bill Habern, who is recognized as one of the top parole attorneys in Texas.

A sex offender is given "...less due process than someone who is having their driver's license suspended," added attorney Richard Gladden. "And it seems to me that ... you start saying, 'What's more important – my driver's license or not being able to live with my kids?'"

U.S. District Court Judge Sam Sparks took issue with Condition X restrictions in a different suit. When told that parole board members spent 10 to 30 minutes reviewing each case, his response was, "It would certainly appear that if the voting members actually reviewed the files, ... the [process] would take substantially longer than 30 minutes."

Texas Parole Board member Jose Aliseda, a former county judge, said recent federal court rulings "have caused us to examine our policy," and the Board was trying "to make sure our policies meet

constitutional muster.”

State courts, however, have been more receptive. In an October 15, 2008 ruling, the Texas Court of Criminal Appeals upheld the imposition of Condition X restrictions on a parolee who had been convicted of indecent exposure and assault more than 17 years earlier, who had received notice that the restrictions were being considered and did not contest them. The parolee in that case had his parole revoked after he visited his father's home – which was within 500 feet of a day care center – to take a shower. See: *Ex parte Campbell*, 267 S.W.3d 916 (Tex.

Crim. App. 2008)

The justice system is not designed “to reintegrate [parolees] into society and be productive members of society. It's set up for them to be roadblocked at every single turn,” remarked Mary Sue Molnar, co-founder of Texas Voices, a fast-growing organization for the reform of sex offender laws.

Even victims' rights advocate Torie Camp observed that putting all sex offenders into one category “does a disservice to victims of sexual assault,” and makes sex offender restrictions less meaningful. As director of the Texas Association

Against Sexual Assault, Camp favors an individualized approach instead of the current parole board practice of lumping all sex offenders together.

Jennings' case is just one example of the unreasonable lengths taken by the Texas Board of Pardons and Paroles against parolees. And in a state that takes pride in locking up over 150,000 of its residents in state prisons and tens of thousands more in county jails, things are unlikely to change anytime soon. ■

Additional source: *Dallas Morning News*

\$2.16 Million Settlement in Dauphin Pennsylvania Jail Strip Search Lawsuit

A class action lawsuit alleging illegal strip searches occurred regularly at Pennsylvania's Dauphin County Prison (DCP) has been settled for \$2.16 million. The class claimed they were arrested on minor charges and strip searched without any particularized suspicion that they possessed weapons or other contraband.

The lawsuit was filed after 125 people were arrested at a local radio event on an undeveloped island during a 2007 Labor Day “camp-out with the DJs.” Those arrested were charged with violating a law that requires a permit for gatherings of 20 or more people in a city park to listen to music, which is equivalent to a traffic ticket.

Of those arrested, more than 50 people were unable to post bond. They were taken to DCP and strip searched. That mass strip search exposed DCP's blanket strip search policy, resulting in the lawsuit.

The class consists of persons arrested between September 16, 2005, through March 12, 2008, on charges of “misde-

meanors, summary offenses, violations of probation or parole or intermediate punishment, civil commitments, or minor crimes who were strip searched upon their entry into” DCP.

Under the settlement, DCP will establish a settlement fund of \$2,160,500. Class members, which are expected to be 9,000 people, will each receive \$1,400. Class representatives Jennifer Reynolds and Ashley McCormick will each receive \$15,000 while class representative Devon Shepard will receive \$10,000.

The five attorneys who represented the class will receive around \$650,000 in fees. “It is a fair agreement,” said class attorney Alan Ross.

A separate lawsuit is pending against the city of Harrisburg for illegally detaining the out-of-state residents arrested at the island party. That suit is in the discovery stage. See: *Reynolds v. County of Dauphin*, USDC, M.D. Pennsylvania, Case NO: 1:07-CV-01688. The settlement in this case is available on PLN's website. ■



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Using Chemical Agents on Mentally Ill Prisoners Unconstitutional

by David M. Reutter

As the mentally ill become more prevalent within the nation's prison population, guards and prison administrators face a dilemma when confronted with such a prisoner who is not conforming to prison rules. While it said it was "a hard case," a Florida federal district court nonetheless held that the Eighth Amendment prohibits using chemical agents on mentally ill prisoners, who lack the mental capacity to conform their behavior to prison rules.

That ruling came in a civil rights action filed on behalf of seven individual prisoners. The Court's finding, after a bench trial, was that only two of the prisoners' rights were violated by the Florida Department of Corrections (FDOC) policy. All of the prisoner plaintiffs were on close management (CM), which is FDOC's version of long-term administrative confinement, at the times relevant to the complaint.

Each prisoner was housed at Florida State Prison (FSP) and subjected to chemical agent spraying. FDOC designated them as having the ability to conform their behavior to the prison's standards. Counsel for the prisoners argued they did not have the ability to conform, making the use of chemical agents on them cruel and unusual punishment. They sought an injunction preventing them from being sprayed at FSP while on CM without first conducting a mental health consultation to evaluate whether they possess the mental faculties to understand and follow guards' instructions.

The majority of FSP's 1,400 prisoners have a psych grade of S-3 (those prescribed psychotropic medications who have moderate impairment in adaptive functioning due to serious mental illnesses such as schizophrenia, bipolar disorder or major depression, or borderline personality disorders. Nearly 80% of FSP's prisoners are on CM.

As a result of the 1999 beating death of death row prisoner Frank Valdes by FSP guards, physical cell extractions are rarely used to gain control of prisoners. Rather, the FDOC utilizes chemical agents to compel prisoners to comply with guards' orders.

Under that policy, guards request compliance and verify that the prisoner has no contraindications to chemical agents in their medical file. If the prisoner fails to comply, three one-second bursts of pepper spray

are used. After five minutes, the spraying is repeated if the prisoner still refuses to comply. Should that still have no result, guards then spray the prisoner with tear gas. When compliance is obtained, the prisoner is handcuffed and offered a cool shower.

The spraying can cause second degree burns if not washed, and it can exacerbate pre-existing conditions. Dr. Donald Gibbs testified that using chemical agents on mentally ill prisoners can worsen their symptoms, making them "more paranoid, frightened, and fearful," and "less trusting and more angry," all of which is "detrimental" to treating their mental illness.

In contrast to the spraying policy at FSP, Union Correctional Institution (UCI) does not allow the spraying of its mentally ill prisoners to quell a disturbance. Instead, UCI has its mental health staff intercede to counsel the prisoner and make medication adjustments as necessary. Dr. Olga Infante testified "that the difference between the two facilities in terms of security and mental health management was 'night and day.'"

She said that disturbances such as prisoners yelling and banging on the cell door can signal that the prisoner has "decompensated." Many prisoners have a history of transitioning back and forth from FSP to UCI. "Known as 'frequent-fliers,' these inmates are treated at UCI and returned to FSP, only to quickly decompensate and be sent back to UCI – sometimes after having been sprayed (even repeatedly) with chemical agents for disturbances they caused in their short stay at FSP," said the Court.

Both sides in this litigation agreed guards can constitutionally spray prisoners with chemical agents to compel compliance with rules of the ward, but they also acknowledged this is only true when the prisoner has the mental capacity to conform his behavior to those rules. After four years of litigation and five days of trial, the Court said it was a close question of whether FDOC's policies with regard to mental health at FSP have evolved that the plaintiffs face no real risk of being sprayed when they do not have the mental ability to conform to the rules.

In a 75 page ruling, the Court determined that prisoners Antonio Ward, Paul Echols, Reginald Williams, and Kelvin Frazier failed to demonstrate a connection between their mental state and the

spraying with chemical agents to prove a constitutional violation. The Court, however, found that prisoners Jeremiah Thomas and Michael McKinney made such a demonstration that they were entitled to injunctive relief.

Both have a long history of being repeatedly sprayed. Yet, both also have a record of serious mental illnesses. "Thomas' symptoms include auditory hallucinations, impaired thought process, and paranoid delusions and his behaviors while incarcerated have included acute agitation, maniacal banging on his cell door (to the point of breaking his own hands), eating his feces, pouring urine on his hands, exhibitionist masturbation, urinating on his mattress, attempting to cut his penis, and repeated suicide attempts."

McKinney has marginal intellectual functioning and propensities for anger and anti-social behavior. His "pathological" behavior has resulted in 320 disciplinary reports over 18 years in prison. He has a history of self-injurious behavior and has been diagnosed at various times with having an adjustment disorder with depressed mood, antisocial personality disorder, and major depression with recurrent psychotic ideations.

The Court's order detailed repeated sprayings of Thomas and McKinney at FSP during episodes that appear to be due to their mental illnesses. It found that they were "frequent-fliers" who are at threat of being sprayed upon return to FSP. While system-wide policies have changed, injunctive relief is necessary because FDOC's actions show its verbal policies are fluid and can result in the unconstitutional spraying of Thomas and McKinney. See: *Thomas v. McNeil*, USDC, M.D. Florida, Case No 3:04-CV-917-J-32JRK. The defendant prison officials settled the prisoners damages claims in this case for amounts ranging from \$2,000 to \$10,000 per prisoner. Another judge had previously denied statewide class certification in a companion case filed in the M.D. Florida in Ft. Myers. *Brown v. Crosby*, Case No. 2:03 CV 526-FTM-29DNF. The defendants have appealed the decision to the 11th circuit appeals court. The plaintiffs were well represented by attorneys from the Florida Justice Institute in Miami, Florida, Institutional Legal Services in Gainesville, and Holland & Knight in Jacksonville. The opinion is posted on PLN's website. ■

Audit Finds California Prison Receiver Broke State Law by Making No-Bid Contracts with Verizon

by Michael Brodheim

An investigation by the California Bureau of State Audits has revealed that Prison Health Care Services, the office overseeing prison health care reform in California, violated legal requirements and bypassed internal controls when it acquired \$26.7 million in information technology ("IT") goods and services without inviting competitive bids. The investigation, conducted by state Auditor Elaine M. Howle pursuant to the California Whistleblower Protection Act, was initiated when, shortly after his appointment in January 2008, J. Clark Kelso, the office's new receiver, discovered that some of the IT contracts executed during his predecessor's tenure may not have followed appropriate state laws and policies. Coincidentally, Kelso had gained familiarity with IT contracting problems of a similar nature during his tenure as California's Chief Information officer (prior to his federal-court-appointment as Receiver). In responding to the audit, Kelso noted that, "For better or for worse," his predecessor had devoted the bulk of the resources of the receiver's office to addressing the very immediate problems posed by "abhorrent clinical conditions on the ground in the prisons." Kelso acknowledged that, as a consequence, perhaps not enough attention had been paid to the administration of the state's contracting system -- a system which he characterized as "also in shambles" when

the receivership was originally established (in 2006).

The auditor detailed the results of her investigation in a report submitted to the Governor and legislative leaders on January 22, 2009. Although the report included a copy of the Receiver's response to the audit, neither Kelso nor his predecessor, Robert Sillen, was otherwise specifically named in the report. And similarly, while the report exposed the failures of four officials and two managers in the Prison Health Care Services bureaucracy to fulfill their contracting responsibilities, those officials and managers -- one of whom was identified in a footnote as having been terminated -- were not named either.

Conspicuously absent from the auditor's otherwise exhaustive report was any mention of either the identity of the vendor who seemingly benefited from the failure of Prison Health Care Services to invite competitive bids, or the specific nature of the IT goods and services thus acquired. That missing information was supplied by Don Thompson of the *Associated Press*; in a press release on January 22, 2009 (the same day as the audit itself was released), the vendor was identified as Verizon Communications Inc. According to the press release, communications giant Verizon (and an unidentified subcontractor) signed a contract with Prison Health Care Services to install its

telephone and data lines.

While the audit concluded that the state could not be certain that Prison Health Care Services had spent \$26.7 million in public funds "prudently" or that it had received the test value for its money, there was no finding of wrongdoing on the part of Verizon (or the subcontractor). Nor was there any evidence that any employee of Prison Health Care Services had personally benefited from the non-competitive manner in which the deal with Verizon had been struck.

In responding to the audit, Kelso indicated that his office had established policies and procedures to ensure that Prison Health Care Services would consistently apply proper contracting procedures in making future IT acquisitions. Then, in what may prove to be a concession to the ultimate inevitability of business-as-usual, Kelso indicated that his office had sought and obtained "an appropriately justified approval" from the state Department of General Services to continue its noncompetitive contracting arrangement with Verizon. The audit is available on PLN's website. ■

Sources: *California Prison Health Care Services Audit*, January 2009 Report no. 2008-0805, January 22, 2009; *Audit: California Prison Receiver Gave No-Bid Contracts*, by Don Thompson, Associated Press, 1/22/09.

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Fifth Circuit Upholds \$14 Million Award Against Louisiana DA's Office in Wrongful Conviction Suit; Affirmed by En Banc Ruling

by Matt Clarke

On December 19, 2008, the Fifth Circuit Court of Appeals upheld a federal jury award of \$14 million in a case involving the wrongful conviction of a Louisiana man for attempted armed robbery and first-degree murder, in which the prosecutors withheld an exculpatory blood test report and other evidence. That decision was narrowly affirmed in an en banc ruling by the Fifth Circuit in April 2009.

John Thompson spent eighteen years in prison, including fourteen on Louisiana's death row, after he was convicted of separate charges of attempted armed robbery and capital murder for crimes he did not commit. To achieve the convictions, the prosecutors manipulated the legal system and withheld evidence.

After being exonerated or acquitted in both cases, Thompson filed a civil rights suit pursuant to 42 U.S.C. § 1983 in U.S. District Court against the Orleans Parish District Attorney (DA) and individual assistant district attorneys for violating his rights by withholding exculpatory evidence. A jury found that while the violation was not the result of an official policy by the DA's office of suppressing exculpatory evidence, it was deliberate indifference for the DA not to have established "policies and practices to protect one accused of a crime from these constitutional violations."

Thompson and Kelvin Freeman were arrested for the capital murder of robbery victim Raymond T. Liuzza, Jr., who was shot five times on December 6, 1984. Victims who fought off an armed robber about two weeks after Liuzza's murder saw Thompson's picture in the newspaper and told police he was their assailant. During that attempted armed robbery some of the robber's blood ended up on one of the victim's pants, and the police took a cloth swatch of the pants for evidence. Thompson was also found with the gun used in Liuzza's murder as well as Liuzza's gold ring – items he said he obtained through trade as part of his drug dealing activities.

The prosecutor decided to try the attempted armed robbery case first because he believed that a conviction in that case would prevent Thompson from testifying

at the subsequent capital murder trial, which would make it easier to convince the jury to give him the death penalty. Shortly before trial a blood test was run on the cloth swatch, which showed it to be type B. Several prosecutors and the DA were aware of the test results but no one told the defense attorneys representing Thompson. Additionally, one prosecutor intentionally withheld the cloth swatch from the defense by removing it from the forensic evidence file; he confessed his actions to another assistant DA after being diagnosed with terminal cancer in 1994.

Thompson was first convicted of attempted armed robbery, and later convicted of capital murder in a separate trial. As intended, the first conviction prevented him from testifying at the capital murder trial; had he testified, the jury in that trial would have learned about the robbery conviction, which would have hurt his defense. Freeman cut a deal with prosecutors and received a five-year sentence in exchange for testifying against Thompson. Freeman was later shot to death by a security guard in 1995.

Thompson spent 14 years on death row and was within weeks of execution, which his lawyers told him could not be prevented, when a defense investigator came across a copy of the blood test results in a microfiche file. Thompson's blood type was type O. The execution was stayed and an investigation ensued which revealed the prosecutor's 1994 confession that he had withheld evidence. Other exculpatory evidence that had not been turned over to the defense was discovered in both the armed robbery and murder cases, including eyewitness descriptions of the murderer that did not match Thompson and the fact that an acquaintance of Thompson had received a monetary reward for identifying him as Liuzza's killer.

The DA moved to vacate the armed robbery conviction and did not retry that case. A grand jury began an investigation into the suppression of the blood type evidence, but the investigation was dismissed by the DA's office. A state appeals court held that the unconstitutional suppression of evidence in the attempted armed robbery

case had contributed to Thompson's conviction in the capital murder case, and overturned that conviction.

The DA retried the murder case in 2003, and the jury acquitted Thompson after just 35 minutes of deliberation. Thompson then filed his federal civil rights lawsuit; he was awarded \$14 million following a jury trial in February 2007. [See: *PLN*, Oct. 2007, p.22]. The defendants appealed.

The Fifth Circuit held that liability had been proven on the basis of the DA's failure to train, monitor and supervise prosecutors regarding their duty to share exculpatory evidence with the defense. The statute of limitations did not begin to run until the capital murder case was overturned, because the suppression of the blood type evidence in the attempted armed robbery case called the validity of the capital murder conviction into question. Thus, the appellate court found Thompson's lawsuit was timely filed.

Thompson was not required to prove a pattern of similar violations, as he had shown it was obvious that training on the issue of suppression of exculpatory evidence was necessary, and failure to provide such training would necessarily lead to violations of defendants' civil rights. The DA couldn't put all the blame on the prosecutor who concealed the blood evidence, because other prosecutors had seen the blood type report and failed to notify Thompson's attorney; the prosecutor who hid the evidence wasn't even involved in the capital murder trial; and other exculpatory evidence had been withheld. The Court of Appeals further determined the jury charge was adequate.

The defendants attempted to argue that Thompson had actually committed the murder, which was thus the proximate cause of his incarceration. They complained about not having been allowed to litigate the issue of guilt or innocence in the civil rights trial. The Fifth Circuit determined the question was whether Thompson could have been convicted in the murder trial but for the constitutional violation – not whether he had committed the crime. The matter of guilt was determined at the second murder trial when Thompson was acquitted, and the

defendants were collaterally estopped from re-litigating the issue once he was found not guilty.

The Court of Appeals held that the jury award of \$14 million – about \$775,000 per year that Thompson was incarcerated – was not excessive. The attorney fees and costs of \$1,166,177.45 awarded against the defendants were about half of what was requested, were reasonable, and did not even compensate Pennsylvania attorneys Michael L. Banks and John Gordon Cooney, Jr. for fourteen years of pro bono work in getting Thompson's convictions overturned. Furthermore, Thompson's attorneys did not seek compensation for local counsel Robert Glass of New Orleans, and the district court pronounced it was "genuinely impressed" with the attorneys' presentation of an extremely difficult and complex case.

The judgment and jury award were upheld except that the case was returned to the district court with instructions to replace the defendants' names with those of the current office holders. See: *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008).

Following the appellate ruling, the DA's office announced that it couldn't

afford to pay the judgment and asked for state authority to file for Chapter 9 bankruptcy. "I just want to have that option available if it is necessary for me to do that," said current New Orleans District Attorney Leon Cannizzaro. Cannizzaro later backed off the bankruptcy plan, opting to first exhaust all appeals in the civil case.

On April 10, 2009, the Fifth Circuit, sitting en banc, affirmed the prior appellate decision in an equally divided opinion. Under the Court of Appeals' rules, equally divided rulings uphold the district court's judgment, usually without a written opinion. In this case, however, several appellate judges issued concurring and dissenting statements.

Chief Judge Edith Jones, joining Judges Clement, Jolly, Smith, Garza and Owen, would have overturned the jury award based partly on a finding of no municipal liability under *Monell v. Dep't. of Social Servs.*, 436 U.S. 658 (1978). "Only under the most limited circumstances may a municipality be held liable for the individual constitutional torts of its employees," Clement wrote.

Chief Judge Jones also cited "the troubling tension between this unprec-

edented multimillion dollar judgment against a major metropolitan District Attorney's office and the policies that underlie the shield of absolute prosecutorial immunity."

Five Fifth Circuit judges issued a concurring opinion that affirmed the panel decision, including Judges Prado, King, Wiener, Stewart and Elrod. They emphasized the importance of the jury's findings and noted the dissenting opinion "overlooks much of the evidence the jury heard and ignores the standard of review that we apply to jury verdicts. By reading the dissent, one would be hard pressed to even realize that a jury rendered the verdict in this case." See: *Thompson v. Connick*, 2009 U.S. App. LEXIS 17728 (5th Cir. 2009)(en banc).

While the en banc ruling is a victory for Thompson in his ongoing efforts to hold the DA's office accountable for his wrongful convictions and the many years he spent in prison for crimes he did not commit, it is a sad commentary that half of the Fifth Circuit judges who ruled in this case would have overturned the jury's verdict. 📞

Additional source: *The Times-Picayune*

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Third Circuit Upholds Pennsylvania DOC Policy Requiring Control Number for Legal Mail

by David M. Reutter

Finding that no legitimate penological interest existed to support a Pennsylvania Department of Corrections (PDOC) policy that requires a PDOC-issued control number on correspondence for it to qualify as legal mail, a U.S. District Court issued an injunction prohibiting enforcement of the policy. However, that ruling was later reversed by the Third Circuit Court of Appeals.

Prior to October 2002, any mail that indicated it was from a court or attorney, or otherwise marked as legal mail, was opened in a prisoner's presence. The new policy, however, PDOC policy DC-ADM 803, disregarded the source listed on the return address. Instead, prison officials relied only on whether there was a control number on the envelope when determining if the mail constituted legal mail that should be opened in the prisoner's presence.

There are two methods by which a PDOC prisoner can receive legal mail. One allows for legal correspondence to be hand-delivered unsealed, which provides for inspection, sealing and then delivery to the prisoner without further interference by prison staff. The other method is via postal mail.

When legal mail is sent through the postal service, the new PDOC policy requires that such mail include a control number issued by the PDOC's office of Chief Counsel. To obtain such a control number, the sender has to submit an application for anything sent by mail other than "essential, confidential, attorney-client communication."

If the legal mail includes a registered PDOC control number it is opened in the prisoner's presence. Mail without a control number, regardless of how clearly marked that the sender is an attorney or court, is treated as regular mail and opened in the mailroom outside the prisoner's presence.

The district court noted that this case had a long procedural history, with over 300 docket entries. The court commended the work of attorneys Stephen D. Brown and Teri B. Himebaugh of the Prisoner Rights Panel for taking the case pro bono and developing a record that allowed it to rule on the parties' motions for summary judgment.

In its motion, PDOC argued that the policy requiring a control number met the

reasonableness test set forth in *Turner v. Safely*, 482 U.S. 78 (1987). PDOC asserted its penological interest for the policy was to address safety and security concerns; prison officials said experience had shown that legal mail could be used to introduce contraband into the prison system.

To support its position, PDOC relied on an Escape Report issued in November 1999, as well as a September 1999 Privileged Correspondence Inspection and Contraband Report. The Escape Report concerned an investigation into a prisoner's escape from SCI Huntington on August 2, 1999. That report concluded, "substantial evidence shows that [the prisoner] was able to introduce contraband into the institution through legal mail." The court, however, found there was no discussion of what that evidence was, and no link between the prisoner's escape tools and legal mail.

The September 1999 report detailed less than a dozen cases since 1986 in which contraband was sent to prisoners through legal mail. None involved escape tools. The court stated that not all contraband, as defined by PDOC, poses a significant security and safety risk that can justify infringement on a prisoner's First Amendment rights.

PDOC Secretary Jeffrey A. Beard acknowledged that the policy change requiring control numbers was motivated by the 1999 escape. The district court found the change "was an overreaction to a single escape incident and a few isolated violations of the contraband policy involving legal mail that may or may not have occurred."

Further, the "policy and its purported rationale overlook the obvious. All legal and court mail, with or without a control number, is still opened and inspected by the staff. If there is contraband, it will be discovered," the court wrote. "The difference is where – in the mailroom if there is no control number, or on the housing units if there is a control number. In either event, a proper inspection is conducted."

The district court also rejected the PDOC's argument that court mail is not privileged because the contents of pleadings and orders are docketed in the court and thus available for public inspection. Although the court found there was no penological interest for the policy, it still

addressed the other *Turner* factors.

The court noted a prisoner can only ask an attorney to obtain a control number, not demand it. Thus, if counsel fails to do so, the prisoner has no other alternatives to comply with the policy. Prisoners are unable to require courts or court staff to obtain control numbers. There is no burden on prison staff beyond what already exists; in fact, the policy requires staff to verify the control number if present on the envelope, which takes additional time, and after verification the mail is opened in the prisoner's presence. The court found that about one percent of prison mail was legal mail, and opening each piece of legal mail in the prisoner's presence entailed "no real burden."

The district court declined to order the PDOC to resume its policy of maintaining a log system to track receipt of legal mail. It did, however, find the control number requirement for legal mail unconstitutional, entered injunctive relief prohibiting enforcement of the policy, and ordered that "all legal and court mail shall be opened in the presence of the inmate to whom it is addressed." The defendants were granted qualified immunity with respect to the plaintiffs' damages claims. See: *Fontroy v. Beard*, 485 F.Supp.2d 592 (E.D. Penn. 2007).

Both parties appealed, and on March 10, 2009 the Third Circuit reversed the district court and upheld the PDOC's control number policy for legal mail. The appellate court considered the *Turner* factors and found the legal mail policy was "reasonably related to legitimate penological interests."

The Court of Appeals determined that there was "ample support for the DOC's belief that its old legal mail policy was being abused," including the testimony of Beard and other PDOC employees, the two escape reports, and evidence that prison staff had discovered purported legal mail with fake attorney return addresses.

Further, the Third Circuit held "the District Court [had] erred in downplaying the implications of changing the location in which certain mail is opened and inspected for the first time," noting that fewer security issues were implicated when legal mail was opened off-site before it

entered the prison housing units.

The appellate court likewise found that the remaining *Turner* standards favored the PDOC, and that the defendants' cross-motion for summary judgment should have been granted. Although acknowledging the new legal mail policy "does place an additional burden on the inmates' First Amendment rights," the Third Circuit held the policy was "reasonably related to legitimate penological concerns," and thus reversed the district

court. See: *Fontroy v. Beard*, 559 F.3d 173 (3d Cir. 2009).

At least one state court had previously embraced the Third Circuit's reasoning. The Commonwealth Court of Pennsylvania acknowledged the adverse district court ruling in *Fontroy* regarding the PDOC's restrictions on legal mail, but held it must defer to the professional judgment of prison officials. See: *Brown v. PA Department of Corrections*, 932 A.2d 316 (Pa. Cmwlth 2007). ■

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Third Circuit Upholds Ban on UCC Materials; Sixth Circuit Disagrees

by Brandon Sample

The Pennsylvania Department of Corrections (PDOC) may lawfully ban the receipt and possession of materials related to the Uniform Commercial Code (UCC), the Third Circuit Court of Appeals held on July 29, 2008. In a more recent ruling, however, the Sixth Circuit upheld a preliminary injunction barring the Michigan DOC from enforcing a policy that restricted prisoners' access to UCC materials.

The UCC is one of several acts which seek to harmonize the law on sales and commercial transactions in all 50 states to better enable interstate commerce. That's the real world short answer.

If you're unfamiliar with the prison version of the UCC, here's a brief introduction. Are you tired of being in prison? If you answered yes, then you might be interested in *Cracking the Code*, a book that tells you step-by-step how to file a lien against your judge and prosecutor. *Cracking the Code* explains how, after the United States went off the gold standard, the government created a split personality for each of its citizens: The real you and a fictional person called the "strawman." Your strawman was pledged by the United States as collateral for its ever-growing trillion dollar deficit. The judge and prosecutor in your case, however, only have power over your strawman and not the real you.

By filing UCC financing statements you can acquire a security interest in your strawman. This will enable you to demand millions of dollars from your judge and prosecutor for their use of your strawman's name on your indictment and other legal documents. Your judge and prosecutor can avoid paying these monies by releasing you from prison. And if they refuse, no problem. You can extort your release by filing liens against them.

Does this sound crazy? That's because it is. But believe it or not, some prisoners (and non-incarcerated citizens) actually have faith in this nonsense. "UCC'ers," as they are sometimes called, subscribe to the so-called "Redemptionist" theory, which supports the use of commercial law to resist authority – including the correctional and judicial systems – despite the fact that the theory is absurd and doesn't work.

Indeed, one U.S. District Court noted that a defendant facing federal charges who insisted on raising nonsensical UCC

arguments was a "prisoner of his own gibberish." See: *United States v. Sandoval*, 365 F.Supp.2d 319 (E.D.N.Y. 2005).

Fraudulent UCC liens, which are easy to file, difficult to remove and disastrous to a person's credit rating, became the focus of Pennsylvania prison officials after a state prisoner filed liens against a judge, PDOC Secretary Jeffrey Beard and a prison superintendent.

In an effort to curb the filing of fraudulent liens, the PDOC designated all UCC-related materials as contraband. An investigation of prisoners believed to be engaged in filing liens was also ordered.

As a result of the new policy, PDOC staff at SCI-Graterford confiscated a variety of UCC materials from numerous prisoners. Believing this action to be unlawful, the prisoners filed suit in federal court. The district court denied relief. The plaintiffs then appealed and the Third Circuit affirmed, finding, that prisoners have no right to possess or receive materials that would help them file fraudulent UCC liens. See: *Monroe v. Beard*, 536 F.3d 198 (3d Cir. 2008), *cert. denied*.

Another federal appellate court has weighed in on the UCC issue in a recent ruling, but reached a contrary conclusion. On June 23, 2009, the Sixth Circuit affirmed a district court's preliminary injunction that enjoined the Michigan Dept. of Corrections (MDOC) from enforcing Rule 23 of MDOC policy directive 05.03.118. Rule 23 regulates prisoners' possession of UCC-related materials.

MDOC prisoner Walter Jones filed suit under 42 U.S.C. § 1983, claiming that Rule 23 infringed upon his First Amendment rights when his letter to the Secretary of State "seeking forms related to Michigan copyright and trademark registration laws" was confiscated by prison officials. He sought injunctive and declaratory relief, plus modest compensatory and punitive damages.

The Sixth Circuit held that the district court had abused its discretion by applying an incorrect "heightened" standard of scrutiny to Rule 23, but affirmed the issuance of the preliminary injunction on the merits under the *Turner* standard (*Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987)).

Although the Court of Appeals noted "[T]here has been a nationwide increase in

the number of filings by prison inmates of unsubstantiated liens and Uniform Commercial Code (UCC) financing statements against state or federal officials involved with their incarceration," it found the MDOC could not enforce a blanket ban on most UCC-related materials under Rule 23.

The appellate court specifically noted that alternatives to Rule 23 existed; for example, prison officials could confiscate UCC materials under other MDOC policies, including Rules 3 and 7, which prohibit mail that is a security threat or that promotes or advocates the violation of state or federal laws.

The Sixth Circuit found that Jones was likely to succeed on the merits of his First Amendment claim, and thus affirmed the district court's preliminary injunction enjoining the MDOC from enforcing Rule 23. Judge McKeague dissented, stating that the majority decision was "directly contrary to *Turner's* clear and insistent teaching to let prison administrators make the difficult judgments concerning institutional operations."

Readers should note that this appellate decision addressed the First Amendment aspect of Jones' claim, and not the merits of any UCC arguments. Indeed, in affirming the lower court's order, the Sixth Circuit held that UCC materials did not qualify as "legal mail" and thus did not have heightened constitutional protection. See: *Jones v. Caruso*, 569 F.3d 258 (6th Cir. 2009).

Congress recently took action to curb the filing of fraudulent liens. As part of the Court Security Improvement Act of 2007, it is now a federal crime for any person to file, attempt to file or conspire to file "any false lien or encumbrance against the real or personal property" of an officer or employee of the United States (Public Law No. 110-177). The offense is punishable by up to ten years imprisonment. Additionally, Michigan has enacted a state statute that makes it a felony to file false UCC financing statements.

UCC'ers should take note: If they persist in filing fraudulent liens as part of their mistaken belief in the UCC, they – and not their "strawman" – risk doing more time in prison. ■

Additional source: www.thomas.gov

Working in Legal Field Not Prohibited While on Federal Supervised Release

Federal probation officers cannot restrict persons on supervised release from working as legal assistants, the U.S. Court of Appeals for the Eleventh Circuit held on April 8, 2009.

Yraida L. Guanipa, convicted of attempted possession with intent to distribute cocaine, was placed on supervised release following her federal prison sentence for drug conspiracy charges. She was prohibited by her probation officer from working as a paralegal based on a condition of her supervised release that barred her from associating with convicted felons or any person engaged in criminal activity.

Guanipa filed a Fed.R.Crim.P.32.1(c) motion seeking clarification of the associational restriction condition as it related to her employment as a paralegal. The district court denied the motion, and Guanipa appealed.

In an unpublished opinion, the Eleventh Circuit reversed. First, the appellate court held that probation officers do not have authority to impose occupational restrictions.

Rather, according to the Court of Appeals, "district courts are exclusively authorized with imposing occupational restrictions as a condition of supervised release."

More importantly, citing *Arciniega v. Freeman*, 404 U.S. 4 (1971), the Eleventh Circuit held that associational restrictions, like the one imposed on Guanipa, do not extend to "casual or chance meetings" or "occupational association, standing alone."

Because an "occupational association, standing alone is insufficient evidence of a likely violation of [a] criminal association restriction," the Court of Appeals vacated and remanded the matter to the district court for more detailed findings as to how such a restriction related to Guanipa's crime of conviction and was necessary to ensure the protection of the public. See: *United States v. Guanipa*, 322 Fed. Appx. 831 (11th Cir. 2009).

On remand, the U.S. District Court for the Southern District of Florida conducted hearings on July 9 and 16, 2009. The court then issued an order on July 21 granting Guanipa's motion to clarify

the conditions of her supervised release, holding that she "may work as a paralegal" within capacities specified by her attorney-employer – which included legal research, drafting and mailing pleadings, contact with clients and opposing counsel, and assisting at hearings, depositions and trials. See: *United States v. Guanipa*, U.S.D.C. (S.D. Fla.), Case No. 1:96-cr-00222-FAM. ■

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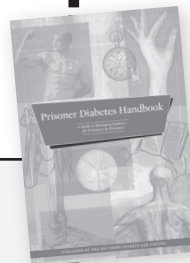
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Prisoners Not Evacuated, Parolees Rounded Up as Hurricanes Hit

by Gary Hunter

On September 8, 2008, Texas Governor Rick Perry issued a disaster declaration for 88 counties as Hurricane Ike bore down on the Texas coastline.

The 900-mile wide storm, with winds in excess of 100 mph "...is now in the Gulf of Mexico and making its approach toward our coast," Perry said. "The next few days will be crucial for residents to follow the direction of local leaders and to take the necessary steps to protect themselves and their families."

As Ike passed over the warm waters of the Gulf it was expected to reach Category 3 conditions of 150 mph winds with a storm surge of up to 25 feet. Officials in Brazoria County, which is located less than 50 miles from the coast, issued mandatory evacuation orders to local residents. However, several prison units holding thousands of Texas Dept. of Criminal Justice (TDCJ) prisoners in Brazoria County were not evacuated.

Prisoners at the Ramsey I Unit sat helpless before the storm hit. "They turned the electricity off two days before the storm got there and it stayed off for five days," TDCJ prisoner Jesus Val Verde stated in an interview with *PLN*. "There was no electricity for the fans so no air was circulating. They turned off the water too and only turned it on twice a day so we could flush our toilets and fill our drinking containers. We should have been evacuated."

Prisoners at the LeBlanc Unit, located further down the coast, also had to weather Hurricane Ike. Over 130 prisoners later filed suit because they were not evacuated before the storm struck. They argued that their Eighth Amendment rights were violated when they were forced to drink salt-contaminated water for several days; they also complained of psychological trauma caused by intense, prolonged fear for their lives caused by having to ride out the hurricane.

On December 14, 2008, the TDCJ posted a statement on its website that the "Stiles, Gist and LeBlanc facilities were notified to boil water for a short time after the city's water system was inundated with salt water from the storm surge." What prison officials apparently hoped the public wouldn't realize was that prisoners do not have the equipment to boil water.

Initially all of the prisoners' claims were included in one case filed in the U.S. District Court for the Eastern District of

Texas, but federal Magistrate Judge Keith Giblin ordered the cases to be handled separately, citing security concerns if all the prisoners had to appear in court at the same time. He was also troubled that the prisoners planned to represent themselves – but apparently not troubled enough to appoint counsel for them.

The TDCJ continued its propaganda efforts with an article in the *San Marcos Daily Record* describing how over 1,300 prisoners from the Stevenson Unit in Cuero were evacuated to the McConnell Unit in Beeville and the Connally Unit in Kenedy. In reality, the McConnell Unit is located closer to the coast than Stevenson. None of the three units were affected by the storm.

Galveston, just up the road from the Ramsey Unit, took a direct hit from Hurricane Ike. Flood waters rose to 7 feet in the district that included the county jail. Galveston County Sheriff Gean Leonard disregarded evacuation orders and left more than 1,000 prisoners locked inside the one-story facility, located less than a mile from the coastline.

Just days earlier, Galveston's city manager warned residents that remaining in the city was unsafe, and the National Weather Service predicted that anyone taking shelter in one-story buildings faced almost "certain death."

The jail operated on a skeleton crew, as most of the staff had been evacuated. The electricity went out and water was scarce as prisoners sat in fear for their lives.

"Mom, I'm worried, scared and hungry," one jail prisoner told his mother. "All of us are here cramped into this little room on the first floor. The flood waters are rising and we're not going to evacuate."

That prisoner's mother said officials had abandoned efforts to communicate with people on the outside. "I called but they're not answering the phones. It's ludicrous why they left the inmates there."

In the storm's aftermath, Dudley Anderson, the architect who designed the county jail, tried to work with the Federal Emergency Management Agency (FEMA) in an effort to install emergency generators at the facility.

"We've been trying to get some power hooked up inside the justice center ... [but] FEMA won't turn loose of the generators until they inspect the area themselves," said Anderson. "They keep saying that will be

tomorrow. I've heard that for days."

Anderson also stated that he had talked to someone from FEMA who "seemed to think we were asking for too much." He noted that the weather and the prisoners were the only ones cooperating with his efforts to restore power at the jail. The prisoners were helping him do the work, and the storm had shrunk to only 600 miles wide when it hit shore.

According to Anderson, poor air circulation at the jail due to no electricity could contribute to the growth of mold and mildew, and worsen the existing problems of lack of water and sanitation. For several days prisoners were not allowed to wash their hands or take a shower while they slept on mattresses less than a foot apart.

"They're just sitting there, they're desperate, it's disease waiting to happen," said Shirley Rutledge, whose son was held at the jail.

At least 22 Galveston jail prisoners filed pro se lawsuits in state district court, raising claims of deplorable conditions and insufficient drinking water. However, the Texas Commission on Jail Standards had toured the facility approximately ten days after Hurricane Ike, and noticed no problems. "I didn't find anything that put the inmates in harm's way," stated Adan Munoz, the Commission's executive director.

Further inland, police in Austin and San Antonio went from shelter to shelter rounding up released sex offenders on parole who had been displaced by Hurricane Ike. Austin police evicted three sex offenders staying at shelters with 1,300 other people.

"I have no idea where they went [after being put out] but they're not allowed to come back," said Austin police detective James Mason.

Matt Simpson, a policy strategist for the Texas chapter of the American Civil Liberties Union, called the sex offender eviction policy "mystifying," and observed that "[i]t's the opposite of keeping track of people."

San Antonio rounded up nine sex offenders and sent them to an undisclosed facility. Statewide, about 18 sex offenders were identified at evacuation shelters and another 1,000 sex offenders on parole were sent to prisons and halfway houses.

Back on the Gulf coast, state prison officials scrambled to deal with the ex-

tensive damage done to the TDCJ's main hospital. The University of Texas Medical Branch (UTMB) is responsible for the medical treatment of 80 percent of Texas prisoners. The main hospital, with 365 beds, is located only several hundred yards from the Galveston coastline.

On November 13, 2008, two months after Hurricane Ike, UTMB officials were still expressing concerns about security as hundreds of prisoners would have to receive treatment in local hospitals while repairs were made.

"It creates a real challenge," said TDCJ executive director Brad Livingston. "It goes without saying that security risks go up." Sen. John Whitmire, who chairs the Senate Criminal Justice Committee, expressed similar worries. "I also have a concern about having many violent inmates in public hospitals around the state," he said. "It's a very unhealthy situation." But a perfectly predictable one since Galveston has been the site of devastating hurricanes since at least 1900 when a hurricane demolished the city and killed between 8,000 and 12,000 residents, making it the deadliest natural disaster in United States history.

To make matters worse, Livingston and UTMB officials learned on November

12, 2008 that 3,800 UTMB employees would be laid off as a result of the estimated \$710 million in damages to the hospital. Flood waters reached up to 8 feet in some of the buildings. The hospital's kitchen, blood bank and radiology department were almost totally destroyed. The University of Texas Board of Regents said there would be no money to operate the facility for at least three months, and FEMA money could not be used for wages, benefits or operating expenses.

To be fair, it should be noted that Texas is not the only state to endanger its prisoners during natural disasters. On June 12, 2008, over 360 female prisoners in Linn County, Iowa – and the jail guards supervising them – were unsure if they would escape rapidly rising flood waters from the Cedar River.

The Linn County Jail, which is located on May's Island, was being pounded by torrential rain. Earlier that morning, before the evacuation, prisoner Melanie Willits had been watching from a third floor window as flood waters covered the Third Avenue Bridge. She and other prisoners were evacuated by bus.

"When we turned from the jail onto the bridge, I thought it was over," Willits

told *The Gazette* newspaper. "At first there was no sound, but as the water came into the bus, it felt as though the bus was floating away. Everybody freaked."

Sheriff Don Zeller insisted that the situation was under control and that the jail prisoners had been moved in a timely fashion.

Prisoner Alicia Echols strongly disagreed. "They moved the mattresses and cars before us," she said angrily. "They put shackles on us and wristbands on us so they could identify the bodies if we drowned. That's what they told us."

"We weren't allowed to use phones or watch the news," Willits added. She said jail officials had falsely told her family that she and other prisoners were moved two days earlier, on June 10. They learned the truth when they saw YouTube videos of the evacuation taking place on June 12.

In Louisiana, the intensity and destructive force of Hurricane Ike caused many to forget that some prisoners were still suffering from the effects of Hurricane Gustav, which had hit the state a few weeks earlier. Prisoners from Terrebonne Parish had been evacuated to the State Penitentiary at Angola when Gustav passed through. The sheer size

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of Hurricane Ike prevented their return, even though the storm was going to make landfall in Texas.

The 500 jail evacuees who were sent to Angola were given mandatory crew cuts when they arrived, and were housed separately from state prisoners. "They're pretty shocked when they come here," remarked Angola Warden Burl Cain. "You get treated just like a prisoner."

Cain said his biggest regret was that he didn't get to put the evacuated prisoners to work "building fences and pushing hoes." Never mind the fact that they included pre-trial detainees who had yet to be convicted, and thus could not legally be forced to work.

PLN has previously reported on the devastating effects of Hurricane Katrina on prisoners in New Orleans [*PLN*, April 2007, p.1; May 2007, p.18], and on a lawsuit filed by federal prisoners who were evacuated but later returned to work under unsanitary and oppressive conditions at a UNICOR factory in Beaumont, Texas following Hurricane Rita [*PLN*, July 2009, p.21].

A separate Federal Tort Claims Act suit was filed on January 9, 2008 by more than 400 prisoners who were not evacuated from USP Beaumont during Hurricane Rita. The lawsuit alleges that federal prison officials were negligent in failing to evacuate the facility, and prisoners suffered as a result due to the lack of electricity, plumbing, food, water, medical care and sanitation. On June 12, 2009, a magistrate judge recommended that the lawsuit be dismissed due to lack of subject-matter jurisdiction. The district court has not yet ruled on that recommendation. See: *Spotts v. United States*, U.S.D.C. (E.D. Tex.), Case No. 1:08-cv-00376-RC-ESH.

Apparently, natural disasters such as hurricanes and floods, combined with callous prison and jail officials who disregard the safety of vulnerable prisoners, can create a perfectly dangerous storm. ■

Sources: *Associated Press*, *Austin American Statesman*, *Daily Comet*, *Dallas Morning News*, *Gazette Online*, *Houston Chronicle*, *Prison News Network*, *San Antonio Express News*, *San Marcos Daily Record*, www.southernstudies.org, *Galveston Daily News*, *Houston Press*, www.mysanantonio.com

Contraband Smuggling by Texas Prison Guards Rarely Punished Harshly

by Matt Clarke

A review conducted by a Houston newspaper concluded that a large quantity and variety of contraband is still being smuggled into Texas prisons by state prison guards, and those caught smuggling rarely receive harsh punishment.

Between 2003 and 2008, the Texas Department of Criminal Justice (TDCJ) brought contraband-related disciplinary action against 263 employees. Of those, 75% received probation, 35 were fired and 26 received no punishment. The only employee who was criminally prosecuted and convicted did not receive prison time.

Contraband smuggling is "the biggest security problem the prisons face," according to John Moriarty, TDCJ's Inspector General. "One corrupt employee can really compromise the security of the operation tremendously ... they can keep bringing and bringing stuff in."

That issue made headlines after a guard allegedly smuggled a cell phone onto death row and condemned prisoner Richard Lee Tabler used it to place harassing calls to state Senator John Whitmire. The resulting political brouhaha led to a system-wide 10-day shakedown in October 2008, plus the implementation of new procedures for searching all persons entering TDCJ facilities, including guards. [See: *PLN*, March 2009, p.29].

Nonetheless, more than 200 cell phones were discovered in state prisons in the five months after the system-wide lockdown ended – including eight phones found on death row. Tabler was indicted on charges related to possession of a contraband cell phone in May 2009, as were his mother and sister. Another TDCJ prisoner, Michael Roy Toney, also was charged.

Yet a review of five years of disciplinary reports for TDCJ employees revealed that attempts to deliver contraband to prisoners resulted in minimal punishment in most of the 47 cases cited. Only seven employees were fired. Even the new zero-tolerance policy "doesn't mean someone is terminated," said TDCJ spokesperson Michelle Lyons. "It means it's addressed and is dealt with accordingly. In some cases, depending on the contraband, the fitting punishment is probation or suspension. In more serious cases, where the facts support that the person intended to introduce contraband to an offender, then it's dealt with

possibly by termination."

That has certainly not been the case in the past. In 2003, a guard at the Estelle Unit was discovered with various knives, a cell phone, two electric razors, prescription drugs, a lighter, portable radios, a box cutter blade, cigars and cigarettes in his backpack. His punishment? Four days suspension and 10 months probation. Another guard received six months probation after being discovered with an unopened can of chewing tobacco while entering the Beto Unit.

The highest numbers of contraband cases involving prison staff were at the Stiles, Michael and Allred Units. At the Connally, Hughes, Estelle and Smith Units, every TDCJ employee caught with contraband received probation. Staff at six other prisons received probation as punishment in contraband cases over 80% of the time.

The lackluster punishment imposed on guards who smuggle contraband stands in stark contrast to the harsh penalties sought for prisoners caught with illicit items. For example, on May 12, 2009, Coffield Unit prisoner Derrick Ross, 38, received a 60-year sentence after a jury found him guilty of possession of a cell phone in a correctional facility. He was sentenced as a habitual offender.

The 68 cases of staff contraband smuggling that were referred to TDCJ's Special Prosecution Unit since 2003 resulted in more than 90 charges being filed. Nine cases were dismissed after indictments were returned, and grand juries refused to indict in three cases. Others are still pending. Those include 26 cases involving tobacco, 17 for cell phones and at least 7 allegations of bribery of TDCJ employees by prisoners, according to Gina DeBottis, who heads the Special Prosecution Unit.

Meanwhile, contraband problems at TDCJ facilities continue – spurred in part by prison employees who engage in lucrative but illegal contraband smuggling. In April 2009, TDCJ officials announced that 21 cell phones, 21 chargers, 14 SIM cards, two MP3 players and 8 bags of tobacco were found in a dog kennel at the Stiles Unit. ■

Sources: *Houston Chronicle*, *San Antonio Express-News*, *Palestine Herald*, www.news-journal.com

Oklahoma Prisoner Beaten to Death After Celled with Co-Defendant He Testified Against

On March 11, 2009, at approximately 9:15 p.m., Paul David Duran, Jr., 23, a prisoner at the Oklahoma State Penitentiary (OSP) in McAlester, was found beaten to death fifteen minutes after being locked in a cell with Jessie James Dalton, 32, who was serving a sentence of life without parole after Duran testified against him in a murder trial.

In March 2002, Dalton, then 25, shot Billy Ray Wayne during an armed home invasion; he was accompanied by Duran and Warren Allen Plank, both then 16. Duran was remorseful and testified against Dalton in a plea bargain that reduced his charge to robbery with a firearm and resulted in a 28-year sentence. Duran tearfully apologized to Wayne's family, who forgave him. Plank pleaded guilty to robbery with a dangerous weapon and was sentenced to 20 years, which he is serving at the Lawton Correctional Facility.

As antagonistic co-defendants, Dalton and Duran were listed in prison records as "separatees" who were never

to be housed together. No official explanation has been given for why Duran was celled with Dalton in violation of prison policy. Department of Corrections spokesman Jerry Massie said an investigation is pending into why the two men were housed together. "At that point [in the days after Duran's death], to me, it looked fairly straightforward, as to what happened," he said. "But ... it never really is straightforward."

Both Dalton and Duran had previously been incarcerated at the Dick Conner Correctional Facility in Hominy, a medium-security prison, and had been moved to the maximum-security OSP following unrelated disciplinary problems. Dalton was caught with a shank while at Conner. A shank was discovered in Duran's cell shortly before his death; he was moved to another cell, but fought with his new cellmate. He was then moved into Dalton's cell where he was beaten to death in short order.

Duran's family said they felt betrayed by prison officials and are considering legal

action. The administrative investigation was completed in July 2009, but at that time the Department of Corrections had not determined whether any prison employees would be disciplined. A criminal investigation is also pending. Three other Oklahoma state prisoners have been killed this year, all in July and all at OSP. ■

Sources: *Newsok.com*, *Oklahoman*

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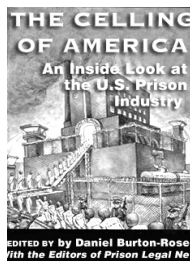
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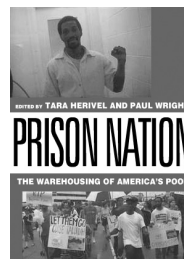
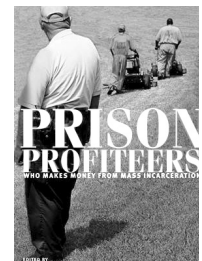
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California Lifers' New Litigation Tool: DA's "Opinion" and Governor's "Belief" Do Not Constitute "Evidence" in Parole Denial Cases

by Marvin Mentor

In the final chapter of the litigation saga of now-paroled *PLN* writer John Dannenberg, on April 22, 2009, the California Supreme Court declined review and approved publication of the state appellate court's January 23, 2009 decision in *In re Dannenberg*, 173 Cal.App.4th 237 (Cal. App. 6th Dist. 2009) [*PLN*, March 2009, p.44]. That ruling had vacated Governor Arnold Schwarzenegger's reversal of Dannenberg's 2005 grant of parole by the Board of Parole Hearings, and ordered its reinstatement.

Of particular import to all California lifers litigating for their release, this newly published precedent makes an important point of law. The Court of Appeals rejected the Governor's argument that had relied upon his own stated "feelings" that Dannenberg's psychological reports were all wrong, and on the District Attorney's stated "opinion" that Dannenberg didn't have adequate "insight." The Court held that "the District Attorney's 'opinion[.],' like the Governor's belief, is not evidence, and therefore does not constitute 'some evidence' supporting the Governor's decision."

Dannenberg had questioned the appellate court whether it was fair for the Board, the Governor or the District Attorney to have their opinions treated as "evidence" in the discretionary "weighing" process that is, in turn, at the heart of those same fact-finders' lawful exercise of discretion in the parole process. In fact, Dannenberg argued that the "opinion" or "belief" of the Board, the Governor and the District Attorney does not rise to the level of "evidence."

Rather, the Board and Governor's use of their own opinions and feelings have routinely been tautologically bootstrapped as the basis to deny parole upon judicial review of those decisions. For example, since neither the Board commissioners, the Governor or the District Attorney are certified to render expert psychological opinions (such as the presence or absence of a prisoner's "insight"), their reliance upon their own opinions as "evidence" in judicial reviews violated the state Supreme Court's recent holding that the Governor [and the Board] "must" rely upon the pro-

fessional opinions of the Board's own psychological experts when making parole determinations. See: *In re Lawrence*, 190 P.3d 535, 44 Cal.4th 1181 (2008) [*PLN*, April 2009, p.30].

Dannenberg complained that blanket vague opinions such as "I feel that prisoner X does not appear to have full insight" or "I believe that prisoner X doesn't show adequate remorse" have been permitted to stand as "some evidence" to support a court's denial of habeas relief.

Now, due to the Court of Appeals'

published ruling, such conclusory statements – without more (i.e., palpable evidence in the record below) – do not rise to the level of "evidence." Dannenberg had requested that the Supreme Court add this important finding to the body of existing case law "to properly inform future parole decisions and court reviews at all levels," by approving publication of the appellate decision. The Supreme Court impliedly agreed. See: *Dannenberg (John E.) on H.C.*, 207 P.3d 2, 93 Cal. Rptr. 3d 537 (Cal. 2009). ■

Notice Required for Rejected Packages; BOP Warden Denied Qualified Immunity

by Brandon Sample

The U.S. Court of Appeals for the Eighth Circuit has affirmed the denial of qualified immunity for a Bureau of Prisons (BOP) warden accused of denying a prisoner procedural due process in connection with the rejection of two packages.

While Vernon Bonner was incarcerated at the Federal Correctional Institution in Waseca, Minnesota, his attorney sent him two packages. Both packages contained trial transcripts and other materials that Bonner needed to pursue litigation; however, they were rejected by prison officials. He was not provided notice of the rejections, and only learned of the rejections from his attorney.

Bonner sued Warden T.C. Outlaw, arguing that Outlaw's failure to notify him that his incoming mail had been rejected was a violation of procedural due process. Outlaw moved to dismiss the suit for failure to state a claim, and invoked a defense of qualified immunity. The district court denied the motion and Outlaw's claim of qualified immunity, holding that the right at issue – for a prisoner to be notified when incoming correspondence is rejected – was clearly established. Outlaw appealed.

The Eighth Circuit affirmed. In *Procurier v. Martinez*, 416 U.S. 396 (1974), the Supreme Court held that prisoners have a liberty interest in uncensored communication by letter. Infringement of that interest or a decision to "withhold delivery

of a particular letter must be accompanied by minimum procedural safeguards." As such, *Procurier* approved a requirement that prisoners, and the sender, be notified of mail rejections and that they be given a reasonable opportunity to contest the decision.

Outlaw attempted to distinguish *Procurier*'s notice requirement, arguing that notification of rejected correspondence only applies to "letters" and not "packages." The Eighth Circuit disagreed.

"The reasoning of *Procurier* applies to all forms of correspondence addressed to an inmate," the appellate court wrote. "Nothing about the reasoning of *Procurier* justifies treating packages differently than letters for purposes of the notice that should be given an inmate when correspondence addressed to that inmate is rejected." The Eighth Circuit further noted that courts had routinely rejected a distinction between "letters" and "packages" for the purpose of notice, citing decisions from the Fourth, Eighth, Ninth and Tenth Circuits.

Outlaw tried to justify the lack of notice by relying on BOP regulations that purportedly do not require notice to prisoners when packages are rejected. But as the Court of Appeals made clear, "the constitutionality of ... conduct is governed by case law, not [prison] regulations."

Finally, the appellate court rejected Outlaw's argument that the more restric-

tive standard in *Turner v. Safley*, 482 U.S. 78 (1987) applied instead of *Procunier*. “We doubt *Turner*’s applicability to the restriction of a specific constitutional right, e.g., notice, the Supreme Court has already declared applicable to a given situation,” the Eighth Circuit wrote.

Further, even assuming *Turner* did apply, the lack of notice for rejected packages would not withstand constitutional scrutiny as “there is no governmental interest advanced by the regulation, inmates do not have alternative means of receiving notice, and there are not additional bur-

dens placed on prison officials by having to give notice.”

Accordingly, the district court’s denial of qualified immunity for Outlaw was affirmed and the case was remanded for further proceedings. See: *Bonner v. Outlaw*, 552 F.3d 673 (8th Cir. 2009). ■

Organ Harvesting In China Prison Goes High Tech

by Gary Hunter

China’s Ministry of Health currently employs several teams of specialized doctors to harvest organs from condemned prisoners. When a prisoner is scheduled to die selected teams are sent to China’s Changi Prison depending upon which organs are to be harvested.

Fifteen doctors compose the renal transplant team which harvests the kidneys. One doctor, using the pseudonym Dr. Lim, says he has participated in six kidney extractions during his twelve years of practice. When it is his turn in the rotation Dr. Lim and his associates arrive at Changi Prison at 5:30 a.m. Executions are carried out exactly at 6 a.m.

Participating doctors are served breakfast in the prison cafeteria while waiting for their subjects to be hanged. Dr. Lim describes the mood during the wait.

“By 6 a.m., the whole place will be very solemn and the gates will be closed. There is minimal movement in the prison complex. I’m not sure if this is out of respect for the person to be hanged.”

Once the execution is carried out the mood quickly changes from solemn to frenetic. Dr Lim explains that organs will become damaged from lack of blood flow if not harvested quickly. Under conventional circumstances, in a hospital,

organs can be removed once a patient is declared brain-dead. Extracting organs from executed prisoners can only take place after cardiac death. For this reason a doctor is checking the hanged man for a heartbeat even before the mask is removed from his head.

The process of extracting organs from executed prisoners has become so commonplace that each team has its own protocol. Renal surgeons get to the body first because the kidneys are the most easily damaged from lack of blood flow. Dr. Lim says the entire kidney extraction process takes about 20 minutes.

“It is not a very difficult or complicated job. We are just like technicians, cutting and removing.”

Eye surgeons and plastic surgeons are next followed by the surgeons who remove the long-bones containing the marrow. According to Dr. Lim it is not unusual to have two teams working on a body simultaneously especially when two or more prisoners are executed on the same morning.

Once a prisoner has been declared dead his body is removed from the noose, wrapped in cloth and taken to one of Changi Prison’s new operating rooms.

“At the old Changi prison, we operated from an air-conditioned container

room,” says Lim. “It had two little operating tables, a changing area and a wash basin.”

Dr. Lim said that in years past doctors were also responsible for delivering the organs to the waiting hospital using their personal cars. “The junior doctor would usually be the driver,” he said. “But we made noise. We have already done our job harvesting the kidneys and after that we still have to deliver them.”

The doctors certainly had a right to complain since their services inside the prison are strictly voluntary. All parties concerned insist that prisoners’ organ donations are voluntary as well.

If a condemned prisoner desires to donate his organs he will communicate that request to prison officials and the process is arranged by the Ministry of Health.

At least that’s how the story goes. It was not long ago that China admitted to illegally harvesting organs from executed prisoners. One company developed several specially built ambulances for that purpose. China executes more prisoners than any country in the world. Its imprisonment rates are well below the United States’ though. ■

Source: *Asia One*



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Former Oklahoma Sheriff Convicted of Sex Crimes – Now Where to Put Him?

by Gary Hunter

Oklahoma officials are trying to decide the best way to incarcerate ex-sheriff Mike Burgess, 56, now that he is a convicted sex offender. On January 9, 2009 the former Custer County lawman was convicted on 13 of 35 felony counts of sexually abusing female prisoners under his care. [See: *PLN*, May 2009, p.1]

The charges against the former sheriff included rape, forcible oral sodomy and bribery of a public official. The prisoners said Burgess coerced them into participating in wet T-shirt contests for the entertainment of jail employees, and that as a member of a drug-court panel he bargained with them for sex in exchange for recommending probation rather than prison.

One former prisoner, Joy Leigh Mason, drew a sketch of the inside of Burgess' home for investigators; the sheriff had taken her there for trysts. Incriminating testimony against also came from a former deputy, Jennifer Tyler. Tyler claimed that Burgess had slipped his hands down her pants and fondled her buttocks while she was being fitted for her uniform.

Following Burgess' conviction, the jury recommended a cumulative punishment of 94 years in prison. Instead, he received a 79-year sentence in March 2009. Now his former colleagues are faced with the problem of where to house the convicted and disgraced sheriff.

"I think it would be difficult to put him in the Custer County Jail," said Mills County Sheriff Joe Hay. "I'd bet half those people in that jail he's had a hand in arresting. Keeping him safe would be really, really tough."

Sheriff Bruce Peoples, Burgess' successor, concurred. "We've started to re-think bringing him here to Custer County. ... We agreed it would probably be awkward, and there would be safety issues for everyone involved."

Nor will those safety issues stop at the county jail. Jerry Massie, a spokesman for the Oklahoma Department of Corrections, remarked that Burgess may have to be shipped to another state where he is less well known, placed in protective custody, or sent to a county jail that houses state prisoners. Meanwhile, the ex-sheriff, clad in an orange jumpsuit, remained in isolation awaiting a decision on where he will serve his time.

As if his 79-year sentence wasn't bad enough, Burgess (and other Custer County officials) also face a federal lawsuit filed by 12 former prisoners who allege that Burgess used them as sex slaves. The plaintiffs are represented by the Garrett Law Office and the Seymour & Graham law firm, and their suit is still pending. See: *McGowan v. Burgess*, U.S.D.C. (W.D. Okla.), Case No. 5:07-cv-01168-HE.

If the lawsuit results in a damages award or settlement, local property own-

ers will likely foot the bill. Four years ago, Sheriff Melvin Holly in nearby Latimer County was sentenced to 25 years for sexually abusing female prisoners and jail employees. A suit filed by Holly's victims resulted in a \$665,000 settlement, which was paid by the county over a three-year period through property tax increases. [See: *PLN*, Aug. 2006, p.1]. ■

Sources: *Associated Press*, www.newsok.com, www.chron.com

Federal Three-Judge Panel Orders California To Reduce Prison Population By 44,000 Prisoners Within Two Years

by Marvin Mentor

In a landmark ruling, a federal three-judge panel ordered the California Department of Corrections and Rehabilitation (CDCR) to cap the prison population of its 33 adult prisons to 137.5% of their 79,828 design capacity, or 109,763 prisoners, within two years. Since the present population (counting only those housed in CDCR's 33 adult prisons) is approximately 154,000, this means cutting 44,000 prisoners. The August 4, 2009 order commands CDCR to present to the court, within 45 days, its plan to accomplish this.

The order is the inevitable result of decades of obfuscation by prison authorities who failed to heed numerous previous court rulings. It brings closure to two decades-old prisoner cases dealing with constitutionally inadequate health care and mental health care, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*. The primary cause of the deficiencies was unmistakable to the court: overpopulation. California's adult prisons were designed to handle approximately 80,000 adult men and women, but were lately being operated at an average of 190% of design capacity. The resultant lack of adequate healthcare from this overcrowding resulted in over 60 unnecessary deaths per year, the court found. In addition, the suicide rate due to inadequate mental health care was 25 per 100,000 (77% preventable), almost twice

the national average. Under the U.S. Constitution, the court ruled, human beings were entitled to better. Today, they got it.

In February 2009, the same three-judge panel issued a tentative ruling warning that if the state didn't knuckle under, up to 57,000 prisoners might be ordered released. (See: *PLN*, March 2009, p. 40.) In response to that threat, the state "failed miserably" to do even what it promised the court. It neither implemented corrective plans in its 33 prisons in accordance with a court-approved "roll-out," nor did it build so much as one new prison bed to ameliorate overcrowding among existing prisoners.

The three-judge court, convened pursuant to a rarely-invoked section of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(3)(B), was required to make specific findings under that law. First, it found that overcrowding was the number one cause of the constitutionally inadequate medical and healthcare treatment. Next, it found that no relief except a prisoner release order would bring CDCR into compliance. Finally, it determined that the population cap order was narrowly tailored to remedy the constitutional violations already found in *Coleman* and *Plata*, and the order would have little, if any, impact on public safety.

Relying upon testimony from an extremely broad field of experts, the court

found the evidence overwhelmingly in favor of the prisoner plaintiffs. The court noted that fully 34,000 of CDCR's adult prison occupants were seriously mentally ill. It observed that CDCR's operating its prisons at 190% of design capacity far exceeded other states' rates, a fact it tied to the excessive medical death and suicide rates. In short, the prisons were only designed to provide health care for about half the existing population, and that was about the rate being delivered. Even after an extensive hiring program, with court-ordered salary increases, CDCR still was short 27% of staffing its medical care and mental health care positions.

CDCR defended against the prisoner suit, claiming that crime would soar in the communities after all these "thugs" were released. But the court evaluated all such factors, and from the expert evidence, respectfully disagreed. First, as to California's vaunted "recidivism" rate of 70 (within three years), that was primarily due to "technical" parole violations, e.g., being late to a meeting with the agent. Few other states invoke such violations, let alone return the parolee to state prison. (In fact, this "recidivism" rate is an artifact created by a pernicious program that identifies empty beds in the prisons, then

"fills" them by sweeping up technically errant violators – finally sending them to CDCR reception centers the next day.)

Experts referred to CDCR's violator treatment as "criminogenic." This means that each time a parolee is taken away from his tenuous reintegration process, he *thereby* becomes *more* likely to later turn to crime to survive. Stated another way, parole violator "correctional" policies are perversely *increasing* criminality in the community.

To reverse this unaffordable trend, the court took suggestions from the experts. It recommended that most of the population reduction could come from simply slashing technical parole violations. Other progressive changes would include increasing the good-behavior credits, which could include educational and rehabilitational programming objectives. Additionally, some of the body count reduction could come from transferring prisoners to out-of-state facilities.

California was already at the cross-roads of a self-imposed prison overpopulation crisis. In its recently passed 2009-2010 budget, the Legislature agreed to cut CDCR's \$11 billion budget by \$1.2 billion. But the details of those cuts were left wholly unspecified. There were sugges-

tions about reducing parole violations and about deporting the tens of thousands of foreign nationals incarcerated for minor felonies. Now, with the added pressure of the federally ordered population cap, and its 45-day fuse on giving the court a workable two-year plan, CDCR will have to actually take steps to cut its highly unionized staff (over 30,000 guards plus innumerable non-peace-officer employees) to comply with both state budget constraints and federal health care restraints.

The state's first response, however, was from Attorney General (and gubernatorial candidate) Jerry Brown, who announced that he would appeal the order directly to the U.S. Supreme Court. In other words, spend yet more money to avoid cutting costs or providing court-ordered health care. "We aren't opening the floodgates and releasing prisoners," CDCR Secretary Matthew Cate added. See: *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P; *Plata v. Schwarzenegger*, No. C01-1351 TEH. Over the decades, the prisoners have been well and tenaciously represented by the Prison Law Office, headed by attorney Donald Specter and the San Francisco law firm of Rosen, Bien and Galvan. ■



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\$25,000 Award to Utah Muslim Prisoner Attacked by Death Row Prisoner Following 9/11

A Utah federal jury awarded \$25,000 to a Muslim prisoner who claimed guards set him up for a beating following the 9/11 guerrilla attacks. The oddest part of the situation is the prisoner was beat by a death row prisoner who was to be segregated from other prisoners.

The lawsuit stems from events at the Utah State Prison (USP) on September 20, 2001. Following the 9/11 attacks, prisoner Jacques Miranda, a black practicing Muslim, was targeted by other prisoners and guards because of his religious beliefs. Guards were upset because Miranda was not feeling very patriotic due to being locked up.

They then began inciting death row prisoner Troy Kell, a white supremacist, to violence against Miranda. Kell was on death row for stabbing another black prisoner to death while guards watched.

On September 20, guards gave Kell two caricature drawings of Osama bin Laden, which he showed to other prisoners while on "rec time." Guards were further upset when Miranda, an artist, refused to do similar drawings because of his religious beliefs.

Shortly after that refusal, guard R. Healey told Miranda to put his shoes on for the remainder of his rec time. Around 8:30, Healey opened Kell's cell door. This violated all USP policies because Kell was a death row prisoner who was to be segregated from other prisoners. Miranda was only in segregation, and was released from prison on January 13, 2004.

Upon opening Kell's door at his request, Healey said, "Okay, yeah, as long as you promise not to kill Miranda,:" and laughed. Kell promptly exited his cell and attacked Miranda, who fought back. Expecting a response team to enter, Miranda tried to avoid Kell. While they fought, Kell referred to Miranda "as a Muslim, as a rag head, as someone wanting to blow things up – all relating to what had upset the guards about Miranda."

Miranda was finally able to get to his cell, but Healey did not unlock his door to be closed as requested. Kell entered Miranda's cell, put him in a chokehold, and beat him to unconsciousness. Miranda later awoke in the prison infirmary. Kell wrote a statement that said guards wanted

him to kill Miranda, that they created the situation to allow him to do so, and Kell chose not to kill him.

On March 6, 2009, the jury found Healey's actions constituted cruel and unusual punishment under the federal and Utah constitutions. The damage

award was for compensatory damages; they refused to award punitive damages. Miranda's counsel, Salt Lake City attorney David S. Pace, was awarded \$35,000 in fees and \$5,058.54 in costs. See: *Miranda v. Healey*, USDC, D. Utah, Case No: 2:03-CV-1097

New York's Correction Law § 24 Held Unconstitutional by US Supreme Court

by *Brandon Sample*

New York's Correction Law § 24, which prevents prisoners from bringing 42 U.S.C. § 1983 actions for damages against prison officials in New York courts of general jurisdiction, violates the Supremacy Clause of the U.S. Constitution, the U.S. Supreme Court decided on May 26, 2009.

Believing that most damages suits filed by prisoners against prison officials were frivolous or vexatious, New York enacted Correction Law § 24. The law, passed in the 1980s, strips New York's courts of general jurisdiction from hearing damages actions brought by prisoners against prison officials. Instead, all such claims must be presented in New York's Court of Claims, with the state being substituted as the party defendant.

However, there are several disadvantages to bringing damages suits in the Court of Claims. For example, plaintiffs have no right to a jury trial, no right to attorney's fees, and may not seek punitive damages or injunctive relief. New York's courts of general jurisdiction, all of which routinely hear § 1983 actions against non-prison defendants, are not subject to any of these restrictions.

Keith Haywood, a prisoner at New York's Attica Correctional Facility, filed a § 1983 action against several prison officials alleging that his civil rights had been violated in connection with three prison disciplinary proceedings. His complaint, filed in state Supreme Court, sought damages and attorney's fees.

Invoking Correction Law § 24, the court dismissed Haywood's suit for lack of jurisdiction, and the New York Court of Appeals – the state's highest court – affirmed in a 4-3 vote. See: *Haywood v. Drown*, 2007 NY Slip Op 9308, 1 (N.Y. 2007).

In doing so, the Court of Appeals

rejected Haywood's argument that Correction Law § 24 ran afoul of the Supremacy Clause of the U.S. Constitution because it interfered with § 1983, a federal statute. The Court of Appeals reasoned that because Correction Law § 24 discriminated against both federal and state law damages actions against prison officials equally (in that neither could be brought in state court), the law represented a "neutral rule" regarding court administration and therefore constituted a "valid excuse" for the state to limit § 1983 damages actions against prison officials. The U.S. Supreme Court granted certiorari and reversed.

Section 1983, enacted in the wake of the Civil War during Reconstruction, was designed to allow litigants to seek relief in either state or federal court for violations of federal rights "by state or local officials acting under color of state law." State jurisdiction to hear § 1983 actions, the Supreme Court wrote, can only be withdrawn by Congress or by a state based on a "neutral rule regarding the administration of the courts." Congress did not withdraw jurisdiction from New York courts, so the only question was whether Correction Law § 24 was neutral. The Supreme Court concluded that it was not.

"Although states retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies," the Court explained.

The fact that Correction Law § 24 withdraws jurisdiction for both state and federal claims against prison officials for damages does not make the law "neutral," the Supreme Court emphasized. "Equality of treatment does not ensure that a state law will be deemed a neutral rule."

Because other § 1983 suits for damages may be entertained by New York courts of general jurisdiction, "New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy." The judgment of the New York Court of Appeals to the contrary was therefore reversed, and the case remanded

for further proceedings. See: *Haywood v. Drown*, 129 S.Ct. 2108 (2009).

PLN supported Haywood's effort to overturn Correction Law § 24, and joined an amicus (friend of the court) brief filed with the U.S. Supreme Court by Prisoners' Legal Services of New York. Other organizations that joined in the amicus brief

included the Prisoners Rights Project, New York State Defenders Association, Center for Community Alternatives, Uptown People's Law Center, Legal Services Organization of Yale Law School, and Civil Rights Clinic of New York University School of Law. The pleadings in the case are on PLN's website. 📄

FBI And States Expand Collection Of DNA To The Innocent

by Brandon Sample

DNA collection is expanding to individuals arrested or detained as state and federal law enforcement officials seek to solve more crimes.

The Federal Bureau of Investigation (FBI) joined 15 states in April 2009 that collect DNA from individuals awaiting trial. In addition, the FBI will now collect DNA from detained illegal immigrants.

The move toward greater DNA collection comes following numerous court decisions upholding the collection of DNA from prisoners and persons on probation, parole, or supervised release.

The FBI's DNA registry, CODIS, currently has 6.7 million profiles. With the expansion of DNA collection to arrestees and those awaiting trial, some 1.2 million new entries are expected by 2012. This is a 17-fold increase from the 80,000 entries the FBI currently processes annually. An already 500,000 entry backlog is expected to get longer--dramatically.

While law enforcement officials claim inclusion of innocent people in DNA databases will help solve more violent crimes, the Americans Civil Liberties Union

(ACLU) and other privacy advocates cite Fourth Amendment concerns.

"What we object to--and what the Constitution prohibits--is the indiscriminate taking of DNA for things like writing an insufficient funds check, shoplifting, [and] drug convictions," said Michael Risher, a lawyer for the ACLU.

Aside from privacy concerns, there are the difficulties associated with removing individuals from DNA databases who have been cleared of wrongdoing. According to most lawyers, a court order is required. Interestingly, the FBI has never received a request to remove anyone from its database.

Perhaps most alarming of law enforcement's increased collection efforts, though, is the potential for increased racial disparity in an already disparate criminal justice system. According to Hank Greely, a Stanford University Law School professor who studies genetics, policing, and race, African-Americans make up 40 percent of DNA profiles in CODIS, the federal database, although they represent only 12 percent of the

national population. And Latinos, 13 percent of the population, are expected to overtake African-Americans soon. Last year, 40 percent of federal offenses were committed by Latinos, almost half for immigration crimes.


Most law enforcement like Rock Harmon, a former prosecutor, take the stance that "if you haven't done anything wrong you have nothing to fear." While there are many faults with this line of reasoning, foremost is its premise--that government has a right to take DNA from its citizens--especially the innocent--in the first instance. It does not. 📄

Source: *New York Times*

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Washington States Passes New Law for Automatic Restoration of Voting Rights

by Eric Nygren

Governor Christine Gregoire has signed into law a bill that reforms Washington's convoluted system for restoring voting rights. The measure will restore the right to vote automatically to citizens who have come out of the criminal justice system. The new law took effect on July 26, 2009.

"This is a much-needed reform of an unfair and unworkable system for restoring voting rights," said ACLU of Washington Legislative Director Shankar Narayan. "Automatic restoration will help people who have served their time to reconnect with their communities. People who vote are at less risk of reoffending, and that leads to safer communities for us all."

Under the reform measure, individuals can register to vote once they're no longer under state-supervised parole or probation. Individuals will still have to repay their debts, but – like anyone else who owes money – they will not be denied the right and duty to vote. It will create a simpler and clearer system and provide a needed bright line to identify those who are eligible to vote. If the registered voter is not eligible to vote, the secretary of state or county auditor a notice at their last known address and at the department correction if the person is under the department's authority.

Under existing state law, more than 167,000 Washington citizens who have prior convictions currently are prohibited from voting. Many of them have completed their prison time and community custody, yet cannot vote solely because they haven't completely paid off all the fees and other costs associated with their sentence; interest on these legal debts accrues at 12 percent a year. An overwhelming majority of felony defendants are indigent at the time of sentencing, and many can never fully pay off their legal system debts – and as a result cannot vote.

This system unfairly ties the right to vote – an essential right in a democratic society – to one's financial means. It also disproportionately impacts people of color; the disenfranchisement rate among African Americans is five times that of the general population and roughly three

times as high among Latinos.

"Our current system is a modern version of the poll tax. Voting is fundamental to our democracy, and the right to vote should never depend on how much money a person has," ACLU-WA Executive Director Kathleen Taylor said.

In addition, the current system for restoring the right to vote is so complicated that even election officials are often unsure who is and is not eligible to vote. It can take nine separate steps, involving state and county officials and several forms and petitions, for a citizen to regain the franchise.

Automatic restoration is supported

by a wide range of organizations, including the League of Women Voters of Washington, the Washington Association of Churches, the Washington State Bar Association, and Washington State NOW, as well as Secretary of State Sam Reed.

"Washington now becomes the 20th state in the last decade to ease voting restrictions on people with criminal histories who are living, working and raising families in the community. There is clearly a nationwide movement to assure that our democracy reflects the voices of all American citizens," said Erika L. Wood of the Brennan Center for Justice at New York University Law School. ■

Sheriff and Guards Indicted: Sex, Misconduct and Contraband Scandal at Texas Jail

by Matt Clarke

On February 27, 2009, a grand jury in Montague County, Texas returned a 106-count indictment against former Sheriff Bill Keating and ten jail guards, four prisoners and two other people in connection with drug-related offenses, contraband smuggling and sexual misconduct at the Montague County Jail.

Keating, 62, a former police officer, also was indicted on a federal charge for coercing a woman into having sex with him. He reportedly told her she wouldn't be arrested after being found with drug paraphernalia if she would "assist" him sexually. Keating pleaded guilty to a civil rights violation in that case on January 29, 2009, before the state indictments came down. [See: *PLN*, May 2009, p.1].

One of the first official acts taken by incoming Montague County Sheriff Paul Cunningham after being sworn into office on January 1, 2009 was to close the jail and send its prisoners to a facility in neighboring Wise County, citing unsafe conditions. Under Keating's tenure, prisoners had recliners and big-screen TVs in their cells and used drugs or smoked contraband cigarettes openly while chatting on smuggled cell phones. Several surveillance cameras and two of the cell doors had been disabled, and prisoners were

armed with shanks made from nails. One *Associated Press* reporter described the jail as "'Animal House' meets Mayberry."

It took \$1 million to repair the damage to the facility, which included painting over graffiti and replacing windows too scratched to see through – and that expense did not include the cost of relocating prisoners to Wise County. The prisoners were returned to the Montague County Jail on March 13, 2009 after the refurbished facility passed an inspection by the Texas Commission on Jail Standards.

The conditions in the Montague County Jail first came to light in August 2008 after Luke C. Bolton, a former prisoner, was arrested and charged with kidnapping and raping his girlfriend, Darlene Walker, a Montague County jail guard. Bolton sent a letter to the Texas Rangers about misconduct at the facility, such as sexual encounters between women prisoners and jail staff, including Keating. He also discussed incidents in which Keating allegedly asked him to assault other prisoners, to teach them a lesson.

"It was a hit, in other words," Bolton said of one such incident. "He said, 'If you handle this, it's two packs of cigarettes.' ... I whipped [the other prisoner] down and stomped on his head." Bolton also claimed that a drug ring operating

at the jail included both prisoners and guards, and that Keating was getting a 10 percent cut.

"If you look at [Keating's] victims, they're all the same: prostitutes, drug users," said Assistant U.S. Attorney Rick Calvert. "They were not people who were going to be believed. It's certainly not far-fetched that these women would not come forward. If [Bolton's] letter had not been written, very likely none of it would have been known."

The FBI began an investigation, interviewing jail staff and prisoners. One female prisoner said she had a sexual encounter with Keating while they were parked in the woods, and that he had used a blue rag to

clean himself and then thrown it out the window of his vehicle. "I instructed the FBI to search those woods, and I'll be damned if they didn't find that rag," said Calvert. "It tested positive for semen. That's when we knew it was happening, that these stories weren't just being made up."

While the federal investigation was ongoing, Keating lost his bid for reelection after serving a four-year term in office. He did not, however, end up serving any prison time despite his guilty plea. Keating was expected to receive up to ten years in federal prison at his sentencing hearing, which was scheduled in June. But on April 30, 2009 he had a fatal heart attack while working outside his home [See:

PLN, July 2009, p.51].

State criminal charges filed against several of the 16 other Montague County defendants, including jail guards and prisoners, are still pending. In April 2009, former jailer Shawna Herr pleaded guilty to four counts of improper sexual activity and one count of providing a prohibited substance. She was placed on probation for five years and ordered to pay a \$4,000 fine. Bolton, who alerted authorities to misconduct at the jail, and his girlfriend, former jail guard Darlene Walker, also face charges. ■

Sources: *Dallas Morning News*, *Associated Press*, *Wise County Messenger*

Philadelphia Tax Break for Hiring Ex-Prisoners a Bust

Giving employers a \$10,000 tax break to hire ex-offenders was a good idea. At least until the Philadelphia City Council ruined it.

While running for mayor of Philadelphia, Michael Nutter proposed a new way to cut crime: Help ex-cons get jobs by offering a \$10,000 tax credit to employers that hire former prisoners. The city council liked the idea so much that it adopted the \$5 million program before Nutter even took office. During its first year, however, no company has taken advantage of the tax credit because the city attached too many strings to the program.

For example, companies must agree to be named publicly to qualify for the tax break. Most businesses are already skittish about hiring ex-felons, and having to publicly declare that they hire former prisoners was too much for many employers. "They want to participate, but they don't want to be named," said Everett Gillison, the city's Deputy Mayor for Public Safety.

Another problem was a requirement that companies pay \$2,000 worth of tuition support for new ex-prisoner employees. Businesses further have to pay their new hires at least 150% of minimum wage, or about \$10 an hour, which in some cases was more than they were paying existing employees. Companies also must agree to stay in Philadelphia for at least five years, and all new hires are required to fork over 5% of their wages to the city.

With all of the strings attached to the tax credit program, it is not surprising that

no employers wanted to participate. If the city removed the unattractive requirements, the tax credit has great potential for doing what it was intended to do — help ex-prisoners find jobs, which in turn will reduce the recidivism rate.

"I am not disappointed in what has happened so far because now there is some interest [in helping ex-offenders]

... which is more than there was in the past," stated city councilman W. Wilson Goode, Jr. Still, while there may be interest, there have not been any results. That may change next year, as two unidentified companies have indicated they plan to apply for the tax credit in 2010. ■

Source: *Philadelphia Inquirer*

[WRITING CONTEST]

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RESILIENCE MULTIMEDIA, publisher of *Think Outside the Cell: An Entrepreneur's Guide for the Incarcerated and Formerly Incarcerated*, is sponsoring its **SECOND WRITING CONTEST** for people who are or were in prison, and their loved ones. The best submissions will be included in the "Think Outside the Cell" book series. *Story topics:*

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California: Parole Board's Policy Barring Friendly Oral Witness Testimony At Lifer Hearings Ruled An "Underground Regulation"

by Marvin Mentor

The California Office of Administrative Law (OAL) struck down the unwritten policy of the California Board of Parole Hearings (BPH) that denied all requests for friendly oral witness testimony at lifer parole hearings. The April 27, 2009 OAL ruling found that because this policy was not expressly permitted by existing properly promulgated regulations, it amounted to an illegal "underground regulation."

The California Code of Regulations (CCR), Title 1, § 250(a) defines "underground regulation" as "any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code [Administrative Procedure Act ("APA")], but has not been adopted as a regulation and filed with the Secretary of State..." Thus, when a state agency such as the BPH spontaneously creates spurious "policies," it may well be acting in excess of its authority under 1 CCR § 250(a). Any person may challenge such a perceived policy by requesting a determination from the Office of Administrative Law.

Donald A. Miller, a consultant in lifer parole law widely known for both his past legal work while in prison and for his highly successful efforts in lifer releases, filed such a request for determination in October 2008. The complained-of "policy" was demonstrated through two written responses from the BPH politely denying written requests from lifer family members to appear at their loved ones' parole hearings to testify orally as to their suitability for parole. The OAL analyzed this evidence with respect to 1 CCR § 250(a).

It found that under Penal Code § 3052, the BPH certainly had the power to promulgate and submit such a regulation for approval. But the OAL also found that neither Penal Code § 3041.5 nor the BPH's existing regulations, 15 CCR §§ 2245 -2256, expressly addressed such personal appearances. Rather, these regulations permitted only *unfriendly* witnesses (e.g., victims and prosecutors). At best, the OAL found existing regulatory

language *silent* on the alleged "policy" of excluding friendly witnesses. But the absence of an express policy does not permit the assumption of such a policy. Indeed, Miller argued to the OAL that the rights established in existing (properly promulgated) regulations are not *exclusive* lists of lifer rights.

After considering Miller's arguments, the BPH's invited response, and the evidence, the OAL ruled that "the challenged rule prohibiting inmates from presenting oral witness testimony at parole suitability hearings meets the definition of a 'regulation' in Government Code § 11342.600, does not fall within any express statutory

APA exemption and therefore, it should have been adopted as a regulation pursuant to the APA."

Of course, the BPH could yet seek such a new regulation per lawful APA procedures, but this would take time and is subject to public comment and review before it could be adopted. In the meanwhile, the BPH's "no friendly witness" policy remains stricken, and lifer's families or other knowledgeable supporters may submit their requests to appear at upcoming BPH parole hearings. See: 2009 OAL Determination No. 9 (OAL File # CTU 2008-1016-05). The ruling is posted on PLN's website. ■

U.S. Supreme Court Recedes from *Saucier's* Mandatory Provisions for Determining Qualified Immunity Claims

by David M. Reutter

The U.S. Supreme Court has retreated from a mandatory procedural practice for resolving government officials' qualified immunity claims, leaving it to the discretion of lower courts as to which prong of the test to apply as required by the facts of the case.

At issue was the Supreme Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001). Prior to that ruling, the Court had held "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."

Saucier made that suggestion a mandate, requiring that the determination of whether "the facts alleged show the officer's conduct violated a constitutional right ... must be the initial inquiry" in every case where a qualified immunity defense is raised. After completing that step, the district court may then turn to "the next, sequential step" of "whether the right was clearly established."

This case, brought by Afton Callahan, began in a Utah federal district court in a lawsuit that alleged officers from the Central Utah Narcotics Task Force had violated Callahan's Fourth Amendment

rights. In 2002, Brian Bartholomew was charged with unlawful possession of methamphetamine. He informed the officers that he was to buy more of the drug later that day from Callahan.

The officers had Bartholomew assure them that drugs were present in Callahan's home. After searching Bartholomew to ensure he didn't have any drugs, the officers gave him a marked \$100 bill and a concealed transmitter to monitor his conversations. Once Bartholomew gave the arrest signal, officers entered Callahan's trailer and searched it, recovering a large bag of methamphetamine and the \$100 bill.

The Utah Court of Appeals later threw out Callahan's conviction, holding the warrantless search was illegal. After Callahan sued the officers for entering his home without a warrant, the federal district court granted the officers qualified immunity.

The district court noted that other courts had adopted the "consent-once-removed" doctrine, which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has viewed contraband in

plain sight. Thus, the officers reasonably could have believed that doctrine authorized their conduct.

On appeal, the Tenth Circuit Court of Appeals “took no issue when the initial consent was granted to an undercover officer,” but disagreed with “broad[ening] this doctrine to grant informants the same capabilities as undercover officers.” Finding the “right to be free in one’s home from unreasonable searches and arrests” was clearly established, the appellate court held the grant of qualified immunity was erroneous.

The U.S. Supreme Court granted certiorari on the issue of whether the mandatory procedure set out in *Saucier* as to qualified immunity determinations should be retained. The Court held that the doctrine of *stare decisis* did not prevent it from revisiting *Saucier*, as a departure from that precedent would not upset settled expectations because *Saucier* consisted of a rule that was judge-made and adopted for court operations, not a statute promulgated by Congress. In addition, *Saucier* had defied consistent application by lower courts.

The Supreme Court found that rigid adherence to *Saucier* may create bad decision making where briefing related to constitutional questions is inadequate. It also may make appellate review unavailable in cases where the court finds that the defendant violated a constitutional right but that the right was not clearly established. “As the winning party, the defendant’s right to appeal the adverse holding on the constitutional question may be contested,” the Court wrote. This places the defendant

in the position of complying with the lower court’s advisory dictum without having an opportunity to seek appellate review, or defying the lower court and adhering to practices that have been declared illegal, thus inviting new suits.

Saucier’s protocol departs from the “older, wiser judicial counsel ‘not to pass on questions of constitutionality ... unless such adjudication is unavailable.’” Thus, the Supreme Court held that respect for lower courts requires giving them discretion in how to apply the two-prong test

for qualified immunity. In this case, the district court’s ruling on the question of qualified immunity was proper, and the Tenth Circuit’s decision was therefore reversed. See: *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

In regard to Fourth Amendment law, it is important to note that there is a split between Circuits on the “consent-once-removed” doctrine. The Sixth and Seventh Circuits have approved that doctrine as to informants, but the Tenth Circuit’s decision in this case holds otherwise. ■

\$3.75 Million Settlement for Orange County, California, Jail Detainee Severely Beaten by Prisoners

After suffering severe brain damage while confined at an Orange County Jail in California, Fernando Ramirez, represented by attorneys Mark W. Eisenberg of Newport Beach and Jerry N. Gans of Santa Ana, sued the County, the Sheriff’s Department, the Sheriff and various officials in federal court, alleging that jail deputies failed to protect him from attack by other prisoners. Filed in May 2007, the suit settled two years later, with Ramirez receiving \$3.75 million dollars.

Ramirez, a 21-year-old undocumented Mexican immigrant, was being housed at the Orange County Central Jail after being charged with inappropriately touching a 6-year-old girl. He had pleaded guilty to a lesser charge of nonsexual battery, but was nonetheless classified as a sex offender

by jail officials. Other detainees learned of the sexual allegations against Ramirez and severely beat him, leaving him with the intellect of a 4-year-old child.

In the suit, Ramirez contended not only that the deputies had failed to protect him, but that the jail’s classification of him as a sexual offender had directly contributed to his being attacked because other prisoners were thereby motivated and able to learn about the sexual allegations against him.

While agreeing to settle, the defendants denied that they had consciously disregarded a foreseeable risk of harm to Ramirez or that they were otherwise liable for his injuries. See: *Ramirez v. County of Orange*, USDC, CD CA, Case No. 8:2007-cv-00601. The complaint and settlement in this case are available on PLN’s website. ■

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Violence on the Rise in Arizona Prisons

by David M. Reutter

The level of violence in Arizona prisons is increasing – at least that is the conclusion to be drawn from recent reports. In 2008 alone there were four homicides in the state's prison system, and with 12 death investigations still pending that number could rise. Arizona prisoners slain last year included:

- Sean Kelly, 42. Kelly was murdered at the Arizona State Prison Complex-Lewis on June 29, 2008.

- Timothy Lacero, 29. In prison for marijuana violations and car theft, Lacero was assaulted and killed at the Cimarron Unit of the state prison in Tucson on September 4, 2008. His scheduled release date was 2011.

- Duffy Kilrain, 51. Kilrain died six days after being assaulted by several prisoners at the Meadows Unit of the Eyman Complex in Florence on October 20, 2008.

- Earl Ray Lappe, 32, serving a life sentence, was murdered by another prisoner at the Lewis facility only a few weeks after Kilrain was killed.

The homicides of Kelly and Lucero were discovered following a public records request by the *Phoenix New Times*. A subsequent inquiry revealed that Arizona's prison system had two murders in 2005, two in 2006 and one in 2007.

Of the 2006 homicides, one was of William Harris, a prisoner at the Florence facility. As a result of that murder, Warden John Ontiveros lost his job and more than a dozen guards were "fired, forced to resign, suspended, or reprimanded" due to mistakes and "operator error" that led to Harris' death.

An unnamed former Arizona state prisoner was quoted as saying one of the single biggest problems within the prison system was "the violence" – and such violence has not been limited to homicides.

A brawl involving ten close-security prisoners and around seven guards occurred at the Arizona State Prison Complex in Tucson over the weekend of January 31 to February 1, 2009. More than 400 prisoners were placed on lockdown following the incident, which occurred when the prisoners were returning to their housing unit from a recreation yard.

On February 25, 2009, a prisoner-on-prisoner assault at Lewis sent one prisoner to the hospital; unconfirmed

reports indicated the incident involved a stabbing.

Another fight, this one involving six prisoners, occurred at Lewis on April 30, 2009. Chemical agents were used to break up the brawl; three prisoners suffered minor injuries, including puncture wounds.

On June 23, 2009, a number of close-security prisoners at the Tucson facility's Rincon Unit began fighting in the dining hall. The violence escalated to include assaults on prison staff, and nine guards suffered injuries ranging from a broken wrist to head trauma. Three prisoners were taken to a hospital for treatment; a number of improvised weapons were recovered after the prison's tactical team brought the incident under control.

"The officers at our Tucson prison re-

acted quickly and efficiently to put down a significant disturbance with limited injuries," said Corrections Director Charles L. Ryan. Days after the fighting at the Rincon Unit, a violent disturbance involving up to 50 prisoners occurred at the facility's Santa Rita Unit. Twenty prisoners sustained injuries and five were hospitalized.

Following these incidents, as well as several unrelated escape attempts, various changes were made at the Tucson prison – including the transfer of some prisoners to other facilities and the replacement of Warden Greg Fizer in July 2009. ■

Sources: *Phoenix New Times*, *Arizona Republic*, *Associated Content*, www.azfamily.com, www.corspecops.com

Maryland Prisoners Receive Kosher Food

by Brandon Sample

Beginning on April 9, 2009, The Maryland Department of Public Safety and Correctional Services (DPSCS) started providing kosher meals to state prisoners with religious dietary needs.

The decision to provide kosher food came after a meeting between the Secretary of the DPSCS and representatives of the Jewish community last summer. "Correctional facilities mirror society, many people of many different faiths," Governor Martin O'Malley said in a statement. "In America, people of every faith are entitled to practice that faith to the fullest extent possible, even in a correctional setting."

The DPSCS's decision affects approximately 130 Maryland prisoners who are registered as Jewish or are members of the House of Yahweh or Assembly of Yahweh. They will receive three kosher meals a day.

Maryland's decision follows a recent trend among prison systems to offer kosher food. The Federal Bureau of Prisons, long a provider of kosher cuisine, has over 5,360 prisoners who receive pre-packaged kosher meals each day. New York's prison system operates a certified kosher kitchen that prepares food for around 3,000 prisoners statewide. In 2007, the Texas Dept. of Criminal Justice established a kosher kitchen at the Stringfellow Unit, near Houston.

While more states have started offering kosher meals, others have cut their kosher food programs or eliminated them entirely. In Florida, for example, the Department of Corrections discontinued its Jewish Dietary Accommodation Program in August 2007, citing higher costs and issues of inequality.

Despite setbacks in states like Florida, advocating for kosher food remains a high priority for Jewish prisoner advocates like Rabbi Shmuel Kaplan of Chabad Lubavitch. "The opportunity to worship freely is enshrined in the founding documents of this country and it behooves the government to make a special effort in that regard," said Kaplan.

In a 2007 survey, 26 of the 34 states that responded said they provided kosher food to prisoners; others offered vegan or vegetarian meals to accommodate prisoners' religious beliefs. In regard to the latter meals being acceptable substitutes for kosher food, Gary Friedman, chairman of Jewish Prisoner Services International, stated, "You can't have substantially kosher, partially kosher. It's either kosher or it isn't."

Some prison systems also offer halal meals for Muslim prisoners. ■

Sources: www.jewishtimes.com, www.nwanews.com, *Associated Press*

***From the Bottom of the Heap: The Autobiography
of Black Panther Robert Hillary King,*
Oakland, CA: PM Press (2009) \$24.95 hardback, 217 pages**

Book review by Mel Motel

Robert Hillary King writes like he speaks. I had the honor of spending some time with the only freed member of the Angola 3 in April 2009 when he swung through Vermont on his book tour. Starting softly, in front of an audience of 60, King grew in volume and intensity as he arrived at the focus of his talk: prisons as an extension of chattel slavery. His style was narrative and circular; he weaved in and out of events and concepts, blending past with present. The first two-thirds of *From the Bottom of the Heap* resemble this warm, sprawling narrative, mostly reflections on his childhood as he bounces from rural Louisiana to New Orleans, from grandmother to cops to train-hopping hobos.

King has an aptitude for storytelling – non-linear, conversational, straightforward, insightful; his eventual explanation of the Black Panther Party's significance and power; and the details of his own legal battles fought from behind prison bars, specifically the appeal that led to his release in 2001 after 29 years of solitary confinement in Angola State Penitentiary, a/k/a "The Last Slave Plantation."

A powerful aspect of *FTBOTH* is that King paints his journey as, at once, remarkable and unremarkable. While his struggle to organize prisoners and steel himself against retaliation is his alone, the circumstances that brought him to Angola and kept him there mirror the experiences of millions of people in this country: the

poor, the uneducated, men and women of color. What King gives the reader is not a lecture but a seasoned account. It is a picture of racism, guard beatings, corruption, torture, favors, snitches, and inhumane living conditions that anyone can identify with who has been locked up or has a loved one in prison.

Where *FTBOTH* falls short is King's failure to better utilize the pages as an educational platform. I wish he had spent more time on political analysis of the Black Panther Party and description of the tactics that he, Wallace, and Woodfox used to organize prisoners. I also wish the story, as he writes it, did not culminate with his release from prison, but further illuminated the work he has been doing since then to raise awareness about the Angola 3 who are still in prison. Towards the end of the book, King includes a serious, concise account of a civil suit that he won when the Nineteenth District issued a ruling against "routine anal searches" (*Woodfox v. Phelps*). He also helpfully documents his partially pro se appeal process throughout the 1990s.

When Robert King was released

from Angola, he declared, "Even though I was free from Angola, Angola would never be free of me." With this book, King makes good on his promise. He exposes the horrors of an unjust, brutal system in the hopes that we may all someday be free. King says, "Sometimes, the spirit is stronger than the circumstances." That King includes "sometimes" is a testament to his honest assessment of reality, that innocence is usually trumped by power. Freedom will not be won without awareness and sacrifice. Available from: PM Press, P.O. Box 23912, Oakland, CA 94623. 📖

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Oklahoma Prisoner Awarded \$65,000 for Inadequate MSRA Care

by Brandon Sample

On March 12, 2009, Chief U.S. District Judge Claire Eagan entered judgment in the amount of \$65,000 against an Oklahoma state prison Health Services Administrator (HSA) accused of failing to provide a prisoner adequate medical treatment.

While incarcerated at the Northeast Oklahoma Correctional Center (NOCC), Richard Potts contracted Methicillin Resistant Staphylococcus Aureus (MRSA), a deadly skin infection frequently found in prisons.

For three weeks, Potts tried to get medical attention for his condition. However, medical staff at NOCC rebuffed him, accusing Potts of faking his illness in order to get out of work. One medical staff member went as far as to say that Potts was “trying to win an Oscar.”

Potts’s condition deteriorated. He lost the ability to walk under his own power, and severe pain rendered him bedridden for days. Because of Potts’s severe pain and inability to walk, other prisoners and staff brought Potts his food and medication. However, once medical staff were made aware of this accommodation, staff were ordered not to bring food or medicine to Potts because according to medical staff, Potts was “faking.” Potts lost approximately 30 pounds because of this.

After three weeks of suffering, Potts was finally taken to the hospital. Potts was told by a physician there that he “was a very sick man,” and that emergency surgery was required. Extensive epidermal abscesses were removed from Potts’s shoulder and the base of his spine. Potts lost so much blood during surgery that a blood transfusion was required.

Potts returned from the hospital to NOCC and continued to receive inadequate medical care. Medications that were ordered by physicians at the hospital, for instance, were not provided by NOCC staff until four days later. Additionally, Potts was ordered to return to his job at the prison farm even though he was physically incapable of performing it.

Potts sued HSA Tom Gibson and three other medical staff in federal court alleging violations of the Eighth Amendment. The court entered judgment against Gibson for \$65,000 upon stipulation of the parties and awarded \$1,000 in attor-

neys’ fees. Potts was represented by Ryan Ray of Norman, Wohlgemuth, Chandler, and Dowdel, a Tulsa firm. See: *Potts v.*

Gibson, No. 06-CV-0188-CVE-PJC (N.D. Okl. 2009). The settlement is available on PLN’s website. 

Sixth Circuit Overturns \$625,000 Verdict for Ohio Prisoner Sexually Abused by Guard

by Brandon Sample

In what one judge described as a “legal travesty,” on March 13, 2009, the U.S. Court of Appeals for the Sixth Circuit overturned a jury verdict in favor of a prisoner who had been sexually abused by a prison guard.

While incarcerated at the Ohio Reformatory for Women, Michelle Ortiz was sexually assaulted on two occasions by Douglas Schultz, a guard at the facility. Ortiz reported the first incident and was taken to see Paula Jordan, a case manager.

Jordan told Ortiz, who was crying and visibly upset, that nobody had the right to touch her. However, she asked Ortiz to keep in mind that it was Schultz’s last day at the prison before he would be transferred to a different facility, that it was Schultz’s “nature” to act that way, and that he was “just an old dirty man.”

Jordan encouraged Ortiz to stay close to her friends, effectively using a “buddy system” to keep Schultz from sexually assaulting her, and said that if anything happened again Ortiz could report it to Jordan when she returned to work in a few days. Ortiz reluctantly decided not to file a formal complaint and to “let it go.” Jordan prepared a report of the incident but did not turn it in until she returned to work several days later.

Later that evening, while Ortiz was sleeping, Schultz entered her housing area and fondled her breast and put his fingers inside her vagina. When Ortiz awoke and realized what was happening, she hit and scratched Schultz until he left.

Ortiz reported the second assault the following day, prompting an investigation by Rebecca Bright, a prison investigator. Bright scheduled a lie detector test for Ortiz, which she passed. Schultz initially denied Ortiz’s allegations but later resigned.

While Bright’s investigation was ongoing, Ortiz was placed in solitary confinement, at Bright’s request, because

Ortiz was allegedly discussing the ongoing investigation with other prisoners. Bright was allegedly concerned about possible retaliation against Ortiz from prisoners who were loyal to Schultz.

Ortiz, on the other hand, felt she was placed in isolation as retaliation for reporting Schultz’s abusive conduct. Ortiz recalled, for example, Bright telling her that she was put in the hole “because [she] had lied.”

Ortiz sued Jordan, Bright, Schultz, the warden and the Governor of Ohio, alleging that Jordan had failed to protect her from Schultz in violation of the Eighth Amendment, and that Bright had violated her due process rights by placing her in solitary confinement. Schultz was dismissed from the suit after he was unable to be served.

The case went to a federal jury trial and the jurors returned a verdict in favor of Ortiz, awarding \$250,000 in compensatory damages and \$100,000 in punitive damages against Jordan, and \$25,000 in compensatory damages and \$250,000 in punitive damages against Bright. Bright and Jordan appealed.

In a stunning display of disregard for the jury’s verdict and the overwhelming evidence presented at trial, the Sixth Circuit panel, by a 2-1 vote, found that Jordan and Bright did not violate Ortiz’s constitutional rights.

Although noting in passing that prisoners have the right to be protected from harm, the Court of Appeals held that Jordan was not deliberately indifferent to Ortiz’s safety. Jordan’s actions of advising Ortiz to rely on a “buddy system” to deter Schultz from attacking her was not unreasonable under the circumstances, the appellate court reasoned, given that it was Schultz’s last day at the facility and it was unlikely anything could have been done to remove Schultz from his post that day. “The fact that [Jordan’s efforts] were ineffective does not change our analysis,”

the Court wrote.

Turning to Ortiz's allegations against Bright, the Sixth Circuit held that Ortiz's temporary placement in solitary confinement did not amount to a due process violation. The appellate court recognized that Ortiz had alleged that her placement in isolation was done "with a distinctively punitive purpose," but declined, at this late stage of the pro-

ceedings, to construe Ortiz's allegations against Bright as a First Amendment retaliation claim.

Circuit Judge Martha Daughtrey, who dissented, called the court's opinion a "legal travesty." Leaving Ortiz "wholly unprotected in the face of a known risk of assault has repeatedly been held by this court and others to amount to deliberate indifference," Daughtrey stated. The

court's decision to the contrary produced an "unfortunate result" in Ortiz's case and was, as Daughtrey put it, "thoroughly senseless."

This ruling is unpublished. Perhaps the two Sixth Circuit judges who wrote the majority opinion were too embarrassed to see their "thoroughly senseless" decision in print. See: *Ortiz v. Jordan*, 316 Fed. Appx. 449 (6th Cir. 2009). ■

\$1 Million Settlement in Santa Clara, California Jail Suicide

California's Santa Clara County paid \$1 million to the estate of a mentally ill prisoner who committed suicide at the Santa Clara County Jail (SCCJ). The estate's federal civil rights complaint claimed jail officials failed to provide necessary medical treatment for the prisoner.

During his years as a student at the University of California in Berkeley in the 1990's, Luis Andrew Martinez became known as the "Naked Guy." In 1992, he organized a "nude in" on campus and appeared on numerous TV talk programs to "prove that people define normalcy in their own terms." Over the last ten years of his life, Martinez battled a diagnosis of schizophrenia.

Martinez was arrested on December 29, 2003, as the result of an altercation between him and caretakers at a Santa Clara County funded facility for persons with mental health disabilities. Despite the caretakers' preference that Martinez be taken to a hospital to continue medical care and treatment, he was arrested by police and taken to SCCJ.

Despite a jail psychiatrist recom-

mending Martinez be placed in a special management housing unit for subacute mental health care, SCCJ placed him in open population, classifying him as maximum security that requires single celling and segregation from other prisoners.

Over the next few years, Martinez made two suicide attempts. While those outcries for help resulted in temporary attention, he always landed back into solitary isolation, which is a known risk factor for suicide. In addition to the isolation, Martinez did not receive proper medications for his condition.

"For Andrew, incarceration without medical care was a death sentence," said his mother, Esther Krenn. On May 18, 2006, Martinez placed a plastic bag over his head in his isolation cell and suffocated himself.

In April 2009, the estate settled the lawsuit for \$1 million and SCCJ agreed to change its policies regarding notification of family members when a prisoner attempts suicide or undergoes a severe psychiatric crisis.

The estate was represented by San Francisco attorney Geri Lynn Green. "Andrew was a victim of a failed system of criminalizing mental illness and warehousing sick people in jails without adequate facilities and qualified medical staffs for the treatment of their sickness," said Green. See: *Krenn v. County of Santa Clara*, USDC, N.D. California, Case No: CV 07-02295. ■

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Indigent Texas Prisoners May No Longer be Required to Repay Cost of Court-Appointed Counsel

by Bill Habern

On March 11, 2009, the Texas Court of Appeals in Amarillo issued an opinion in a case involving Gilbert Alexander Perez, an indigent defendant. Perez raised two issues on appeal. First was the extreme sentence imposed in his case (25 years for possession of less than four grams of meth); however, that issue was quickly dismissed by the appellate court. The second issue concerned the trial court's order that Perez repay to the state the sum of \$1,250.00, which was the cost of representation by his court-appointed attorney. The Court of Appeals, citing Tex. Code Crim. Proc. Art. 26.05(g), removed the cost of attorney fees from the judgment.

For years indigent Texas prisoners have been subject to repayment of costs, fees and fines after being convicted. The good news is that in the past no one tried to collect these expenses. Recently there have been attempts by the state to recoup such funds, but until the ruling in Perez's appeal, no one carefully examined the procedure for repayment of court-related costs.

In 2007, many District Clerk offices across the state began to attach and levy funds in prisoners' institutional trust accounts through a garnishment process in an attempt to collect assessed costs. After the Texas Court of Appeals ruled that prisoners had the right to contest the amount of the costs the state was trying to recover, the effort to collect those funds became bogged down in litigation.

When the attachment of trust funds became more expensive and complicated than it was worth, another approach was tried, instituted by Texas Parole authorities. Thus far it appears those efforts have been limited to the greater Houston area (which happens to be one of the largest metropolitan areas in the United States). Under this procedure, when parolees report for their monthly meetings they are given a form to have completed by the District Clerk's office. The District Clerk enters the amount of costs, fees and fines that are owed; offenders return the form to their parole officers, who instruct them how much must be paid each month toward reduction of those costs. Of course, these are the same prisoners who are usually indigent, go to prison broke, and

upon their release can seldom afford to put a quarter in a parking meter.

In Perez's case, the Court of Appeals noted that under Art. 26.05, particularly Art. 26.05(g), before costs are assessed against a defendant (who is usually indigent), the trial court must enter findings that the defendant is: 1) capable of, and 2) able to repay such expenses either during the term of the case or upon release. Otherwise, no entry of costs related to attorney fees should be entered.

In regard to Perez's conviction, the record only reflected that he was indigent, lived with a relative and had no employment. The trial court did not conduct proper fact finding to determine a reasonable amount of attorney fees, nor was evidence introduced to establish findings of fact relative to Perez's ability to raise funds to pay the fees. Thus, the Court of Appeals found that "no evidentiary basis exists supporting the trial court's decision to levy any fees upon appellant." Consequently, Perez will not be burdened by the collection efforts of the Parole Board once he is paroled.

Over the 37 years of my practice in Texas, defense lawyers as well as judges have failed to conduct fact finding pursuant to Art. 26.05(g) to ascertain the ability of defendants to repay court-appointed attorney fees. The *Perez* ruling opens the

door for prisoners to review their judgments to determine the costs they owe, and to possibly take action to have those costs set aside. However, the appellate courts could find that the failure to object at the time of sentencing resulted in a waiver of the right to challenge the assessment of fees on appeal. What will happen if writs are filed claiming ineffective counsel on this point is unknown, as that issue has not yet reached the courts.

Texas prisoners of today who will be parolees tomorrow should start planning now to challenge the validity of the court-assessed fees they will have to pay upon their release. The Parole Board's new cost-collection procedure will result in more financial stress for released prisoners unless they have their fee assessments overturned, as did Perez. See: *Perez v. State*, 280 S.W.3d 886 (Tex. App. Amarillo 2009).

Defense lawyers in Texas are encouraged to put in their stack of forms for each court-appointed case a motion seeking a hearing on their client's ability to raise and pay court-assessed fees and costs. ■

William T. Habern is a founding partner of Habern, O'Neil & Pawgan LLP in Huntsville, Texas, a law firm that specializes in the areas of parole and prison-related litigation as well as criminal law.

No Qualified Immunity for Guards Who Failed to Help Vomiting Prisoner Who Died

The U.S. Court of Appeals for the Eighth Circuit has affirmed a denial of qualified immunity for three Greene County, Arkansas jail guards accused of violating a prisoner's Eighth Amendment rights.

On January 4, 2002, Phil E. Blount, a moderately obese man who suffered from mental illness and a variety of other maladies, vomited and requested medical assistance for over seven hours while incarcerated at the Greene County Jail. Despite the obvious seriousness of Blount's condition and his repeated requests for medical assistance, jail guards Christopher Gray, David Wanner and Michael Johnson did nothing. Instead, they attributed Blount's

vomiting to his having ingested shampoo some hours earlier. Blount died early the next day; an autopsy revealed that his death was due to a heart attack.

Blount's sister, Susan Vaughn, filed suit against the guards alleging violations of Blount's Eighth Amendment rights. The district court denied qualified immunity and the defendants appealed.

On appeal, the guards did not dispute that they were aware of Blount's vomiting or his requests for medical assistance. Rather, they asserted that their failure to act did not constitute deliberate indifference because they thought Blount's vomiting was caused by his ingestion of shampoo and not some other, more

serious condition.

Recognizing that “an official’s failure to alleviate a significant risk that he should have perceived but did not” does not violate the Eighth Amendment, the Eighth Circuit still found that “a reasonable jury could determine that [the guards] were actually aware that Blount needed

medical attention, but simply chose to do nothing about it.” The guards’ “self-serving contention that they did not have the requisite knowledge does not provide an automatic bar to liability in light of the objective evidence to the contrary,” the Court of Appeals wrote.

The district court’s denial of qualified

immunity was therefore affirmed, and the case was remanded for further proceedings. See: *Vaughn v. Gray*, 557 F.3d 904 (8th Cir. 2009).

According to attorney Lawrence W. Jackson, who represented Blount’s family, following remand the case settled for \$62,500, which included attorney fees. ■

California Prison Still Subpar, Grand Jury Finds

The Pleasant Valley State Prison (PVSP) in Coalinga, California continues to suffer from overcrowding and inadequate medical care, according to a March 25, 2009, report by the Fresno County Grand Jury.

As part of section 919(b) of the California Penal Code, grand juries are charged with inspecting the condition and management of California prisons annually.

The Fresno County Grand Jury visited PVSP in September 2008. Opened in 1994, PVSP houses minimum, medium, and maximum security prisoners. Designed for 2,200, PVSP currently has 5,191 prisoners, some of which are housed in a gymnasium.

According to the grand jury report, the Coalinga Regional Medical Center, the closest hospital to PVSP, does not have a secure medical wing. As a result, prisoners requiring hospitalization have to be taken to the Bakersfield Community Medical Center, almost an hour away. Construction of a secure medical wing at Coalinga is unlikely due to “budgetary constraints,” the grand jury explained.

The spread of Valley Fever is also a problem at PVSP. Caused by a fungus that lives in certain arid type soils, Valley Fever is spread through spores that are released into the air when soil is disturbed by wind, farming, construction, and other activities. Individuals with asthma, emphysema, and other compromised medical conditions are particularly susceptible to the fever. While at risk prisoners are transferred to other prisons, “the location of the prison . . . along with serious budget constraints, make [Valley Fever] an ongoing problem,” according to the grand jury report.

Other medical related problems at PVSP include the lack of adequate office space for doctors, and the lack of funds to implement a court ordered receiver’s turnaround plan for medical care within all Califor-

nia prisons. The entire health care system in the California prison system has been under the control of a Federal Receiver for years now after multiple class action lawsuits were filed by prisoners alleging inadequate medical care, mental health care, and dental care, and noncompliance with the Americans with Disabilities Act. The grand jury report is available on PLN’s website. ■

Sources: 2008-2009 Fresno County Grand Jury Report # 4; *The Fresno Bee*

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News in Brief:

Arizona: On July 17, 2009, 27-year-old Danny Torres, a guard at the Corrections Corporation of America run Saguaro Correctional Center in Eloy, was shot and killed during a home invasion robbery in Tucson. Pima County Sheriff's Deputy Dawn Barkman said Torres was one of three men involved in the home invasion. They allegedly entered the house and pistol-whipped the owner while his wife and children were present. Torres was shot by a neighbor while attempting to flee the scene; the other men involved, Manuel Nathan Moreno, 19, and Alejandro Salazar Romero, Jr., 18, were arrested on first-degree murder charges soon after the incident. Torres had worked for two years as a guard at the, said Louise Grant, a spokeswoman for CCA.

Arkansas: On June 20, 2009, an unnamed parolee was shot and killed by guards running a contraband checkpoint outside a prison in Jefferson County. The man was returning to the prison to pick up his wife, who was visiting a relative. He had dropped her off in the morning before the checkpoint was set up. He fled because he was wanted for failing to report to his parole officer, and was subsequently shot. The exact reason for the shooting and other details were not made available to the public.

Indiana: On April 27, 2009, former Floyd County Jail guard Michelle Hurst, 39, was sentenced for trafficking with a prisoner, a class C felony. Hurst admitted to having sex with 31-year-old prisoner Chris Proctor on at least two occasions and bringing him drugs and other contraband. Although the advisory sentence for a class C felony is four years in prison, Judge Susan Orth sentenced Hurst to two years of home detention followed by two years on probation. "Judge Orth's sentence was appropriate under the circumstances, and we appreciate the kindness she showed Michelle," said her attorney, William Gray. "She's excited to get this behind her."

Indiana: On June 11, 2009, guards opened fire while breaking up a fight at the U.S. Penitentiary in Terre Haute. One prisoner was transported to a local hospital for treatment of a gunshot wound. A second prisoner was also hospitalized for unspecified injuries. The fight broke out at about 8 a.m. in the recreation yard, and "shots were fired by institution staff to prevent the possible loss of life" when

the prisoners failed to stop, said Terre Haute spokeswoman Hattie Sims. No guards were injured. Sims said she had no further information on the condition of the injured prisoners. The facility was locked down following the shooting.

Iowa: On May 11, 2009, a judge awarded former Oakdale prison guard Derek White unemployment benefits because he was terminated for displaying a bumper sticker on his vehicle that other employees also displayed without disciplinary action. White's vehicle was adorned with a sticker that said, "F##K Joakdale. I like real prisons." He gave similar stickers to other employees who put them on their vehicles. Prison officials asked White to remove his sticker and terminated him for insubordination when he refused; however, they ignored other prison employees' continued display of the bumper stickers. Administrative Law Judge Beth A. Scheetz found that such disparate treatment was unacceptable, and ruled in White's favor.

Maryland: On July 22, 2009, two Frederick County Jail guards were disciplined following a prisoner suicide at the facility. Corporals Gilbert Sackett and Ryan Harris were the supervisors on duty on June 10 when 26-year-old Justin Lihvarchik hanged himself with a noose made from his shoelaces. Lihvarchik was jailed around 2:30 a.m. and found dead about three hours later. Jail policy requires guards to check on prisoners every 20 minutes.

Mexico: On May 16, 2009, an armed gang freed more than 50 prisoners from the Cieneguillas prison in Zacatecas state, including two dozen prisoners with ties to the powerful Gulf drug cartel. The raid, which started just before dawn, took less than 5 minutes and involved 20 gunmen in 10 vehicles. No shots were fired and no one was injured. According to Gov. Amalia Garcia Medina, the prison director, 40 guards and two police commanders were detained for questioning in connection with the prison break. Mexican officials have openly admitted that corruption permeates all levels of law enforcement. Gov. Medina said the raid may have been revenge for recent arrests of cartel members by the Zacatecas state police.

New York: On July 7, 2009, three former guards were convicted of obstructing justice in connection with a beating they inflicted on a prisoner at the Queens

Private Correctional Facility on April 17, 2007. Supervisor Marvin Wells and two unnamed accomplices were found guilty of staging a cover-up, but Wells was acquitted of using excessive force. Prisoner Rex Eguridu testified at trial that the guards beat him because he said "Hello, baby. You look beautiful today" to a female guard named Krystal Mack. Eguridu said he was dragged into a shower room, where Wells ordered him to strip and then repeatedly punched him in the chest. Wells threatened to kill Eguridu if he ever called an officer "baby" again. The jury could not agree on a charge that Mack had tampered with a witness. The Queens facility is operated by GEO Group.

Nigeria: On June 3, 2009, 153 prisoners escaped from the Enugu prison, a pretrial facility that holds 734 prisoners. Nigerian Prisons Comptroller-General Olushola Ogundipe said one prisoner fell to his death after climbing a perimeter fence. Two more prisoners were killed during the mass escape and 36 female prisoners were gang-raped by male prisoners during the episode. Authorities continue to search for the remaining fugitives.

North Carolina: On July 18, 2009, former state court judge, federal prosecutor and state Republican Party chairman Sam Currin was released from federal custody. Currin was originally sentenced to 70 months in prison for laundering \$1.3 million on behalf of David Hagen, an email spammer who allegedly ran one of the most prolific spamming operations in the world. Federal prosecutors recommended in May that Currin's sentence be reduced by half due to his testimony against Hagen. Currin's defense attorney asked that the sentence be reduced to 29 months so Currin could attend his son's law school graduation. But Senior U.S. District Court Judge W. Earl Britt, who handed down Currin's original sentence and presided over the Hagen trial, went even further and commuted Currin's sentence to time served. Judge Britt cited Currin's extensive cooperation with prosecutors. Currin, who had been held at the Federal Medical Center in Fort Devens, Massachusetts for undisclosed health problems, was originally scheduled for release in 2013. Hagen, convicted of multiple crimes due in large part to Currin's testimony, faces up to 45 years in prison. It appears that cronyism has paid dividends for Currin, while Hagen has not

fares as well.

Pennsylvania: On July 10, 2009, Philadelphia lawyer Randall J. Sommovilla, 61, was arrested and charged with attempting to smuggle heroin into the Delaware County Jail. Sommovilla allegedly went to the facility after visiting hours to see Amber Knox, a client awaiting extradition to New Jersey on unknown charges. A routine ion scan used to detect illegal drugs registered positive, and a plastic bag was found near Sommovilla's feet. The bag contained heroin and pills. Cocaine and three glass pipes were found in his vehicle. He told police that Knox had called him from the jail and said she was sick and needed drugs, and that another woman, "Brittany," had asked him to take the drugs to Knox. Sommovilla would not acknowledge possessing the drugs. He told police, "My suspicion is that Brittany placed the drugs in [my] clothing, and when I got out to the facility Amber would convince me to give her the drugs." He has since been released on bail.

Rhode Island: On July 28, 2009, Glenn Rivera-Barnes, who worked as a medical technician at the privately-run Donald W. Wyatt Detention Facility in Central Falls, pleaded guilty to a felony charge that he lied to federal investigators about having sex with an unnamed immigration detainee. Federal authorities contended they had DNA evidence proving that Rivera-Barnes had sex with the detainee on May 11 and May 24, 2008. He was fired from his job shortly after the allegations surfaced. Although a hearing has not been scheduled, federal prosecutors are recommending a one-year sentence on home detention with electronic monitoring.

Texas: In May 2009, Ellis County Commissioners approved an ordinance to charge prisoners at the Wayne McCollum Detention Center for medical visits and medication. Prisoners will now be charged \$5 to see a nurse, doctor or dentist; for prescription medication, they will be charged \$3. They will be charged \$1 for over-the-counter medication. The money will come from each prisoner's commissary fund. "We're not going to refuse anyone medical care if they need it, but we need to recover costs and cut back on the frivolous use of doctor visits," said Charles Sullins, detention center chief.

Texas: On May 12, 2009, Coffield Unit prisoner Derrik Ross, 38, received a 60-year sentence for possessing a cell phone in prison. According to the prosecutor, Allyson Mitchell, a guard

attempted to stop Ross because he was acting suspicious. He ran through the prison and tossed the phone onto a rooftop. Guards subsequently recovered the cell phone, which was stuffed in a sock with a charger. The jury took less than an hour to convict and sentence Ross as a habitual offender. He will serve the 60-year sentence consecutive to a 25-year sentence he was already serving for stealing a car.

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The sentence is one of the longest in state history for this type of offense. Mitchell said she was pleased with the result, and hoped it would "send a message to the TDCJ inmates that still have cell phones and the visitors and unethical officers that provide them cell phones." The guards who smuggle the cellphones in to prisoners will however continue to receive probation and light sentences. ■

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\$1,000 Jury Award to Beaten Missouri Prisoner

A Missouri federal jury awarded a prisoner \$1,000 on a state law battery claim. The award came after trial on several claims brought by Eugene Kenneth Jones-El for damages he incurred while imprisoned at Missouri's Eastern Reception Diagnostic and Correctional Center (ERDCC).

Jones-El went to the office of ERDCC social worker Scott Roper on June 9, 2003. The purpose of Jones-El's visit to Roper was to request he make copies of a complaint Jones-El had filed in court, which challenged his conditions of confinement.

Roper requested to see the complaint and response letter, which he proceeded to read upon receipt. He ignored Jones-El's request to discontinue reading the

documents, making several phone calls to other prison officials about the complaint. Finally, Roper advised Jones-El that he had authorization to confiscate the complaint.

Jones-El politely grabbed the complaint, tore it up, dropped it on the floor, and walked out of Roper's office. As he was waiting for the control room to open the outer door, Roper came up behind Jones-El and sprayed him with pepper spray on his head and face. He was also struck in the head and shoulders with physical blows before being handcuffed.

The incident resulted in segregation and other punitive measures, including a transfer. In his complaint, Jones-El made several claims. A federal excessive use of force and state law claim of battery

survived preliminary proceedings and went to trial.

The jury found for Roper on the excessive force claim, but it found he had committed battery on Jones-El. It awarded Jones-El \$500 in actual damages and \$500 in punitive damages in its April 23, 2008, verdict.

At trial, Jones-El was represented by attorney James Krispin, who was appointed by the Court. In a post-trial motion, the Court granted Krispin \$6,362.20 in attorney fees and costs, requiring Roper to pay \$1,362.20 and the non-appropriated fund to pay the remainder. See: *Jones-El v. Roper*, USDC, E.D. Missouri, Case No: 4:05CV28. The relevant documents in this unpublished case are available on PLN's website. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

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Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$19.00. Documented first hand reporting on law enforcement's war on the poor. Covers paramilitary policing, the INS and prisons. 1002

Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Ceiling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

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The Ceiling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 pages. \$22.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$14.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

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States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

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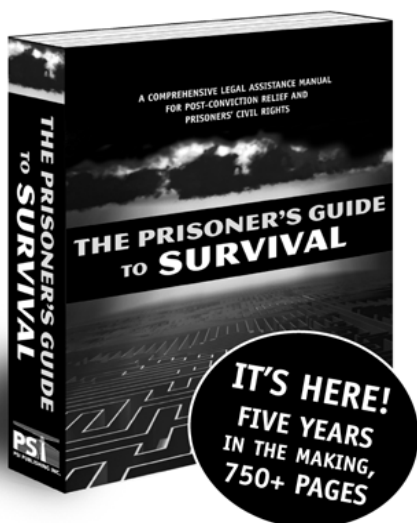
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October 2009

Texas Prisoners Still Dying in Houston Jails, Among Other Problems

by Gary Hunter

Clarence Freeman's hot check turned out to be his death warrant after it resulted in his arrest and incarceration at the Harris County Jail in Houston, Texas, where he was fatally assaulted by a guard.

On New Years Day in 2008, Freeman worked a double shift passing out meal trays at the jail. For his efforts he was promised an extra tray for himself. When the extra tray wasn't forthcoming, Freeman complained and said he wanted to file a grievance. In response, jail guard Nathan Hartfield escorted Freeman to an isolation cell so he could fill out a grievance form. Hartfield claimed that once at the cell, Freeman became aggressive,

called him a racial epithet and struck him in the face. According to Hartfield, he had to physically subdue Freeman.

Freeman's written account of the incident, given shortly before his death, described an entirely different scenario. Freeman insisted that Hartfield had choked him, without provocation, until he couldn't breathe and lost control of his bodily functions.

"On the way to lockup, the officer put his hands around my neck to throw me to the ground. I never resisted," Freeman wrote in his dying statement.

The fact that Freeman had urinated on himself during the altercation was verified in Hartfield's report. Hartfield also admitted to using a choke hold, and stated he was not trained in applying such holds. Conveniently, there were no surveillance cameras in the area of the jail where the incident took place.

Another Harris County jail guard, Travis Vaughn, arrived on the scene in time to see both men on the floor. According to Vaughn, Freeman was on his stomach when he arrived. Vaughn helped handcuff Freeman, and the two guards then escorted the injured prisoner to the jail's clinic. Freeman complained of difficulty breathing, and medical staff sent him to the Lyndon B. Johnson Hospital.

Shortly after giving authorities his statement, Freeman developed a blood clot, lapsed into a coma and was placed on life support. On January 9, 2008, doctors declared him brain dead; the next day they pulled the plug. The county medical examiner ruled Freeman's death a homicide resulting from respiratory failure due to compression of his neck.

In his original report, Hartfield stated that Freeman had become unruly when he didn't receive an extra meal tray, and Sgt. Joyce Harris ordered him to escort Freeman to an isolation cell where he could file a grievance. Sgt. Harris verified Hartfield's version of events.

However, investigators learned that Harris had been outside the jail talking on a cell phone at the time of the incident, and therefore had no idea what actually happened. Both guards eventually admitted that they had lied.

Hartfield and Harris were fired on July 10, 2008. Yet after nine months of investigation and in spite of the medical examiner's homicide finding, a Harris County grand jury declined to indict either former guard in connection with Freeman's death. Instead, Hartfield was only charged with lying to investigators.

Quanell X, a local Houston community activist, expressed outrage at the grand jury's decision. "It's a disgrace that the Harris County grand jury system once again has allowed murderers to go free. It is a proven fact that the life of an African-American male means nothing to the Harris County grand jury system. The jail has become a place to go to die."

Freeman had been serving a two-year sentence at a state jail on a bad check charge. He was transferred to Harris County to testify in a murder trial, and was due to be released in September 2008.

His wife, Cherry Bradley-Freeman, suspects a cover-up. "He was not a dangerous villain. Him fighting a guard or hitting him in the face? I don't believe it," she said. "Somebody else in that jail

Inside

From the Editor	6
Habeas Hints	8
Torture in US Prisons	10
Maine Prison Turmoil	12
Guantanamo Not Closing	14
Children Tasered in Florida	17
Sacramento Jail Suit Settled	22
Florida Commissary Woes	25
Montana's Empty Jail	28
BOP FOIA Suit	30
PLN Sued CCA For Records	31
Los Angeles Pays \$7 Million	33
News in Brief	50

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Dying in Houston Jails (cont.)

besides Clarence and that guard knows what happened.”

The truth may never be revealed about the events that led to Freeman’s death. But one truth is inescapable: prisoners are dying in Houston jails – lots of them.

“A Place to Go to Die”

Between January 2001 and December 2006, more than 100 prisoner deaths were reported in Harris County jails. Most were pretrial detainees. [See: *PLN*, Sept. 2007, p.9]. Twenty-one prisoners died in 2008, and there have been nine deaths this year as of September 1. Other prisoners, including Johnell Patrick, died at the Houston Police Department’s city jail, which holds arrestees temporarily before they are moved to the Harris County jail system, which is operated by the sheriff’s department.

On June 9, 2007, Patrick died after he was left hogtied in a padded cell at the Houston city jail. Video footage showed Patrick face-down on the cell floor with his hands and legs cuffed behind his back. An autopsy found that Patrick’s death was accidental, due to cocaine and alcohol intoxication; it also revealed that he had fractured ribs, multiple blunt force injuries and subscalp hemorrhaging. The District Attorney’s office investigated but declined to refer the case to the grand jury.

Ram Chellaram, a medical specialist at the jail, was fired for failing to provide Patrick with adequate treatment. Chellaram countered that he was a scapegoat, and blamed officers who had violated protocol by hogtying Patrick.

Hogtying was banned by a number of law enforcement agencies in the 1990s after it was learned that the practice could cause positional asphyxia. It is common knowledge among corrections professionals that hogtying prisoners can be fatal, and the Texas Dept. of Criminal Justice prohibits the practice. Police officials denied that Patrick had been hogtied, stating he was placed in “interlocking” restraints. Houston Police Department spokesman John Cannon would not – or could not – explain the difference between hogtying and interlocking restraints.

Another prisoner who died at the Houston city jail was apparently brutalized before he got there. On July 21, 2007, Pedro Gonzales, Jr. was found dead in a holding cell, the apparent victim of a

severe beating. An autopsy found that Gonzales had multiple bruises and abrasions, eight broken ribs, a punctured lung, and was missing two front teeth. His family said his teeth were not missing before he was arrested. His death was ruled a homicide.

Gonzales had been arrested for public intoxication on July 18, 2008. He was released two days later and rearrested within two hours by Pasadena police officers Christopher S. Jones and Jason W. Buckaloo.

A 911 operator reported a police brutality call originating from the area where Jones and Buckaloo arrested Gonzales, but the report was never investigated. Both police officers claimed that Gonzales suffered his injuries when he tripped and fell on his way to the patrol car, but police officials later stated the officers had used “knee strikes” on Gonzales, who they said was resisting arrest. Jones and Buckaloo were charged with criminally negligent homicide but were acquitted at trial on June 2, 2008.

At the Harris County Jail, medical problems have proved fatal for a number of prisoners. On January 12, 2008, jail prisoner Margarita Saavedra, 44, died of sepsis resulting from a bacterial infection in her knee. Her family said she had complained about her knee for weeks but did not receive medical treatment. In August 2009, Saavedra’s family filed a lawsuit against Harris County officials, alleging medical malpractice and claiming that jail nurses had accused Margarita of faking her injury. See: *Casarze v. Harris County*, U.S.D.C. (S.D. Tex.), Case No. 4:09-cv-02786.

Other medical-related deaths at the Harris County Jail from 2007 to 2008 included a diabetic female prisoner who collapsed and died while waiting in the jail’s clinic, five days after seeking medical care; a prisoner with liver disease who died following a two-week delay in treatment, who had been housed in general population rather than the infirmary; and a psychotic prisoner who did not receive his prescribed medication and then died after being injected with a sedative by the jail’s medical personnel.

On June 20, 2009, Harris County jail prisoner Theresa Anthony, 29, died due to unknown causes. Sheriff’s officials would only say that jail staff responded to a medical call and that Anthony was transported to a hospital, where she was pronounced dead. An internal investigation and au-

Dying in Houston Jails (cont.)

topsy results are pending; Anthony was serving a two-and-a-half-week sentence for marijuana possession.

Town Hall Meetings and Investigations

In April 2008, Harris County jail guard Timothy Gough was charged with assaulting two prisoners. Michael Lagatta, who had been arrested for trespassing, accused Gough of taking him to a section of the jail with no surveillance cameras and beating him severely in the face. Lagatta was handcuffed at the time. Another prisoner raised similar allegations against Gough, who was freed on a \$30,000 bond after being booked.

On February 24, 2009, Gough pleaded guilty to a misdemeanor charge; as part of a plea bargain, he agreed not to work in corrections again. He also will serve no jail time. "Mr. Gough should be serving [a] jail sentence for beating up an innocent man, a defenseless man," Lagatta said in an interview. "That's what should have happened." Lagatta is pursuing a federal lawsuit against the county. See: *Lagatta v. Harris County*, U.S.D.C. (S.D. Tex.), Case No. 4:08-cv-03189.

Harris County is no stranger to litigation involving the sheriff's department. County officials settled a multimillion-dollar civil rights suit on March 3, 2008 after sheriff's deputies participating in a drug raid wrongfully arrested and brutalized Sean and Erik Ibarra. The Ibarra brothers were taking pictures of the raid at a nearby house, where deputies had forced several small children to remain on the front porch barefoot and in shorts in cold weather.

When the deputies realized they were being photographed, they stormed into the Ibarra's home, drew their guns, confiscated the cameras, assaulted Sean Ibarra and arrested both brothers. The ensuing court battle resulted in a \$1.7 million settlement plus \$1.3 million in attorney fees, and cost then-Harris County District Attorney Charles "Chuck" Rosenthal, Jr. his job. [See: *PLN*, Oct. 2008, p.20].

As a result of such incidents, the public outcry over Houston's out-of-control criminal justice system became so intense that it prompted U.S. Rep. Sheila Jackson Lee to schedule a town hall meeting. On July 18, 2008, Rep. Lee, accompanied by U.S. Rep. John Conyers, Jr., state Sena-

tor Mario Gallegos, State Rep. Harold Dutton and City Councilman M.J. Khan, listened to about 200 Houston citizens tell horror stories about how they had been abused or their loved ones had been mistreated or even killed at the hands of sheriff's deputies and jail guards.

Following the meeting, Rep. Conyers said, "I've been stunned. I've been shocked. I've been deeply moved by what I heard today."

However, problems involving the sheriff's department and jail should not have come as a surprise. The Harris County Jail has been under fire for years due to brutality, overcrowding and deficient medical care, and has failed several state inspections. [See: *PLN*, Jan. 2009, p.30; Jan. 2006, p.1].

On March 7, 2008, the Civil Rights Division of the U.S. Dept. of Justice (DOJ) notified Harris County officials that it would be investigating conditions at the jail. The investigation resulted in a June 4, 2009 report that acknowledged "In many ways, the Jail actually performs quite well." However, the 24-page report also concluded that "certain conditions at the Jail violate the constitutional rights of detainees." The DOJ said the "number of inmates deaths related to inadequate medical care ... is alarming," and found the jail had failed to provide prisoners with adequate medical and mental health care, protection from serious physical harm, and protection from "life safety hazards."

The report detailed a number of deficiencies in medical care by Harris County jail staff that resulted in prisoner deaths; the DOJ investigators also stated they had "serious concerns about the use of force at the Jail," which was described as "flawed." The report noted that jail officials did "not train staff that hogtying and choke holds are dangerous, prohibited practices."

Additionally, the DOJ cited overcrowding problems at the jail and observed that the Texas Jail Commission had granted waivers to allow Harris County to house 2,000 more prisoners than the facility's original design capacity. The county has had to send hundreds of jail detainees to Louisiana to relieve overcrowded conditions, at a cost of \$9 million a year. [See: *PLN*, Oct. 2008, p.28].

Overcrowding has exacerbated a number of other problems at the jail, including access to medical care and the ability of staff to ensure prisoners' safety. In the latter regard, the DOJ stated that

"in one recent ten month period, the Jail reported over 3,000 fights and 17 reported sexual assaults." At least 500 pretrial detainees at the jail have been incarcerated for over a year, which contributes to the overcrowding problem. The Harris County jail system holds over 11,000 prisoners.

In an unrelated investigation, Houston's city jails were found to be deficient, too. In a May 26, 2009 report, a court-appointed inspector found "filthy" conditions at the city jails and recommended that Houston build new detention facilities "with all due speed." After visiting one of the jails earlier this year, City Councilwoman Jolanda Jones called it "inhumane" and said prisoners were "being forced to live in subhuman conditions."

Houston's jails have been under a court-enforced consent decree resulting from a class-action suit filed in 1989, which requires quarterly inspections. The inspector, David Bogard, cited problems with the use of interlocking restraints on prisoners, an inadequate investigation into a prisoner's death, delays before arrestees were arraigned, and delays in follow-up medical care.

"We're doing the best we can," said Houston Police Captain Doug Perry, who is in charge of the city's jail division. Apparently, though, those best efforts have not been good enough.

Other Texas Jails Also Problematic

In all fairness, Houston does not have the only jails in Texas with serious shortcomings. In 2004, inspectors determined that the Dallas County Jail was dangerously short of smoke detectors and emergency ventilation systems. The facility had also failed every state inspection for years. [See: *PLN*, Nov. 2007, p.14]. So it was major news when jail officials finally began to install smoke detectors four years later, in June 2008.

It was only after a prisoner in a holding cell at the Nueces County Courthouse tampered with the plumbing and flooded a courtroom floor in May 2008 that state inspectors even realized prisoners were being held there. The following month, a female detainee tried to commit suicide in one of the holding cells. It had been decades since the cells were inspected, and the Texas Commission on Jail Standards admitted it "was not aware there were holding cells being utilized in the courthouse."

In Montague County, the sheriff and ten guards were indicted on Feb. 27, 2009 following an FBI investigation into sexual misconduct and contraband smuggling at the county jail, which was compared to the rowdy fraternity in "Animal House." [See: *PLN*, Sept. 2009, p.40; May 2009, p.1].

In June 2008, Rodney George Cole II, a guard at the Jefferson County Jail in Beaumont, was sentenced to one year on probation and a \$4,000 fine for assaulting prisoner Joseph Christopher Roberts. A video caught Cole hitting Roberts four times in the face, injuring his mouth.

When Roberts spit blood onto some jail paperwork, another Jefferson County guard, Johnny Lynn Vickery, Jr., threw him against a wall and smeared the bloody papers across his head and face. Vickery received a \$4,000 fine but no jail time or probation. At the time of the incident, Roberts was being held for unpaid parking tickets.

Adrienne Lemons, incarcerated at the Tarrant County Jail in Fort Worth, died on June 13, 2008 after being denied medication for an aggressive staph infection. Lemons had been diagnosed with Methicillin-resistant *Staphylococcus aureus* (MRSA) while at the Dallas County Jail. She received four days' worth of medication before she was transferred. When she arrived at Tarrant County, her paperwork indicated that she needed six more days of medication. She never received it.

When the pain from the MRSA infection became too much to bear, Lemons became suicidal. Jail staff placed her in segregation but did not check to see why she was in pain, which would have revealed her need for medical treatment. She died within hours after being taken to a local hospital.

The Tarrant County medical examiner determined that Lemons' death was caused by a "rapid and catastrophic" infection from "flesh-eating" pneumonia and septic shock. Doctors responsible for medical care at the jail insisted that Lemons had never informed them she was on medication. They also agreed that she probably would have lived had she received the additional six days of antibiotics. Like Roberts, Lemons had been arrested for unpaid parking tickets.

"It is a tragic thing that my sister goes in for some traffic tickets and comes out dead," said Lemons' brother, Shannon Woodrome. "I can see an infection killing someone in the 1600s or the 1700s, but that shouldn't happen today."

The More Things Don't Change

Harris County has made efforts to improve its jail system following the release of the DOJ's report last June – though such efforts were likely motivated, at least in part, by a desire to avoid a lawsuit by the U.S. Department of Justice. "We have been making, are making and will continue to make improvements to the way we operate at every level," said Harris County Sheriff Adrian Garcia.

The jail passed a surprise inspection by the Texas Commission on Jail Standards in late July 2009, after failing an April inspection due to overcrowding, malfunctioning intercoms and broken toilets. Harris County has also appointed a former district judge as its "jail czar" to act as a liaison between the jail and court systems.

Yet county officials remain in denial over the seriousness of the problems in their jails. On August 25, 2009, the County Attorney's office released a 300-page rebuttal to the DOJ report, arguing that "At no time ... has the jail not met constitutional standards." The County Attorney noted that million of dollars had been spent to computerize prisoners' medical records since the DOJ's inspection, and said "At the least, the jail system of the past and present meets minimal standards."

County Judge Ed Emmett opined that the DOJ report was "fairly positive It has some episodic events but it does not show a pattern of problems." Which is, of course, a very optimistic – and entirely incorrect – interpretation of the findings made by the DOJ, which said it could sue the county if improvements were not made.

Meanwhile, Harris County jail prisoners continue to die. On August 18, 2009, prisoner Daniel Aguirre, 20, fell into a coma and died after he was reportedly involved in several altercations with jail staff. His family has claimed he was "beat up by a jailer three times" and had his head slammed against a wall. An investigation is pending.

Year after year, *PLN* has reported

on the abysmal conditions in Texas jails. Time and again there have been empty promises of change from local leaders. Yet the number of deaths and the extent of abuse in jails in the Lone Star State continue to increase. Each new administration inherits the apathy of its predecessor, and Texas citizens unfortunate enough to find themselves in jail continue to pay a high price – up to and including their lives. ■

Sources: *Associated Press*, *Beaumont Enterprise*, *Dallas Morning News*, *Houston Chronicle*, *Fort Worth Star-Telegram*, www.houstonpress.com, www.kristv.com, *KTRK-TV Houston*, www.rawstory.com, <http://gritsforbreakfast.blogspot.com>

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From the Editor

by Paul Wright

On August 25, 2009, Senator Ted Kennedy died of brain cancer. With his passing prisoners lost one of the few advocates they had in the US Senate. Not surprisingly, mainstream media accounts largely ignored this aspect of Senator Kennedy's long career. Probably the highlight of this was his role on holding senate hearings in the mid 1970s on the use of prisoners as medical test subjects. The threat of legislation resulted in Health and Human Services regulations, still in effect today, which prohibit the use of prisoners in federally funded medical research. Until this happened virtually all drugs and cosmetics were tested on human prisoners, along with chemical and biological warfare agents and other items. Senator Kennedy was also instrumental in enacting the Americans With Disabilities Act and was always a reliable vote for legislation that not only benefitted all Americans, but also the most powerless and dispossessed of Americans as well.

He leaves a rich legacy behind him. Unlike many politicians, Senator Kennedy was consistent and his advocacy for the poor didn't change over time or with the political winds. American politics is an even more impoverished place with his passing.

By now readers should have received PLN's annual fundraiser letter. Like many other non profits, PLN has been affected by the economic downturn with smaller and less donations and grants. If you can afford to make a donation to support our work please do so. Every little bit helps.

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Fifth Circuit: Special Parole Review Request Doesn't Toll AEDPA Limitations

The Fifth Circuit Court of Appeals held that improperly-filed state habeas corpus applications and requests to the parole board for special review do not toll the one-year AEDPA limitations period established by 28 U.S.C. § 2244(d).

Barry Michael Wion, a Texas state prisoner, filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254, alleging that retroactive changes in Texas parole laws violated the Ex Post Facto Clause of the U.S. Constitution. The district court granted relief after holding that Wion's improperly-filed state application for a writ of habeas corpus and his request to the parole board for special review (which was denied) tolled the AEDPA limitations period. Alternatively, if they did not, equitable tolling should apply because Wion had diligently pursued his claims. [See: *PLN*, Feb. 2009, p.14].

The state appealed, and the Fifth Circuit held that a state prisoner is required to

exhaust all state procedures for relief before filing a federal habeas action. However, in contrast to the law governing prisoners who seek time credits, which requires them to exhaust a specific administrative remedy before filing a state petition for a writ of habeas corpus, nothing prevents a prisoner from filing a state habeas petition while a request for special review with the parole board is pending. Therefore, the pendency of a special parole review request does not toll the limitations period.

Wion had initially filed a state application for a writ of habeas corpus that was held for more than two months, then dismissed for non-compliance with state rules. He properly filed another state habeas petition, but it would have been after the limitations period if neither his request for special parole review nor the non-compliant state habeas application tolled the limitation period. The Fifth Circuit held that the AEDPA was specific in requiring that a state petition for

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post-conviction or other collateral review be “properly filed” to toll the limitations period. Wion’s non-compliant state application was not properly filed, and therefore his federal habeas petition was untimely.

Neither the request for special parole review nor the non-compliant state habeas application qualified for equitable tolling because they were not “rare and exceptional circumstances.” Therefore, the Fifth

Circuit reversed the decision of the district court and rendered judgment for the state due to the expired AEDPA limitations period. See: *Wion v. Quarterman*, 567 F.3d 146 (5th Cir. 2009). ■

Megan’s Law Preempts Local New Jersey Sex Offender Ordinances

The New Jersey Supreme Court affirmed a lower court’s order that invalidated two townships’ ordinances restricting where registered sex offenders could live. The March 24, 2009 ruling held that the statewide Megan’s Law takes precedence over local statutes that impose residency restrictions on sex offenders.

Before the state Supreme Court were consolidated appeals that challenged the invalidation of ordinances enacted by Galloway and Cherry Hill townships. Other than the penalties for violation, the ordinances were similar. Both prohibited convicted sex offenders from living within 2,500 feet of any school, park, playground or daycare center. Upon notification, affected sex offenders had to move within 60 days or face penalties.

G.H., a twenty-year-old freshman at Richard Stockton College, challenged the Galloway ordinance after he was advised

that he had to move from his college dormitory and could not live within 2,500 feet of the campus. G.H. was convicted when he was 15 of having criminal sexual contact with a 13-year-old.

The challenge against Cherry Hill’s ordinance, which made nearly the entire township off limits to sex offenders, was brought by convicted sex offenders James Barclay and Jeffrey Finguerra. They were the recipients of Section 8 housing allowances and had been approved to move into a motel within 2,500 feet of Camden Catholic High School by their parole or probation officers. When they failed to move within 60 days after notification by Cherry Hill officials, they were issued citations and later found guilty of violating the local residency restriction ordinance.

The Appellate Division concluded the townships’ ordinances conflicted with the policies and operational effect of the state-

wide scheme implemented by Megan’s Law. The comprehensiveness of Megan’s Law had been refined over a decade and provided for the rehabilitation and reintegration of convicted sex offenders into the community. Allowing local communities to create their own ordinances would interfere with and frustrate the purposes and operation of the statewide scheme, the appellate court held. See: *G.H. v. Township of Galloway*, 951 A.2d 221 (NJ App.Div. 2008).

The Supreme Court affirmed the Appellate Division’s finding that Megan’s Law preempted the Galloway and Cherry Hill ordinances, and declined to address “abstract” or hypothetical questions posed by the townships, “presumably to glean advice that might salvage an ordinance to replace the one invalidated.” See: *G.H. v. Township of Galloway*, 199 N.J. 135 (N.J. 2009). ■

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“Habeas Hints”

by Kent Russell

This column provides “habeas hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is on habeas corpus under AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

HABEAS YEAR IN REVIEW: 2009

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the prosecution cannot present “testimonial statements” – those prepared for the primary purpose of being used at trial – unless the defense has had an opportunity to cross-examine the author of the statement. In *Melendez-Diaz*, the Court held that laboratory reports, such as those commonly used to identify illegal drugs, are “testimonial” under *Crawford*, and hence cannot be used as evidence at trial unless the prosecutor brings the lab tech in as a “live” witness whom the defense can then cross-examine. Moreover, the mere right of the defense to have called the analyst as its own witness does not defeat the State’s obligation to produce that witness, since the Confrontation Clause requires that the State bear the consequences of any no-show by an analyst whose testimony the State must present in order to prove its case. Hence, and because the vast majority of states had previously permitted the prosecutor to introduce lab reports as “business records” without having to bring in the technician who prepared the report, *Melendez-Diaz* means that prosecutors will now have to incur the additional hassle and expense of bringing in lab technicians and analysts in to testify at trial. The defense at the trial level thereby benefits two-fold: first, by having the opportunity to use cross-examination to expose flaws in those lab analyses that may actually be faulty; and second, by having the ability in routine cases to force the prosecution to incur the added expense and uncertainty attendant to bringing in live witnesses, which can then lead to more favorable plea offers.

Nevertheless, these benefits that *Melendez-Diaz* confers on the defense at the trial level will not easily translate to

advantages on habeas corpus, for several reasons:

(a) Based on the “*Teague*” rule, a habeas corpus petitioner cannot benefit from a “new” rule of criminal procedure that was announced after his or her conviction became final on direct appeal. *Melendez-Diaz*, decided on June 25, 2009, is seemingly such a new rule. Hence, most prisoners, whose convictions became final well before that date, will not be able to make a tenable *Melendez-Diaz* claim on habeas corpus. Note, however, that one can argue that the result in *Melendez-Diaz* was “dictated” by *Crawford*, and if that contention holds water, then petitioners can employ *Melendez-Diaz* to challenge convictions which did not become final before March 8, 2004, when *Crawford* was decided.

(b) The petitioner in *Melendez-Diaz* had the foresight to make a Confrontation objection at trial, thereby preserving that claim for appeal, and forcing the Government to carry the burden of negating prejudice from any *Melendez-Diaz* violation, which is typically hard for the Government to do. (See, e.g., *Duvall v. United States*, --- A.2d ---, 2009 WL 2043963 (D.C. 2009) [*Melendez-Diaz* error not harmless even though identity of the substance was not contested and there was other evidence that it was an illegal drug].) If, however, no Confrontation objection was raised at the trial level, then raising the argument for the first time on appeal could preserve it for habeas, but the petitioner would have the burden of showing prejudice by the much tougher (although not impossible) standard of “plain error”. If the claim was not raised at trial or on appeal, it likely will be procedurally barred on habeas corpus.

(c) Many states have statutes that require the defense to give timely pre-trial notice to the prosecution of any intention to confront the analyst at trial, and the Supreme Court approved in principle of those types of rules. Therefore, if the State had such a notice procedure in a given case and the defendant failed to utilize it within the time limits provided, that could be fatal to asserting any *Melendez-Diaz* claim on appeal or on habeas.

(d) Just because the defense has the right to confront and cross-examine the analyst or lab technician does not mean

that a savvy defense attorney will actually want to do so. If a lawyer decides that a given forensic analysis is sound, s/he will very often decide that it’s far better to have the results read to the jury from a cold stipulation, rather than have the conclusions related “live” to the jury by a well-qualified expert witness for the prosecution. And, once the decision has been made to stipulate to the test results rather than force the State to bring in the analyst for live testimony, the defendant can’t later turn around on habeas corpus and complain that the stipulation was used in lieu of live testimony.

Habeas Hint:

As with any Supreme Court decision expanding the scope of constitutional rights, you have to look carefully before you leap into assuming that the decision is actually going to do you any good on habeas. That said, a defendant whose conviction was significantly based on laboratory tests that were introduced at trial without the analyst being called as a witness, and who can overcome the caveats listed above, should consider making a timely habeas corpus claim based on *Melendez-Diaz* error (or, derivatively on ineffective assistance of counsel in failing to assert a Confrontation objection to a questionable laboratory analysis). Furthermore, unless and until the Supreme Court says otherwise, petitioners should argue that *Melendez-Diaz* applies not only to laboratory reports, but also to other forensic reports that are prepared with the expectation that they will be used in criminal cases – for example: handwriting and fingerprint analyses; autopsy reports; and forensic statements regarding child sex abuse complainants.

District Attorney’s Office for Third Judicial District v. Osborne, 129 S.Ct. 2308 (2009)

In this case, the Supreme Court held that there was no Due Process right under the Constitution for a prisoner to obtain DNA testing results that might prove his innocence. On the face of it, this seems like a bad decision for habeas corpus petitioners. However, a closer reading of the case shows that it involved a civil rights lawsuit under 42 USC § 1983 – a completely different remedy than 28 U.S.C. § 2254, the habeas corpus statute – and that: (a)

the defendant's lawyer testified that she had purposefully *declined* to ask for any DNA testing at the trial level out of fear that it would prove that her client was *guilty*; and (b) the defendant had since *confessed* to committing the crime at his parole hearing.

Habeas Hints:

Because most petitioners seeking DNA testing on habeas corpus have never admitted that they are guilty, and didn't have trial lawyers who concede that they ran away from DNA testing at trial, the "bad" holding in *Osborne* – that there is no automatic Due Process right to DNA testing – is readily distinguishable. Meanwhile, some of the reasoning in *Osborne* is potentially helpful, for example:

Osborne denies a federal right to DNA testing based on the assumption that state courts are *already* affording a habeas corpus petitioner all the process and discovery he or she needs to obtain DNA evidence in an appropriate case, namely one where: (a) a conviction was based primarily on eye-witness testimony; (b) there is "doubt" regarding the identification; and (c) DNA testing would prove exonerating. Almost all legitimate DNA claims meet these criteria. Hence,

if a petitioner whose case meets these requirements attempts to utilize all available state law remedies to obtain DNA testing and the State refuses to provide it, the petitioner can argue that the State is not affording the Due Process that *Osborne* assumes that the States have to provide and are providing. Similarly, if the petitioner attempts to obtain post-conviction discovery of DNA results through the available State processes and the State won't provide it, the petitioner can argue that *Osborne* requires such discovery at *some* level, thereby establishing good cause for the federal court to grant DNA discovery under the rules allowing for limited discovery on federal habeas corpus.

Osborne holds that *Brady* does not automatically impose a requirement on the prosecution to disclose potentially favorable evidence post-conviction, but it does not hold that the State is automatically exempt from such an obligation. Rather, *Osborne* says that a *Brady* obligation exists on a case-by-case basis in the post-conviction context, depending on the degree to which fundamental fairness requires a post-conviction disclosure. Hence, consistently with *Osborne*, petitioners can maintain that the State has an obligation

to continue to disclose favorable evidence even after conviction, but should tailor a *Brady* request to the particular facts of the case rather than to any per se disclosure requirement.

Cone v. Bell, 129 S.Ct. 1769 (2009)

In *Cone*, the state had refused to consider a *Brady* claim made in a second state habeas corpus petition, either because the claim had been previously presented in the first state petition and had been denied (arguably making it "successive"), or because the claim had not been presented at all in the first petition ("waiver"). The federal circuit court had then automatically refused to consider the merits of the claim on the assumption that a federal court was barred from questioning any ruling by a state court that was based on the application of state law.

The Supreme Court reversed because the state court's reasoning in applying its own procedural rules to bar the *Brady* claim was unsound. As to the "successive claim" rationale, the Supreme Court found that it was bogus because a federal court is not barred from considering a claim that a state court declined to consider because it had been presented and rejected previ-



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Habeas Hints (cont.)

ously. (See *Ylst v. Nunnemaker*, 501 U.S. 797, 804, n. 3 (1991).) The Court then rejected the “waiver” rationale because the state had never actually denied the *Brady* claim on that basis.

Habeas Hint:

This decision is significant because it draws the line between a federal court “deferring” to the state courts on matters of state law; and automatically accepting all state court determinations of state no matter how fundamentally flawed or irrational they may be. Hence, where the state argues that a state procedural bar must be automatically accepted as a bar to federal court review, counter by arguing that:

A state’s refusal to consider a claim on habeas because that claim was previously denied in state court can never be a bar to federal habeas corpus review.

A state court procedural bar that relies on “false premises” is not binding in federal court.

A state procedural bar that is not based on principles that were “well-established” and “consistently applied” at the time is not binding in federal court. (See, e.g., *Townsend v. Knowles*, 562 F. 3d 1200 (9th Cir. 2009) [untimeliness ruling by a lower California court that was not supported by well-established case law was not “adequate” to prevent a hearing on the merits on federal habeas corpus].)

Phelps v. Alameida, 569 F. 3d 1120 (9th Cir. 2009)

This eloquent 35-page decision by Judge Stephen Reinhardt holds that Rule 60(b) – rather than the back-breaking “successive petition” provisions under 28 U.S.C. § 2244(b)(3)(A) – can be used to challenge a habeas corpus petition that was denied on a procedural basis, where fairness and equity demand relief. The specific equitable principles cited in *Phelps* were lack of clarity in the law at the time of the original denial; subsequent change in the law favoring petitioner’s original arguments; diligence in seeking review after the law changed; and the fact that the petitioner was not challenging the merits of the denial. Where a prior federal habeas corpus petition was denied solely on procedural grounds and these or other similarly compelling equitable considerations are present, one should use Rule 60(b) to attempt to set aside the dismissal. ■

Kent A. Russell specializes in habeas corpus and is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus under AEDPA. The 5th Edition, completely revised in September of 2006 and seasonally updated since then, can be purchased for \$49.99, which includes priority mail postage. Prisoners who are pay-

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Perpetrators and Enablers of Torture in the US

by Corey Weinstein, MD, CCHP

During the past 25 years I’ve spent a lot of time with survivors of torture, men and women enduring long term solitary confinement in California’s prisons. They are the most urgent victims of US mass incarceration with its overcrowded facilities and policy of incapacitation, not rehabilitation.

Those thousands held in solitary for years on end report the expected classic symptoms of psychic disturbance, mental deterioration and social disruption. As described by various penal psychiatric experts, the symptoms of this syndrome include massive free-floating anxiety, hyperresponsiveness to external stimuli, perceptual distortions and hallucinations, a feeling of unreality, difficulty with concentration and memory, acute confusional states, the emergence of primitive aggressive fantasies, persecutory ideation, motor excitement, and violent destructive or self-mutilatory outbursts. The degrading conditions produce behaviors ranging from fights among prisoners to assaults on staff, assaults by staff, excrement throwing, self mutilation and contract killings. Isolation tears apart family and friendship ties creating social dislocation.

In California there are about 4,000 men and women held in the State’s supermax facilities called Security Housing Units (including 600 serving SHU terms in Administrative Segregation). That is 2.5% of the total population of 160,000. The regime in SHU is a 23.5 hour per day lockdown in the 8’ X 10’ cell with no communal activities aside from small group exercise yards for some. There is no work, no school, no communal worship and meals are eaten in cell. TVs and radios must be purchased, so the poor have none. Visits are noncontact, behind glass and limited to 1-2 hours on each weekend visit day. Each prisoner must submit to being handcuffed behind the back in order to exit the cell. Leg iron hobble chains are commonly used.

More than 50% of the men in SHU are assigned indeterminate terms there because of alleged gang membership or activity. The only program that the California Department of Corrections and Rehabilitation (CDCr) offers to them is to debrief. The single way offered to earn their way out of SHU is to tell departmental gang investigators everything they know about gang membership and activities including describing crimes they have committed. The Department calls it debriefing. The prisoners call it “snitch, parole or die.” The only ways out are to snitch, finish the prison term or die. The protection against self incrimination is collapsed in the service of anti-gang investigation.

CDCr asserts that the lockdown and snitch policy are required for the safety and security of the institution. Having legitimate penalogical purpose, the SHU program is deemed worth any harm done to the prisoners. California prisons continue to have a high rate of assaultive incidents among prisoners and from prisoners to staff. There is no proof or even any study that demonstrates that these measures are effective anti-gang measures. They appear to be no more useful than previous brutalities like that unleashed at Corcoran prison more than a decade ago. .

Between 1988 and 1995 CDCr ran a program at the Corcoran SHU called the Integrated Yard Policy. Rival gang members were deliberately mixed together in small group exercise yards. The prisoners had to fight, and fight well or be punished by their own gangs. When the fights occurred guards were required to fire first anti-riot guns and then assault rifles at the combatants. Seven prisoners were killed and hundreds wounded. The program of beating prisoners down into the concrete with gunfire resulted in bigger stronger gangs with new martyrs and heroes. Mayhem and violence was added to the prison

social system by departmental policy. No CDCr official has ever been held accountable or even assigned responsibility for what was known at Corcoran as the gladiator days. Line staff brought to trial by the US Department of Justice avoided criminal convictions by proving that they were just following orders.

There are four prisons in California with SHUs: Corcoran, Pelican Bay and Tehachapi for men and Valley State Prison for Women. Only a few women have ever been given a SHU term for gang activity. All those identified as gang members by the administrative kangaroo court serve SHU terms without end. The only way out is to debrief, to testify against oneself to prison rules violations and crimes.

Prisoners have found it very hard to attack the abuses in the SHU, even though the US is under the jurisdiction of the UN Convention Against Torture (CAT). The US states reservations to the treaty asserting that the US Constitution and body of law are all that is required to satisfy the obligations of CAT. But the 1995 Prison Litigation Reform Act (PLRA) that prohibits a prisoner bringing action for mental or emotional injury without prior showing of physical injury is one law that violates CAT. The UN Committee on Torture expressed concern that by disallowing compensation for psychic abuse the PLRA is out of compliance with CAT.

Under CAT torture includes, "...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted..." But the US 1990 reservations to CAT were designed specifically to allow solitary confinement

as the reservations state that mental pain and suffering must be prolonged, be tied to infliction or threats of infliction of physical pain, the result of drugging or the result of death threats.

Despite SHU confinement without end to attempt to control gangs, prison gangs thrive in California's prisons. The gang leadership predictably uses the snitch sessions to falsely target their rivals, or just recruit new members. Just as we have seen in US anti-terror investigations, information derived from coercion is often unreliable.


Using indeterminate total lockdown to extract confessions is torture by international standards, as is the use of prolonged solitary confinement. US prison officials order by rule the torture of prisoners. 1 in 31 adults in the US are under the supervision of the criminal detention system (jail, prison, probation or parole) with 2.5 million behind bars. Prisons dominate the lives of poor communities and communities of color and are ignored by affluent white America. 1 in 11 African-Americans and 1 in 27 Latino-Americans are under penal jurisdiction. Prisoners damaged by incarceration are returning to communities increasingly less able to absorb them. The 2005 census found that severe poverty increased 26% more than the overall growth in poverty. In 2002 43% of the nation's poor were living in severe poverty, the highest rate since 1975.

Torture has always served more to beat down a population than to extract reliable information. The unstated goal is to incapacitate

and marginalize the dangerous poor who are locked out of America's opportunity and riches. The routine even banal nature of torture in US prisons enables torture to be acceptable, and informs our failing strategies of dealing with any opposition by using brute force.

A more useful way to undermine and blunt prison gangs would be to provide programs and procedures that enliven the community of prisoners with rehabilitative activity making them too busy and too hopeful to become involved. Drug and mental health treatment and education and vocational training rather than enforced idleness and despair will help change the culture of the prison yard from a battleground to a place for personal and social renewal. To be successful at a renewal behind bars, a revitalization of our poor communities is desperately needed.

I'll never forget my visit to several prisons in the United Kingdom a number of years ago. I toured one of their high security units housing eight of the forty men out of 75,000 considered too dangerous or disruptive to be in any other facility. The men were out of their cells at exercise or at a computer or with a counselor or teacher. The goal was to get them back on mainline through rehabilitation not terror. With embarrassment the host took us to the one cell holding the single individual who had to be continuously locked down and cuffed and hobbled before exit from his cell. I was equally embarrassed to tell our guide that this is how 2.5% of US prisoners are routinely treated. ■



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Maine Prison in Turmoil

by Lance Tapley

By the time Warden Jeffrey Merrill revealed on June 3 that three Maine State Prison employees had been put on paid leave as a result of a state police investigation of an inmate's death in April, probes of corruption and other issues at the 925-prisoner lockup had already cast a harsh light on its management.

Governor John Baldacci said on June 4 he was "concerned about the apparent circumstances of the death" of 64-year-old sex offender Sheldon Weinstein, who died in his cell in the Warren prison's solitary-confinement "Supermax" unit on April 24. He had been beaten four days earlier, and police are investigating inmates as suspects in what they term a homicide.

But several prison sources said Weinstein also had been refused proper medical treatment, and that this is the reason the employees were put on leave. On June 10, the Maine State Police said he died of "blunt force trauma," but would confirm little else.

A prison chaplain, former state representative Stan Moody, of Manchester, said he hopes Weinstein's death "will lead to widespread reform" within the prison. "Sadly, change often comes about through tragedy." He believes he was one of the last people to talk with Weinstein.

Commenting on the prison's mounting troubles, Baldacci also said in his June 4 statement he was confident Corrections Commissioner Martin Magnusson "will take appropriate disciplinary steps, if necessary, and correct any identified problems" at the prison. He expressed "complete confidence" in Magnusson: "He has been aggressive in his pursuit of allegations that have been made concerning the treatment of prisoners or other activities within the prison system."

Weinstein, who — in addition to injuries from his beating — suffered from diabetes, had moved about the prison in a wheelchair. He had asked for medical attention in the late afternoon of the day of his death, it was refused "because he's a sex offender," and he was found dead in his cell when guards did the 6 pm "count" of prisoners, according to Michael James, a Supermax prisoner at the time who was interviewed at the Riverview Psychiatric Center in Augusta, where he is now a patient.

James said Weinstein had been beaten by prisoners because he was a "skinner," the prison slang for sex offender. Several prisoners reportedly have been put in the Supermax's isolation cells as suspects in the beating, but officials would not confirm this. Violent inmates often target sex offenders. After his beating, Weinstein was moved out of the prison's general population to a cell in the Supermax (officially called the Special Management Unit).

Officials would not identify the employees placed on leave in the incident, who now face an internal investigation. James said guards as well as prisoners treated Weinstein with hostility. Despite the shadow over the prison's treatment of Weinstein's injuries, Maine State Police spokesman Stephen McCausland said his agency was "not looking at Corrections personnel as having any role" in the homicide.

Arrested in 2007, Weinstein, a retired salesman, had been sentenced last fall to two years in prison after pleading guilty to sexual assault several years ago against a young girl, a relative, in Berwick, where his family has a home. His residence in recent years had been in New Hartford, New York, though he stayed in Berwick awaiting the outcome of his criminal case.

His widow, Janet Weinstein, of New Hartford, said her estranged husband had broken a shoulder and a leg in a fall from a bunk at the Maine Correctional Center in Windham, but had recently been transferred to the Warren prison because of his need for physical rehabilitation.

"Why was a 64-year-old man sentenced to a sex crime, in a wheelchair, [put] in the general population?" of a maximum-security prison, she asked, very upset, in a phone interview.

Her lawyer, Scott Gardner, of Saco, who represented Sheldon Weinstein in his sex-abuse case, said as a convicted sex abuser Weinstein "was hypersensitive to his own safety," and he would have protested any risk he faced. He described Weinstein as "extremely frail."

Gardner said a suit against the state for damages is under consideration.

The state police officer who had called Janet Weinstein on June 10 to tell her the death was a homicide provided few details in a "confusing" conversation, she said. And when she was informed of his

death in April a Corrections Department officer had told her that her husband had died "apparently from natural causes," she said.

(Ironically, before he entered the prison system, Weinstein had called the *Phoenix* to express fears that, because he was a diabetic, he would "be killed" by the prison diet.)

This case is not the only recent example of prisoner-on-prisoner violence. On June 3 Warden Merrill told the Rockland *Herald Gazette* that a prisoner had been recently stabbed by another prisoner using a "shank," a homemade knife. The victim was not seriously injured, and the suspect was put in the Supermax, he said, but he disclosed little other information. Last year, Magnusson, in discussing a hostage-taking incident at the prison, told the Legislature's Criminal Justice Committee, "There are probably 300 inmates right now with a weapon in their hand." Legislators expressed no interest in this fact.

Investigations of corruption and prison 'culture'

Some legislators, however, are expressing an interest in the prison. State investigations they launched in March have produced several reports critical of the prison's management. (See "Lawmakers to Probe the Prison," by Lance Tapley, April 10.)

The state controller's office, which audits state agencies, told the Legislature's Government Oversight Committee on May 22 that the prison's two auto-repair garages, which employ inmates as workers, have such poor financial controls, including "inaccurate accounting" and poor documentation, that "it would have been difficult to find" fraud or theft had it occurred, according to auditor Ruth Quirion.

Her department's detailed written report said complaints about corruption at the auto-restoration programs had been, for years, "not only numerous but continuous." Later, in e-mails, Controller Edward Karass said other government agencies, including the FBI and the state attorney general, had been looking into the allegations since 1994, but they had not found proof of wrongdoing.

However, because the auto programs

performed work for prison employees and their family members without charging for labor, there was a "conflict of interest" and an opportunity for improper personal gain, Quirion told the committee.

Oversight Committee member Richard Nass, a Republican senator from Acton, suggested the prison forbid employees from having any work done for them by prisoners, citing complaints also about two wooden sleighs restored for Warden Merrill in the woodshop. (The controller's office found that Merrill had paid \$1,295 for the work.)

At a previous committee meeting, on May 8, the controller's office had reported it had not found evidence to support allegations by former and current employees that prison personnel had stolen state equipment and supplies or used them for private purposes, or that prison officers dipped inappropriately into a privately established fund dedicated to inmate self-improvement.

But in another report submitted to the committee on that date, the Legislature's nonpartisan Office of Program Evaluation and Government Oversight (OPEGA) found a troubling management-employee "culture," and strongly advocated reform. The report zeroed in on complaints about management "intimidation of, and retaliation against, individuals attempting to raise concerns," an atmosphere that may result in employees not reporting "unethical" situations. Employees also sometimes felt harassed or discriminated against by their superiors, the report said, and there was a general lack of respect for management. (For more on these issues, see "Falling Down," by Lance Tapley, November 5, 2008.)

At the May 8 meeting, OPEGA's direc-

tor, Beth Ashcroft, had recommended the committee decide between two options: allow OPEGA to deepen its investigation of the need for reform, or have Corrections immediately develop a plan to reform its culture and start implementing the plan with the help of the National Institute of Corrections, a federal agency that has already done some work to improve the way the prison is run.

The committee chose the second option, and on May 22 asked OPEGA to keep tabs on the progress of reform, working with the Legislature's Criminal Justice Committee, which has day-to-day oversight of Corrections. The Democratic-controlled Legislature — especially the Criminal Justice Committee — has traditionally been reluctant to second-guess Democrat Baldacci's Corrections Department.

Commissioner Magnusson responded to the committee's concerns by noting that he had shut down one of the auto-repair programs, Saving Cars Behind Bars, in which inmates restored classic "muscle cars." He said he was taking the controller's report "very seriously," promising to improve the remaining programs.

Although Magnusson appeared apologetic about the prison's operations and determined to fix them, in an interview outside the committee room he sang a different tune. He said he saw no reason to fire or discipline anyone because of what the

controller's office and OPEGA investigators had found. Mostly, they discovered "some accounting problems," he said, and as for the prison-culture issue, "We have dealt with it," citing several training initiatives.

Prisoner-rights activist Ron Huber, of Rockland, said he believes it's a mistake for the Oversight Committee to allow Corrections to oversee the reform of a prison because of the inherent conflict of interest. He said activists will monitor the reform process.

Although Moody, the prison chaplain and former politician, is hopeful Weinstein's death will catalyze change at the prison, he doesn't see much happening, realistically, in the short term: "It would be politically nearly impossible at the end of an eight-year-term for a governor and commissioner to initiate major change. That will be a top agenda item for the next administration." ■

This article originally appeared in the Portland Phoenix. It is reprinted with the author's permission. Lance Tapley can be reached at ltapley@roadrunner.com.

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Obama Promises Guantanamo Will Close and Torture Will End ... but When?

by Matt Clarke

During last year's election campaign, President Obama came out forcefully against torture by U.S. officials and in favor of closing the military prison at Guantanamo Bay, Cuba, which holds approximately 230 alleged "terrorism" suspects. However, what Obama has done on these issues since taking office is another matter.

Two days after his inauguration, Obama promised to close Guantanamo within a year, even signing an executive order to that effect. Since then, members of his own party as well as political opponents have moved to prevent that from happening.

Last June, Congress stripped \$80 million needed to close Guantanamo out of a \$106 billion war funding bill. The bill, which was signed by President Obama on June 23, 2009, also allows Guantanamo prisoners to be moved to the U.S. for prosecution but not for permanent detention or release. The latter restrictions were spurred in part because several U.S. cities, including Hardin, Montana, volunteered to house maximum-security prisoners from Guantanamo. [See related article in this issue of *PLN*]

Most visible among the Guantanamo detainees who have been cleared of "terrorist" activities is a group of 17 Uighurs. Uighurs are a largely Muslim minority ethnic group who primarily reside in western China. The Uighurs were captured in Pakistan by private bounty hunters who, in exchange for large cash rewards, turned them over to U.S. officials as suspected terrorists. In fact, the Uighurs were refugees from widespread persecution in China. Years of investigation have proven that the Uighurs were not involved with resistance to US forces in the region. Nonetheless, they remain imprisoned at Guantanamo because they cannot be returned to China due to possible mistreatment, nor can they be settled in the U.S. due to the restrictions imposed by Congress.

Beyond the Obama administration's difficulty in closing Guantanamo is the expansion of another secretive military prison in Afghanistan. Located a few miles north of Kabul, Bagram Air Force Base contains a prison that eclipses Guantanamo in terms of prisoner abuse.

Bagram is the only facility named by every prisoner interviewed by the Red Cross in its investigation of abuse at overseas U.S. military prisons. [See: *PLN*, May 2006, p.14].

Bagram currently holds about 600 prisoners in primitive conditions. However, the facility is scheduled for a \$60 million, 1,100-bed expansion with the blessing of the Obama administration. Thus, while reducing the total "war-on-terror" prison beds with the proposed closure of Guantanamo, there will be a net increase due to the 1,110-bed expansion at Bagram.

Also of concern is the Obama administration's legal stance toward the prisoners incarcerated at Bagram. Four Bagram detainees are fighting in federal court to gain the same access to the U.S. court system that a prior Supreme Court decision applied to prisoners at Guantanamo. As under former President Bush, the Obama administration has resisted giving Bagram detainees any such rights.

On April 2, 2009, the U.S. District Court over the Bagram case refused to dismiss habeas petitions filed by three non-Afghan detainees, holding they could seek relief in U.S. courts. See: *Al Maqaleh v. Gates*, 604 F.Supp. 205 (D.D.C. 2009). The district court based its decision on the Supreme Court's prior ruling in a similar case related to Guantanamo prisoners. See: *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) [*PLN*, Dec. 2008, p.20].

On the day that Obama promised to close Guantanamo, the judge in *Al Maqaleh* said the President's executive order "indicated significant changes in the government's approach to the detention, and review of detention, of individuals currently held at Guantanamo Bay," and asked the government to "refine" its legal position since "a different approach could impact the court's analysis of certain issues central to the resolution" of the Bagram case. The Attorney General's reply was a terse, one-line statement that it would "adhere to its previously articulated position [under the Bush administration]."

This was a crushing blow to human rights groups – especially considering

that U.S. personnel have been convicted of abusing prisoners at Bagram. In fact, a military report documented at least two cases in which Bagram detainees were beaten to death. The Obama administration has since appealed the district court's ruling in *Al Maqaleh*, in an effort to close U.S. courthouse doors to Bagram prisoners.

In April 2009, the ACLU filed a Freedom of Information Act (FOIA) request related to the detention and treatment of detainees at Bagram. "Bagram prisoners reportedly receive an even less robust and meaningful process for challenging their detention and designation as 'enemy combatants' than the process afforded prisoners at [Guantanamo] – a process the U.S. Supreme Court declared unconstitutional last year," stated ACLU staff attorney Melissa Goodman. "There is renewed public concern that Bagram has become, in effect, the new Guantanamo."

In an August 18, 2009 *ABC News* report, the White House declined to comment on the ACLU's FOIA request. "Despite President Obama's rhetoric regarding the closure of Guantanamo, his administration claims the right to use Bagram to imprison people indefinitely and deny them human rights," said Tina Monshipour Foster, executive director of the International Justice Network.

On August 24, the *New York Times* reported that "renditions" of terrorism suspects by U.S. officials to other countries for detention and torture and interrogation, which took place under the Clinton and Bush presidencies, would continue under the Obama administration – only with closer monitoring and oversight. Typically, suspects have been sent to countries with a history of torture. The decision to continue using renditions was made by the Dept. of Justice's Interrogation and Transfer Policy Task Force.

Further, President Obama has decided to continue the use of military commissions to try "terrorism" suspects, calling them "appropriate" and "legitimate." The military commission process will be reformed, however, to bring it "in

line with the rule of law.” For example, statements obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admissible as evidence.

In late August 2009, seven months after President Obama took office, the U.S. Attorney General appointed John Durham as a special prosecutor to investigate whether CIA officials or contractors had illegally tortured terrorism suspects. It is considered unlikely that the investigation will extend to top-level officials in the Bush administration such as former Vice President Dick Cheney or former Attorney General Albert Gonzales. President Obama had previously said he was not in favor of prosecuting officials from the previous administration who may have committed crimes, stating he wanted to “look forward, not backwards.”

Meanwhile, Guantanamo prisoners who have been cleared of resistance activity continue to struggle for their release. Two detainees have been accepted by Portugal, and two by Ireland. Three Guantanamo prisoners were sent to Saudi Arabia, and Italy and Germany have indicated they would consider taking some detainees.

In September 2009, three Uighur prisoners accepted an offer to relocate to Palau, a small island nation in the Pacific. They had been held at Guantanamo for years, even after U.S. military officials determined they were not enemy combatants. Previously, four Uighur detainees were accepted by Bermuda.

The deadline for President Obama’s

promise to close Guantanamo is January 2010. “I don’t have a crystal ball that I can say with certainty [that will happen],” stated John Brennan, the Obama administration’s senior counterterrorism advisor. White House press secretary Robert Gibbs was more optimistic. “It’s our full intention to close down Guantanamo Bay per the president’s direction. We’re doing everything possible to ensure that we are able to meet that directive and meet that deadline,” he said.


But even if Guantanamo closes as scheduled, what is the advantage when hundreds of other prisoners are housed at Bagram and the Obama administration continues Bush-era policies of renditions,

military commissions, indefinite detention, and denying legal protections to detainees in overseas U.S. military prisons? For the victims of imprisonment without trial or end, of renditions and torture the only change they can believe in is that of a new presidential administration carrying out the policies and practices of predecessors. Readers can note that date, not a single prisoner has been released from Guantanamo due to court action. ■

Sources: www.alternet.org, www.village-voice.com, *ABC News*, *New York Times*, www.propublica.org, *Miami Herald*, *Washington Post*

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Human Rights Watch Report Calls to Reform PLRA

by David M. Reutter

“The PLRA has had a devastating effect on the ability of incarcerated persons to protect their health and safety and vindicate other fundamental rights,” concludes a June 2009 report titled *No Equal Justice: The Prison Litigation Reform Act [PLRA] in the United States*. The report was published by Human Rights Watch.

No Equal Justice says the PLRA places a host of burdens and restrictions on lawsuits filed by prisoners and that apply to no other persons. Those restrictions result in prisoners seeking the protection of the courts against unhealthy or dangerous conditions of confinement or a remedy for sexual assault and other injuries inflicted by prison staff and prisoners having had their cases thrown out of court.

In addition to detailing the circumstances of such cases, the report draws on interviews with former prison officials, prisoners denied remedies for abuse, and criminal justice experts to examine the PLRA's effect on prisoners' access to justice. *No Equal Justice* then makes recommendations on amending the PLRA.

The report begins by examining the United States' prison population and oversight with that of other industrialized democracies. With 760 incarcerated persons for every 100,000 residents, the U.S. rate of imprisonment is five to ten times higher than other democracies.

Unlike those democracies, “the United States has no independent national agency that monitors prison conditions and enforces minimal standards of health, safety, and humane treatment.” By contrast, Great Britain has an Inspectorate of Prisons and 46 European states' prisons are supplementarily monitored by a European Council committee.

Another departure from the practice of developed democracies is that most U.S. prisoners are denied the right to vote. Other democracies either allow prisoners to vote or only disenfranchise a small proportion of prisoners. Recognizing the U.S.'s disenfranchisement of prisoners, the U.S. Supreme Court has said, “Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most fundamental political right, because [it is the] preservative of all rights.”

Prior to enactment of the PLRA, the US prison system was transformed primarily through litigation rather than via executive or legislative action. With the enactment of the PLRA, prisoner litigation quickly took a swift dive. Despite the prison population growing 10% between 1995 and 1997, federal civil rights filings by prisoners fell 33%. That trend continued. Using the 1995 level as the yardstick prisoner filings fell by 43% by 2001 while the population grew 23%. By 2006, prisoner filings had fallen 60%.

The report's first recommendation is to remove the PLRA's requirement that courts dismiss lawsuits because the prisoners have not exhausted the prison or jail grievance system, replacing it with a provision to allow courts to temporarily stay the action while the prisoners take their complaints through the grievance system.

When grievance systems were created in the 1970's, it was never contemplated that a misstep in the process could result in a prisoner forfeiting the right to file in court. That, however, is exactly what happens under the PLRA without any exceptions being made or excuses allowed.

“A basic structural problem with the exhaustion requirement is that prison officials themselves – the defendants in most lawsuits brought by prisoners – typically design the grievance system which prisoners must exhaust before filing suit,” states the report.

The first problem with most grievance procedures is that the issue must usually be raised with the staff member involved, which usually results in retaliation. A more major problem is that the exhaustion requirement shortens the statute of limitations from years to a few days in most cases. Courts refuse to excuse the failure to comply with those deadlines even where extenuating circumstances exist. The report details cases where prison officials created those circumstances or where prisoner suits were dismissed for technical grievance errors.

Next, the report recommends allowing prisoners to recover compensation for mental or emotional injuries on the same basis as non-prisoners. Not only has the PLRA immunized rape by

foreclosing cases of rape for failure to exhaust administrative remedies, but some courts have prohibited compensation on grounds that rape does not result in physical injuries.

Under the PLRA, a prisoner may not sue “for mental or emotional injury suffered while in custody without a prior showing of physical injury.” The courts have extended this to situations where it felt that the physical injuries were *de minimus*. The report details numerous instances where prisoners have been denied compensation for injuries that would be compensable if the litigant were not a prisoner. Many entail serious mental trauma, racial discrimination, denial of the right to practice religion, sexual assault, long term unjustified segregation, and even torture.

Finally, the report recommends removing from the scope of the PLRA persons held in juvenile detention facilities and persons under age 18 held in adult prisons and jails. “In most other settings, society recognizes the limited abilities of children by permitting (and in many other cases requiring) their parents or other adults to act on their behalf,” states the report. “However, federal courts have ruled that the efforts of parents or other adults on behalf of incarcerated children do not satisfy the PLRA's exhaustion requirement.” Thus, vindicating the legal rights of detained youth has become difficult due to their inability to fulfill the requirement because educational or maturity issues.

The PLRA was intended to discourage the filing of frivolous or meritless lawsuits. Yet, rather than prisoners winning a larger percentage of suits, the opposite is occurring, which suggests “that rather than filtering out meritless lawsuits, the PLRA has simply tilted the playing field against prisoners across the board.”

The report, following the heels of an American Bar Association resolution and a recommendation by the Commission on Safety and Abuse in America's Prisons, says it's time to reform the PLRA and amend the law “to restore the rule of law to US prisons, jails, and juvenile facilities, and ensure that ‘equal protection of the laws’ is not an empty promise.” The report is available on PLN's website. ■

Florida Prison Guards Fired, Suspended for Shocking Children with Stun Guns

by David M. Reutter

The Florida Department of Corrections (FDOC) has fired three guards, demoted a warden and disciplined other employees following an investigation into dozens of children being shocked with stun guns during "Take Our Daughters and Sons to Work Day" on April 23, 2009. Apparently, some FDOC employees wanted to give their kids a demonstration of how they treat prisoners while on the job.

What started as an investigation into an incident at the Franklin Correctional Institution (FCI) expanded after similar incidents were disclosed at two other state prisons. The investigation began when the father of a 12-year-old girl filed a lawsuit after his daughter was shocked by an FCI guard with a 50,000 volt stun gun. The jolt knocked her to the ground, causing abrasions and trauma that required a doctor's treatment.

That guard, who was not identified, shocked at least six children. Frank Gonzalez, owner of Self-Defense USA, a large stun gun company in San Diego, described the 50,000-volt shock as "similar to grabbing a live wire in your house with a wet hand – like a hard punch in the stomach with the added trauma of electricity running through your body."

The father of the 12-year-old filed suit after he objected to the use of a stun gun on his daughter, which had been approved by the child's mother, who works at FCI. The child's parents are separated. "These devices are designed for stopping dangerous prisoners and can cause injury or death," said attorney Matthew Foster. "They are not for experimenting on children."

The FDOC agreed. "There are very clear rules about when, where, and who these devices are to be used on, and all officers are clearly trained in this. So we don't yet know how this could have happened at three facilities on the same day," said FDOC spokeswoman Gretl Plessinger.

The children involved were between the ages of 5 and 17. The stun guns require bodily contact. They normally knock victims to the ground, cause a few minutes of disorientation and leave

two small burn marks. In some cases the children were shocked individually; in others they held hands in a circle and the shock was passed through them. The only child who was identified as being shocked was the daughter of the warden at Indian River Correctional Institution (IRCI), which houses male juvenile offenders from 14 to 18 years old.

Five IRCI employees were suspended, including Major Seth Adams, Sgt. Charmaine Davis, Sgt. Linda Rosada, Lt. P.J. Weisner and guard Steve Rich. The use of stun guns on children visiting the Martin Correctional Institution resulted in suspensions of Lt. Russell Bourgault, secretary specialist Annette Ennis, guard Randy Kartner, secretary specialist Kory L. Rupp and guard Thomas Skillings.

Bourgault, Davis and Sgt. Walter Schmidt were subsequently fired, while Adams and Weisner resigned – though Weisner said the stun gun demonstration was a "common practice." Sixteen other FDOC employees were disciplined, ranging from suspensions and demotions to written reprimands. On May 15, 2009, IRCI warden Ricky Dixon was demoted to assistant warden and transferred to another facility.

According to a July 7, 2009 news report, more than 40 children were shocked with stun guns at FCI, IRCI and Martin; those who were shocked reportedly were told they could be first in line to get hamburgers and hotdogs. Some of the children's parents were asked for permis-

sion and some were not. While similar incidents involving children being shocked by FDOC staff may have occurred in previous years, this was the first time it was reported.

"We believe this behavior is inexcusable," said FDOC Secretary Walter McNeil. "I apologize to the children and parents. None of these kids should have been exposed to these devices."

The FDOC is also investigating an incident that occurred the same day as the inappropriate use of stun guns by prison staff, in which children were unintentionally exposed to tear gas at the Lake Correctional Institution.

Ironically, at the time the shocking incidents occurred, prison officials said stun guns had not been used on any FDOC prisoners since the beginning of 2009. ■

Sources: *St. Petersburg Times*, *Associated Press*, www.tcpalm.com



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Problems at Washington's Civil Commitment Center Continue

by Matt Clarke

On July 30, 2008, Paepaega Matautia, Jr., 39, a mail room guard at the Special Commitment Center (SCC) for sex offenders on McNeil Island in Washington state, was arrested on federal charges of attempting to possess and distribute crack cocaine at the facility. The next day, SCC resident (the SCC term for prisoner) Lawrence Williams, 50, was arrested for conspiracy to distribute crack cocaine and witness tampering.

Matautia, who had worked at SCC since December 2003, reportedly delivered drugs to Williams at least eight times. Williams had been incarcerated at SCC since he was civilly committed after his sentence for a first-degree rape conviction expired in August 2002.

On December 12, 2008, Matautia pleaded guilty to one count of attempting to possess and distribute cocaine; he has not yet been sentenced. Williams pleaded guilty on April 13, 2009, but later sought to withdraw the plea after he accused the government of breaching the terms of the agreement.

The arrests of Matautia and Williams are not the only incidents to occur at SCC, which holds 280 men and one woman under prison-like conditions, complete with razor-wire fences and video surveillance cameras. In 2006 and 2007, SCC staff discovered contraband 230 times. The contraband included at least two instances of child porn on computers, unauthorized video games, Xboxes, Playstations, cell phones hidden inside shoes, "inappropriate" magazines, pills, weapons, photos of nude children, and videos of a sexually-oriented TV show. One SCC resident, Richard Eugene Jackson, was caught with 760 child porn files on a computer; he was returned to state prison. Another, John Michael Obert, was found with CD-ROMs containing child pornography.

How does such contraband get into SCC, which is basically a prison within a prison (the McNeil Island Corrections Center), located on an island? SCC residents and common sense tell us that staff members bring in much of the contraband. The arrest of Matautia gives credence to this proposition.

"The administration, they want to point the finger at the residents and tell us we're the cause of it when it's not," said Carrie Benjamin, an SCC resident

for the past eight years. "It's the staff bringing the contraband and they want to restrict us."

SCC superintendent Dr. Henry Richards said they were doing the best they could, but the facility was criticized in 2006 for not developing a policy of randomly testing residents for alcohol use despite having "a long history of alcohol being brewed and consumed" at SCC, and for not having changed its procedures to eliminate contraband "despite repeated instances of pornography" being discovered.

There also have been complaints about some SCC residents using telephones to harass victims of their crimes and using chat lines to establish inappropriate contacts with children. According to Dr. Richards, there have been no disciplinary actions or prosecutions because they cannot positively identify who was on the phone, and are prohibited by law from restricting telephone use. SCC residents are considered civil detainees, not convicted prisoners, and thus have greater rights.

Richards said that "because the law is written that they have all rights except those required to contain them here in the center and to provide for their treatment," nothing can be done about the phone calls. State Representative Troy Kelly is seeking to change that. Kelly introduced a bill calling for an outside company to maintain logs at SCC showing who called whom, which could be checked if there is a complaint. "Sex offenders in the commitment center shouldn't be able to continue victimizing the public," he said. SCC residents countered that logging their phone conversations would violate their constitutional rights and constitute an invasion of their privacy and the privacy of the persons they call. The bill failed to pass in 2008 and has been reintroduced this year as HB 1099, where it has stalled in committee.

On October 22, 2007, a state rehabilitation counselor resigned after being placed on paid administrative leave pending an investigation into whether she had an inappropriate relationship with an SCC resident. The counselor, Nora Cutshaw, had escorted resident Casper Ross to a relative's home on April 1, 2007. A police officer checking the home discovered Cutshaw fixing her shirt and hair, while Ross was adjusting his belt. A photo of Cutshaw in a bathing suit was later found in Ross' room.

An investigation did not substantiate a sexual relationship, but Cutshaw was found to have violated policies and protocol. She denied any inappropriate conduct and has since filed a claim against the state for mental and emotional distress and the loss of her good name.

On December 29, 2008, a prisoner at the state prison that surrounds SCC, the McNeil Island Corrections Center, almost escaped from the facility. Dressed in street clothes, Donald Dravis walked out of the prison after telling a guard he had left his ID in his truck. Dravis was recognized by another guard, who followed him to a ferry that Dravis had boarded which would have taken him to the mainland. A team of guards convinced Dravis to return to the prison peaceably.

A January 7, 2009 incident review report by the WA Dept. of Corrections found numerous policy violations that contributed to the attempted escape, including prison staff who "did not follow emergency response guidelines." Dravis was serving time on child molestation charges, and is a potential candidate for confinement at SCC after he completes his sentence.

A suspected arson fire damaged a building at SCC on January 25, 2009; the fire resulted in the evacuation of 74 residents and an estimated \$155,000 in property damage, but no injuries. Local law enforcement authorities were investigating.

It costs the State of Washington about \$167,000 annually to hold each resident at SCC, which it considers a treatment center. This compares with \$33,000 per prisoner per year at state prisons. One other major difference is that SCC residents have no release dates; they are held indefinitely until they are deemed "cured." Only two residents have been unconditionally released from SCC since the facility opened in 1990. [See: *PLN*, May 2009, p.38].

"The law says civil commitment is indeterminate until they're rehabilitated, treated or whatever word you want to use," said James Mayhew, a Vancouver, Washington criminal defense attorney. "But it's basically a life sentence." ■

Sources: *Associated Press*, www.komonews.com, www.king5.com, *Seattle Times*, www.tdn.com

Southern California Jails Addicted to ICE Money

by Matt Clarke

Faced with budget cuts due to the down economy, jails across Southern California have turned to a new revenue stream – immigration detention. The federal government paid over \$55 million to house immigrant detainees in California jails in fiscal year 2008. That was up from \$52.6 million in FY 2007, and is expected to increase to \$57 million in FY 2009.

The Los Angeles County Sheriff's Department has the largest federal contract, receiving \$32.3 million in FY 2007 and \$34 million in FY 2008. It dedicated a 1,400-bed jail in Lancaster to hold immigration detainees.

Smaller cities also got their share. Glendale's income from federal immigration detention tripled last year to almost \$260,000, while Alhambra's doubled to \$247,000.

Santa Ana's Immigration and Customs Enforcement (ICE) contract increased from \$3.7 million in FY 2007 to \$4.8 million in FY 2008. The Santa Ana Police Department used federal money for holding immigrant detainees to make up for an expected 15% budget reduction and hiring freeze.

"We treat [the jail] as a business," said Santa Ana Police Chief Paul Walters. "The [budget] cuts could have been much deeper if it weren't for the ability to raise money there."

To increase the county's immigration detention "business," Walters plans to

convert two multipurpose rooms at Santa Ana's 480-bed jail into dormitories and use them to hold another 32 detainees. This should increase his ICE funding by \$1 million while no doubt greatly decreasing the jail's ability to provide rehabilitative programming to its other, local prisoners. Walters also hopes to increase the per diem payments from ICE from \$82 to \$87 per detainee.

Russel Davis, the jail's administrator, regrets not having built another floor onto the jail originally. ICE "is inundated with detainees," Davis said. "If I had 100 more beds, they'd fill them."

Immigration rights activists have criticized ICE's practice of using local jails to incarcerate immigrant detainees, because such facilities may not be up to federal standards and may not segregate detainees from prisoners facing criminal charges.

"Immigration detention is civil, not criminal," said American Civil Liberties Union of Southern California staff attorney Ahilan Arulanantham. "If you are holding them in the same place, that distinction is meaningless."

Apparently that doesn't matter to ICE, which has become desperate to find housing for its growing detainee population since it closed the agency's San Pedro immigration detention facility on Terminal Island in 2007. It also doesn't matter to cities and counties frantically looking for

ways to boost their dwindling budgets.

"We have become very reliant on this revenue," said Edward Flores, head of Santa Clara County's Department of Corrections.

Meanwhile, the head of California's prison system has announced that the state will no longer imprison undocumented immigrants who were paroled, deported and then reentered the U.S. illegally. Previously, such detainees were held on parole violations for 4 to 8 months before being deported again. This cost the state about \$10 million a year.

Now, all undocumented immigrants released from California state prisons will be discharged from parole when they are turned over to ICE for deportation. If they reenter the U.S. again they will likely be housed in city or county jails with federal immigration detention contracts, where they are considered a valuable source of revenue. ■

Sources: *Los Angeles Times*, *Union-Tribune*, www.nydailynews.com

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CA Prison Medical Care Receiver: Three Top Officials Ousted, Controversial Building Plan Opposed

by Matt Clarke

On March 12, 2009, J. Clark Kelso, California's federal court-appointed receiver over prison medical care, demanded the resignations of his chief of staff, John Hagar; Stephen Weston, Hagar's assistant; and medical services CEO Dr. Terry Hill. Hagar and Weston both resigned; Hill refused to resign and was fired. Kelso said the staff changes were "housecleaning that you do every spring," though Hagar, Hill and Weston cited "irreconcilable differences ... concerning the new direction of the receivership."

Meanwhile, California lawmakers openly opposed Kelso's \$8 billion plan to reform the state prison system's medical and mental health services by building seven new prison hospitals, creating 5,000 long-term medical care beds and 5,000 long-term mental health beds. State officials had previously tried to terminate Kelso's position as receiver, claiming it was unnecessary. [See: *PLN*, Aug. 2009, p.20].

A California federal court appointed Robert Sillen as the first receiver in 2006 after state prisoners, represented by the Prison Law Office, filed a class-action lawsuit alleging constitutionally inadequate medical and mental health care in the California Dept. of Corrections and Rehabilitation (CDCR). See: *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), Case No. C01-1351 TEH. [*PLN*, March 2006, p.1].

Kelso replaced Sillen as the court-appointed receiver in January 2008 after Sillen was criticized for taking a confrontational approach in his relationship with state officials. Recently, Kelso has been subjected to criticism too, for excessive spending. California currently spends an average of \$14,000 per prisoner on medical and mental health care, more than double the amount spent in New York, Texas and Michigan.

The comparison with other states was also used to criticize Kelso's plan to build 10,000 medical beds for the CDCR's 172,000 prisoners. Texas has less than 3,000 long-term medical beds for 125,000 prisoners, while Michigan has 1,440 for 48,000 prisoners. "In states like Texas and Illinois, [prison medical] systems that were in a shambles were built into systems that provide a level of care that is fair and reasonable" at a cost far less than

\$8 billion, said Dr. Owen Murray, medical director for the Texas prison system. "California may need a more common-sense approach."

However, Texas has been criticized for dumping prisoners with serious mental health and medical problems into the general population, and its prison medical system has been described as barely constitutional. [See: *PLN*, May 2008, p.39]. Also, no other state has had to make up for the many years of medical neglect that California prisoners have suffered. Denying adequate medical and mental health care to prisoners is much more expensive in the long run because infections, diseases and other conditions which could have been inexpensively treated at their onset cost much more to treat once they have reached advanced stages.

The quality of medical care for CDCR prisoners is still spotty. San Quentin State Prison's chief medical officer, Dr. Elena Tootell, described her job as "working with the [medically] underserved...." San Quentin has recently received generous resources as the CDCR's medical prototype, and is the site of one of the new prison hospitals being built. State lawmakers who criticize the receiver's expensive construction plans tend to concentrate their complaints on building costs while ignoring basic medical services such as skilled nursing, dialysis and wound care which result in lower death rates, according to Dr. Tootell.

Yet whether "improved" medical services at CDCR prisons have reduced the death rate is not as clear as one might expect. The number of prisoner deaths listed as "preventable" has dropped, but the number of "possibly preventable" deaths has increased, from 48 in 2006 to 65 in 2007. "The difference between a 'preventable' and a 'possibly preventable' death is a matter of a degree of certainty, rather than reflecting adequacy of care," noted Donald Specter, Director of the Prison Law Office.

Overall, the death rate for California prisoners is higher now than it was during the worst years of medical neglect, from 1996 to 2001. In 2007, the receiver reported 292 cases involving "extreme departures from the community standard" of care related to prisoner deaths, which was a notable increase over the previous year.

There is also an issue with the receiver overpaying prison medical staff. While Kelso makes \$224,000 a year, down from the \$620,628 that Sillen earned, in 2007 at least 240 CDCR doctors and nurses made more than the \$226,359 salary of the CDCR's medical director. Further, seven of Kelso's staffers, some of them working part-time, made over \$225,000 each. Hagar was paid around \$390,000 as a part-time employee.

The highest-earning CDCR doctor made \$441,774 in 2007, while the top-paid nurse made \$330,499. The median salary for CDCR doctors was \$35,000 more than for non-prison physicians in San Francisco, one of the highest-paid locales in the state. An expert testified that such higher salaries were necessary to attract qualified personnel to work in prisons and to overcome the pre-receivership legacy of the CDCR, which had hired any doctor with "a license, a pulse and a pair of shoes." Others disagreed.

The current salaries are "fairly outrageous," said University of California, Irvine, criminology professor Joan Petersilia. "It's the downside of what happens when the courts intervene in management practices."

Kelso defended the salaries of his staff – especially CDCR pensioners, double-dippers who receive both CDCR pensions and large receivership salaries – whom he described as necessary to manage ill but still dangerous prisoners. However, he intends to move many of his core employees to state positions with state pay scales. Following the forced resignation of John Hagar, Hagar's duties were assumed by Elaine Bush, Kelso's chief deputy, who makes \$160,562 a year. Apparently that is one example of staff salary reductions.

Kelso has proposed gradually reducing the CDCR's \$2.2 billion annual cost for medical and mental health care. He cited the elimination of "extraordinarily expensive" community-based specialty physicians and hospitals located outside CDCR facilities as part of the cost savings. Kelso also noted that his much-criticized medical bed building plan is designed to be implemented in stages, so it can be terminated should the CDCR's needs be

met with less than the entire proposed complement of prison hospital beds.

Another costly problem with the CDCR's medical care system is corruption and malfeasance. On November 25, 2008, five Salinas Valley State Prison (SVSP) doctors were named in a 31-count indictment charging them with grand theft by fraud, filing false claims and falsification of a public record. They are accused of billing over \$160,000 for hours worked at the prison when they weren't there. State investigators used GPS devices attached to the physicians' cars to track their whereabouts. [See: *PLN*, Feb. 2009, p.29].

Dr. David Hoban allegedly convinced Drs. Randy Sid, Pedro Eva, Wade Exum and Mark Herbst to bill ten-hour days when they were only working six to seven hours. Dr. Charles Lee, SVSP's chief of medical services, allegedly knew of the fraudulent billing scheme and went along with it. Lee and the other doctors also were indicted on four counts of misappropriation of public funds and conspiracy. The alleged overbillings included \$60,445 by Hoban; \$44,963 by Herbst; \$24,562 by Eva; \$16,800 by Sid and \$13,570 by Exum.

Previously, Kelso had raised the hourly rate for prison doctors to \$250 from \$150 to entice qualified physicians to work for the CDCR. Evidently, the rate increase also attracted dishonest doctors who belong in prison as offenders, not as care-givers.

The future of Kelso's \$8 billion plan to build 10,000 medical and mental health care beds may hinge on the outcome of an August 4, 2009 ruling by a three-judge panel in the *Plata* litigation that requires California to reduce its prison population by around 43,000 prisoners within a two-year period. [See: *PLN*, Sept. 2009, p.36].

On September 11, 2009, the U.S. Supreme Court rejected a request by California officials to delay an order by the three-judge panel to submit a plan

to reduce the state's prison population. Also on September 11, Governor Arnold Schwarzenegger signed legislation that seeks to relieve prison overcrowding through changes to parole and early release programs. The state is still appealing the *Plata* prisoner release order, however, which will further delay comprehensive

reforms to ensure that CDCR prisoners receive constitutionally adequate medical and mental health care. ■

Sources: *Sacramento Bee*, *Associated Press*, *San Francisco Chronicle*, *Monterey Herald*, *Fresno Bee*, *New York Times*, *Los Angeles Times*

California Sheriffs Appropriate Rehabilitation Funds for Security Needs

by Michael Brodheim

As California's budget crisis deepens, local law enforcement agencies are looking for creative ways to cover shortfalls in their budgets. Increasingly, county sheriffs are raiding funds intended by the Legislature to be expended "primarily for the benefit, education and welfare of the inmates confined within the jail." Referred to as "inmate welfare funds" (or "IWF's"), traditionally those funds have been used to pay for programs that help to rehabilitate prisoners. With local budgets stretched thin, however, more and more sheriffs are redirecting those funds to pay for equipment, construction, and increased security -- expenditures that ordinarily would be covered out of the general fund. In so doing, the sheriffs risk being sued. A 2005 suit against Santa Clara County officials, for instance, settled in 2008 when the county agreed to reimburse the IWF \$1.5 million and also to make policy changes that will limit the possibility of such misappropriation of funds in the future.

Similarly, grand juries in Orange and Los Angeles counties are investigating whether the sheriffs of those counties misused their IWF's. And in Sacramento County, prisoner advocates claim that the sheriff's department has inappropriately di-

verted more than one million dollars from the IWF there to pay for construction costs and such items as security cameras.

Significantly, IWF money is derived from profits generated by selling writing materials, hygiene products, food and other canteen items to the prisoners housed in the jail, as well as from proceeds from collect phone calls made by those prisoners -- but not from taxpayer-funded sources.

The possibility of lawsuits notwithstanding, the alleged misdirection of IWF's by local law enforcement agencies is likely to continue because the statute which provides for the existence of those funds is vaguely worded, leaving room for a range of interpretations sufficiently broad that the outcome of a lawsuit is never a foregone conclusion.

In tough economic times then, programs intended to increase public safety by rehabilitating prisoners (or otherwise helping them to transition back into society) may fall prey to creative bookkeeping as sheriffs, willing to chance being sued, seize upon statutory ambiguity in an effort to balance their budgets. ■

Source: *Sacramento Bee*



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Nebraska Prison Officials Must Pay Attorney's Fees in Kosher Diet Case; Found in Contempt After Excrement Discovered in Prisoner's Food

by *Brandon Sample*

Nebraska prison officials cannot delay paying \$204,856.28 in attorney's fees and costs awarded in a lawsuit where they were found to have violated the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA) by failing to post a prayer schedule and to provide a prisoner with kosher meals, U.S. District Court Judge Joseph F. Bataillon ruled on February 4, 2009. Separately, Judge Bataillon held prison officials in contempt after it was discovered that the court's order requiring that the prisoner be provided with kosher meals had been violated by guards who, among other things, put excrement in his food.

As previously reported by *PLN*, Mohamed El-Tabech, a Nebraska state prisoner, successfully sued prison officials for violating RLUIPA and the First Amendment by refusing to provide him with kosher meals and post a daily prayer schedule. [*PLN*, Oct. 2008, p.30]. As relief for the violations, the court ordered the provision of "nutritionally-sufficient kosher meals" and the posting of prayer schedules. Additionally, the court ordered the defendants to pay \$204,856.28 in El-Tabech's attorney's fees and costs.

Despite the court orders, Nebraska prison officials were reluctant to comply. For example, they told El-Tabech's attorneys that they had to file a claim with the Nebraska State Claims Board and wait for the legislature to appropriate funds for the judgment before it would be paid. Refusing to play such games, El-Tabech's attorneys sought execution of the judgment and filed a motion under Fed.R.Civ.P. 69 and 70.

The district court granted the motion. "The state may not successfully hide behind state procedural shields to avoid the consequences of a valid district court judgment," the court wrote. Accordingly, Judge Bataillon ordered that El-Tabech's attorneys receive nearly \$8,000 in interest on the fee award, and that interest accrue at the rate of fourteen percent from the date of the court's order to ensure the attorney's fees were paid.

The district court also found non-compliance with its order that El-Tabech be provided with kosher meals. The court held that El-Tabech had demonstrated

that "on several occasions, he has found non-kosher foreign materials, including excrement, in his food." According to prison officials, that was due to "rogue employees." Finding such noncompliance to be civil contempt, the court ordered that El-Tabech be provided with prepackaged kosher meals to avoid tampering by prison staff. See: *El-Tabech v. Clarke*, U.S.D.C. (D. Neb.), Case No. 4:04-cv-03231.

El-Tabech's attorneys subsequently filed a supplemental motion for attorney's

fees in connection with their successful contempt motion, post-judgment monitoring of the court's kosher meal order, and enforcement of the prior fee award. On June 10, 2009, the district court granted the supplemental fee request, finding it "reasonable in light of the defendant's conduct" and ordering the defendants to pay an additional \$73,360.20 in attorney's fees and \$271.20 in costs. See: *El-Tabech v. Clarke*, 2009 U.S. Dist. LEXIS 49062 (D. Neb. 2009). ■

Sacramento County Jail Settles Excessive Force Suit For \$260,000

On April 20, 2009, Sacramento County agreed to settle an excessive force suit brought by a former prisoner at the Sacramento Main Jail (SMJ) for \$260,000.

On December 1, 2005, Donald Black, a probationary sergeant at SMJ, ordered the use of flash bang grenades during a cell extraction of five prisoners who flooded their rooms as part of a protest of inhumane conditions at the jail.

Flash bang grenades are louder than a jet at takeoff and brighter than 8 million candles, and are typically used as distractions in riot or hostage situations.

The grenades were thrown through a food port in the door of each cell and exploded within feet of the prisoners' faces. None of the prisoners were armed, and none were given the opportunity to voluntarily exit their cells before the grenades were used. The grenades were used in order to disorient the prisoners and make their removals easier.

Courtney Countee was one of the prisoners the grenades were used on. According to Countee's attorney, Sanford Jay Rosen, Countee was blinded and in pain after the grenade was thrown into his cell. Guards then rushed Countee, beat and cuffed him, dragged him down the stairs, and strapped him into a restraining chair, commonly called the "devil's chair." Countee remained there hooded, for more than two-and-a-half hours, without medical attention for his temporary blindness, deafness, burns, and other injuries. The guards' actions

were captured on video surveillance.

Countee sued Sacramento County alleging violations of his civil rights. The \$260,000 settlement the county agreed to in the case was "simply a business decision," said John McGinnis, Sheriff of Sacramento County. "It would have cost more to try the case, and if the guy was awarded so much as a dollar, his attorneys would have been entitled to their attorneys' fees. I think the county made the best possible deal."

McGinnis called the incident that led to the suit "a lesson learned," nothing the policy regarding the use of flash-bang grenades had been changed. Under the new policy, flash bangs cannot be used "absent clear evidence that the inmate has armed himself with some type of weapon" or when someone is in imminent danger.

The District Attorney's (DA) office declined to prosecute the guards involved in the incident, citing lack of evidence. However, the DA's office said the incident "raises significant questions regarding jail operations and the treatment of inmates." Black, the sergeant who ordered the use of the grenades has since been demoted.

Countee was represented by Sanford Rosen of Rosen, Bien, and Galvan, and Geri Green of Geri Green LC, San Francisco firms. See: *Countee v. County of Sacramento*, No. 2:07-CV-20560-LKK-DAD. The settlement and complaint are available on PLN's website. ■

Additional Source: *The Sacramento Bee*

PLN Files Public Records Suit Against San Francisco County, Sheriff's Office

On August 20, 2009, *Prison Legal News* filed suit in Superior Court against the City and County of San Francisco, the San Francisco Sheriff's Department, Sheriff Michael Hennessey and City Attorney Dennis Herrera. The lawsuit alleges that the defendants failed to comply with their statutory obligations under the California Public Records Act (Gov't Code §§ 6250, *et seq.*)

Last year, on July 9, 2008, *PLN* submitted a request to Sheriff Hennessey for records related to litigation against the Sheriff's Department, including payouts in settlements and verdicts resulting from tort, overdetention and civil rights claims involving both prisoners and jail employees over a multi-year period. *PLN's* records request was forwarded to the City Attorney's office, which on December 17, 2008 produced a spreadsheet that included information about payouts in 722 cases. However, City Attorney Dennis Herrera admitted that the spreadsheet was not "all encompass-

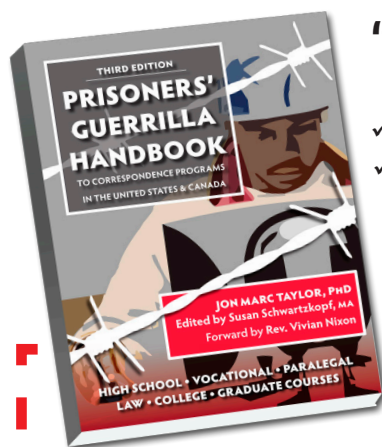
ing." On March 27, 2009, *PLN* provided additional information regarding its records request and submitted a supplemental request for litigation payouts since the date the original request was filed. No response was received and the defendants failed to produce all of the requested records, which clearly should have been produced under the Public Records Act.

PLN's lawsuit notes that according to state law, "public records are open to inspection at all times during the office hours of the state or local agency and every person has as right to inspect any public record." Government agencies are also required "upon a request for a copy of records" to make the requested records "promptly available to any person." Further, the San Francisco Administrative Code provides that "The right of people to know what their government and those acting on behalf of their government are doing is fundamental to democracy, and with very few exceptions, that right supersedes any other policy

interest government officials may use to prevent public access to information." "The amount, type and cost of litigation involving the Sheriff's Department related to prisoners and employees is a matter of public interest, and reflects on the efficacy and adequacy of San Francisco's jail operations," said *PLN* editor Paul Wright. "The public has a right to know how their tax dollars are being spent," added *PLN's* counsel, Sanford Rosen.

PLN also has public records suits pending against Los Angeles County and the California Dept. of Corrections and Rehabilitation, related to requests for similar information regarding litigation payouts.

PLN is represented by Sanford Jay Rosen, Elizabeth Eng and Kenneth M. Walczak of Rosen, Bien & Galvan, LLP, a San Francisco law firm. See: *Prison Legal News v. City and County of San Francisco*, Superior Court, County of San Francisco, Case No. CGC 09 491641. ■



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***Columbia Jail Journal: The Compelling, Exclusive Inside Story of the Columbia Three*, by James Monaghan, Brandon Press, 277 pages**

Reviewed by David Preston

Of the many and varied detours a man can take off the road to happiness, a trip to prison would have to be about the most discombobulating. And for most of us, a prison stint in an impoverished and violence-blighted nation like Columbia would have to be considered equivalent to organ failure or death. Yet, in fact, even a calamity like this is survivable—if you’ve got people. Fortunately for James Monaghan—who spent the first three years of the twenty-first century as a political prisoner in Columbia—he did have people. Accordingly, he has lived to tell the tale.

Monaghan’s 2007 book recounts his odyssey as a prisoner in the not-failed-but-not-exactly-successful state of Columbia, where he and colleagues Martin McCauley and Niall Connolly traveled in the summer of 2001 on behalf of the Sinn Féin, the party of the Irish republican movement. By that time Sinn Féin had been participating, as a minority party, in the Northern Ireland peace process for several years, and the organization wanted to observe and advise Columbia’s left-wing FARC rebels as they laid down their weapons and began a similar transition from armed rebellion to peaceful political struggle.

After winding up their mission as observers, the three Irishmen (*irlandeses* in Spanish) were returning home when soldiers arrested them at a Bogotá airport on suspicion of “rebellion” and, typically for Columbia, drug possession. That this was a political case is evident from the fact that a shadowy figure from the U.S. State Department—never a friend to Irish republicans—was lurking about almost from the time of the men’s arrest, directing the interrogation, overseeing secretive tests for explosives and drugs, and consulting with the Colombian authorities about what charges to press. That the main evidence against the men was fabricated may be surmised from the fact that the bulk of this evidence was withdrawn by the time of the trial, leaving the government with a case that amounted to, essentially, passport violations. (The men, who had a record in Ireland on behalf of their political activities, had been travelling under assumed names.)

As the Colombian peace talks began to collapse, the right-wing press in Great Britain and the U.S. hastened the process by quoting anonymous sources who characterized the Columbia Three as IRA “terrorist operatives” and claimed to have info linking them to the IRA. Ever the lapdogs, the right-wing Colombian establishment gleefully and publicly chimed in, ensuring that the men could never get a fair trial there. To perfect the comic irony of this puppet show, it turns out that one of the supermax-style prisons where the men spent time (Combita) was actually designed, and is still overseen, by the Federal Bureau of Prisons. That’s the *United States* Federal Bureau of Prisons.

Ultimately, the Columbia Three were found innocent of the main charges and released in late 2004, pending sentencing for passport violations. While awaiting sentencing, the men were able to slip out of the country for good. During their three-plus years in custody they had been shuttled between six prisons around the country. By the end of their stint, they had become experts on the Colombian penal system.

In *Jail Journal*, Monaghan portrays a world where violence is endemic; besides the usual nastiness of prison there are politically motivated beatings and assassinations, winked at, even encouraged by, prison guards. Yet surprisingly, life in a Colombian prison is not as cutthroat as one might expect. In ways it seems even humane, especially by U.S. standards. True, they don’t have HBO, but prisoners are allowed liberal access to reading material, mail, phone calls, and commissary privileges. They are even allowed visitors, and under significantly lighter restrictions than one would find in the US too. Conversely, there are none of the abhorrent “isolation units” with which readers of this magazine are so familiar, at least not in Monaghan’s experience; he was never isolated from his fellow *irlandeses* for more than a few days. Prisoner disputes and behavior problems are usually solved by more or less democratically elected cell block leaders, and prisoners awaiting trial are allowed at least some constitutional protections, which the Columbia Three

took liberal advantage of in forcing the prosecutor to finally bring their case to court.

But the most remarkable thing about life on the inside in Columbia is how closely it mimics life on the outside. Outside—where politics is all. The first thing required of each new internee is that he choose sides: there’s one section of the prison for the guerillas, another for the paramilitaries, with no neutral ground in the middle. Nominally, both groups are subject to the same prison regulations, but the prisoner’s daily experience is influenced much more deeply by the rules and customs of the political subculture he aligns himself with. As Monaghan tells it:

“Life with the guerillas is more orderly and safe from bullying but you could be killed in an attack on the guerillas. Life with the paramilitaries is more violent and the prisoner may have to pay rent for a sleeping space on the floor, and perhaps be a servant to a paramilitary leader. The real deciding factor is that when released after the sentence, the prisoner would be classified as an enemy of the state if they spent their time with the guerillas. Their lives and the lives of their families will be affected for ever afterwards. Not surprisingly, most social prisoners spend their time with the paramilitaries.”

As leftists, the Columbia Three naturally chose to cast their lot with the guerrillas. By so doing, they were able to tap into a network that could extend its protection to them inside as well as garnering them essential support and publicity on the outside. This prison network kept them from harm while the “Bring Them Home” campaign launched in Ireland joined forces with a handful of steadfast supporters inside Columbia to win their release.

I found myself stifling a yawn or two while reading *Jail Journal*; Monaghan’s daily accounts struck me as annoyingly dispassionate at times, considering that he and his friends were under constant threat of assassination. But I’m not claiming false advertising. As the book’s title indicates, this is a journal, not a screenplay, and in another sense the author’s

dry, matter-of-fact style goes toward his credibility. (No one could manufacture this stuff.)

Certainly, Monaghan's experience is not typical, so if you're looking for

an all-around survival guide to prison, this is not your book. If you're looking for a guide to surviving adversity, however, it comes closer to the mark. And if there is a lesson for the rest of

us in Monaghan's tale, it is that anyone, no matter how bleak his situation, can benefit from keeping faith in his cause. Whether that cause is freedom, or mere survival. ■

Florida DOC and Keefe Gouge Prisoners on Commissary Sales

by David M. Reutter

While the economic downturn has caused the price of goods and commodities to decrease in the free world, the cost of items in Florida's prison canteens has skyrocketed under a new contract.

Florida law requires that items sold in prison canteens "shall be priced comparatively with like items for retail sale at fair market prices." That provision was enacted in 1996, along with another directive that transferred canteen profits from the Inmate Welfare Fund to the state's General Revenue Fund.

In other words, rather than utilizing canteen profits to fund recreation programs, chapel activities and other services for prisoners, those profits now go directly to funding state operations. The result is that activities previously funded by the Inmate Welfare Fund have been eliminated or must rely on donations to operate.

The state's General Revenue Fund netted about \$30 million in fiscal year 2007-2008 as a result of the canteen contract between the Florida Department of Corrections (FDOC) and Keefe Commissary Network. Keefe began operating the FDOC's canteens in 2003; the company's current contract began on March 29, 2009 and extends for the next five years.

Keefe's most recent contract with the FDOC included price increases that have caused an outcry by Florida prisoners and their family and friends. The FDOC said it had received more complaints than usual about the higher prices, which went into effect on March 30. "Prices are going up everywhere," said FDOC spokeswoman Gretl Plessinger. "We're sympathetic to them, but it's tough on everyone."

For the FDOC, however, making money off prison canteens is not tough at all, as the state's contract includes guaranteed per diem payments from Keefe. "Regardless of the amount of gross sales, the Contractor will compensate the Department in an amount of \$0.96 per day per inmate based on the Department's

Average Daily Population," the contract states. With the FDOC's population averaging around 99,000 prisoners daily, this equates to payments of about \$2.9 million a month.

In April 2009, the Florida Justice Institute compared the FDOC's canteen prices with the cost of comparable items at CVS Pharmacy stores. The conclusion was that most items "were within an acceptable price range," and that some of "the new canteen prices were actually lower [than] the prices of similar or the same products available at CVS."

The trick to making the contract extremely profitable for Keefe was to raise the prices for the most commonly purchased canteen items. For example, a plain #10 white envelope costs \$.15, which equates to \$15.00 per 100 envelopes.

Candy bars jumped from \$.66 to \$.89 each. A 12 oz. can of Coke went from \$.57 to \$.89. In some cases, Keefe sells individual items that are clearly marked "This unit is not labeled for individual sale," at inflated prices. Coffee-mate creamer, Pop-Tarts, Quaker Oatmeal and cereal bars are several examples of such individual-sale items. One of the largest price increases was for honey buns. A chocolate variety went from \$.61 to \$1.49 each.

Canteen profits have also been enhanced by reducing the number of entrée items sold. Rather than having 21 items available, FDOC canteens now carry only eight. The 10 meat items were reduced to three. "Filler" items like macaroni and cheese and rice and beans were eliminated, forcing prisoners to buy 3 oz. Ramen Noodle Soups at \$.45 each, up from \$.26.

While such price increases are small, they are generally higher than comparable prices in the free world where there is competition among vendors. And with a prison population of 99,000, even small price increases result in large profits for Keefe. Further, higher canteen prices are a burden on prisoners' families, as more of

the money that family members send their incarcerated loved ones goes into Keefe's pockets. Florida prisoners have very few legal means of earning an income while imprisoned.

Absent intervention or corrective action, Florida prisoners can expect an annual price increase of 10% under the FDOC's canteen contract. This is a far cry from the nation's annual inflation rate, which is under 2%. The only restraint on the cost of prison canteen items is what the FDOC determines to be "fair market prices," a term that is not defined in the contract and in any event appears to lack an enforcement mechanism. Of course, since the state receives a flat per-diem payment from Keefe, prison officials have no incentive to ensure reasonable canteen prices.

This follows a national pattern of price gouging. If prisoners were unable or unwilling to purchase Keefe's monopoly priced goods rather than make money they might lose money. In Florida, it would cost Keefe \$2.9 million a month due to the company's contractually-required payments. Until something is done, "fair market prices" for prison canteen items will be those that best inflate Keefe's bottom line. ■

Sources: *Contract between FDOC and Keefe Commissary Network, Associated Press*

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\$1.8 Million Settlement in Beating of Florida Jail Prisoner

by David M. Reutter

Florida's Broward County Sheriff's Office (BCSC) agreed to pay \$1.8 million to settle a civil rights action, in mid-trial, brought by a former prisoner who was left brain damaged after a beating from other prisoners, who were encouraged by guards.

When Dana C. Jones entered the Broward County Jail (BCJ) on November 2, 2004, on a domestic violence charge for hitting his mother, he was known to be mentally ill. The trial court overseeing his charges found him incompetent, ordering him to the Florida State Hospital for treatment in February 2005.

Jones was returned to BCJ in August 2005 with instructions that he be given "mood stabilizing medications." Psychiatrist Mercy Gonzalez, who was employed by BCJ's medical contractor Armor Correctional Health Services, found Jones exhibited signs of mental illness, finding him to be "hostile, angry, refus[ing] to speak, inappropriate behavior, oppositional, aggressive, manipulative, no eye contact, increased motor activity, and poor judgment."

Gonzalez provided no mental health care or psychotropic medication for Jones, nor did she order him to a "behavioral health unit." Instead, Jones was placed in open population to sleep in a "blue plastic boat" in the open area of the cellblock because there were no empty cells or bunks. The complaint alleged this arrangement for sleeping violated a previous consent decree on overcrowded conditions at BCJ.

When Jones felt that he had not been given his lunch on December 16, 2005, he had a verbal dispute with guard Monica Blair, using a sexual epithet and racial remark towards her. After she had him counseled by other guards, she incited other prisoners to "do something" about Jones making the slur against her.

While the cellblock was in its normal lockdown, guards did not make rounds between 1:51 p.m. and 3:22 p.m. When other prisoners began beating on their doors, a guard came to find Jones lying in "a pool of clotted blood" and "gargling blood from his mouth." His injuries were so severe that he remained in a coma-like state for months, and he now resides in a nursing home, unable to walk or talk.

To avoid the medical costs associated

with his care, BCSO had Jones released from custody. It also dropped its investigation into what transpired in the beating after another prisoner allegedly flunked a polygraph test.

That review is being reopened. "Now that the civil thing is out of the way, that frees us up to do a top to bottom as to how all this happened," said BCSO Sheriff Al Lamberti. The lawsuit was settled on September 8, 2008, and Jones was represented by Fort Lauderdale attorneys Barbara Heyer and Douglas McIntosh. See: *Jones v. Jenne*, USDC, S.D. Florida, Case No: 07-CV-60839

In other Broward County news,

former sheriff Kenneth Jenne has been hired as a consultant to develop political strategies for businesses seeking government contracts by Fort Lauderdale law firm Rothstein, Rosenfeldt, and Adler. Considering his credentials include a corruption conviction for taking money from BCSO vendors, lying on tax returns, and abusing the public trust that resulted in 10 ½ months in federal prison, the new position for Jenne seems odd or an approved way of doing business in government if you don't get caught. ■

Additional source: *Miami Herald*

Pennsylvania Jail Mired in Scandal ... Again

by David M. Reutter

With the suspension of two top officials at the Monroe County Correctional Facility (MCCF) in Snyder'sville, Pennsylvania, efforts to turn the jail around have hit yet another stumbling block. The February 27, 2009 suspensions – and later resignations – of Warden David Mauro and Captain Owen Thomas created a vacuum in the MCCF administration that remains unfilled more than six months later. As *PLN* has previously reported, the jail has been plagued by scandal, including contraband smuggling and sexual misconduct by staff. [See: *PLN*, Dec. 2007, p.1].

The suspensions of Mauro and Thomas without pay were apparently based on a new zero-tolerance policy by the Monroe County Prison Board, which ordered the suspensions. That order was accompanied by a directive to investigate a February 26, 2009 conversation between Mauro and Thomas in the MCCF lunchroom.

Thomas reportedly made a disparaging remark to Mauro about a guard at the facility, stating "what a waste of a uniform." Another guard overheard the comment. Afterwards, Thomas engaged in "damage control" discussions with several employees and warned the guard who overheard the remark not to repeat it. Mauro failed to intervene, and the Prison Board ordered the suspensions the next day.

MCCF has been mired in scandal since 2006. At that time, six guards were under investigation for having sex with or providing contraband to prisoners.

In March 2007, former guards Mark Gutshall, Richard Chilmaza, Frank Bell, Yvonne Lockard, Roodney Ulysse and Dana T. Simpson, Sr. were indicted. Kitchen worker Misty Marie Mate also was charged. In June 2007, guard Karen E. Stone was charged with nine counts of giving contraband to prisoners.

Mate pleaded guilty in June 2007 to smuggling contraband. In October 2007, Ulysse, Lockard and Stone all pleaded guilty to delivering contraband to prisoners, and received one-year probation sentences. Simpson pleaded guilty to having sex with prisoners in November 2007. Gutshall received 23 months in prison in December 2007 after pleading guilty to institutional sexual assault against a prisoner. [See: *PLN*, May 2009, p.1]. Finally, in January 2008, Bell pleaded guilty to a contraband charge.

At least two prisoners have filed suit claiming they were sexually harassed and abused by MCCF guards, and that the Prison Board had a policy of "inadequately and improperly investigat[ing] complaints of correction officer misconduct" See: *Knight v. Simpson*, U.S.D.C. (M.D. Penn.), Case No. 3:08-cv-00495-RPC-MCC, and *Scindo v. Simpson*, U.S.D.C. (M.D. Penn.), Case No. 1:08-cv-01332-YK-LQ.

The sex and contraband scandal at MCCF resulted in a 41-page report by The Moss Group, which was funded by the National Institute of Corrections, an agency of the U.S. Department of

Justice. The report was made public in May 2008.

"Until quite recently, there were no policies, procedures, or training related to staff sexual misconduct and staff was unaware of the 2003 legislation, the Prison Rape Elimination Act," the report stated. "There was no clear 'zero tolerance' message communicated by the Board, the warden, or the leadership team. Staff described relationships between staff that cross professional boundaries and result in inappropriate interactions. There has apparently been a great deal of off-duty socializing, which at times has included former inmates."

The Moss Group report recommended the addition of more supervisory positions at MCCF, promoting more women and minority employees, improved grievance filing procedures for prisoners, and more formalized expectations of guard conduct with prisoners. One of the steps taken following the issuance of the report was to install a \$125,000 video surveillance system at MCCF.

Warden Mauro had been at odds with the Prison Board before his suspension. On December 30, 2008, prisoner Thurman Stanley walked away from a court-ordered work-release assignment. The Board was not informed of the escape, learning about it only after the incident was reported in a local newspaper.

The task of turning MCCF around has been tough on its wardens. In May 2007, longtime warden David Keenhold resigned. He was replaced by interim warden David Kessling, on loan from the Penn. Dept. of Corrections. Warden Marlene Chamblee was hired in January 2008 but stepped down after only seven months on the job.

The Prison Board announced on March 11, 2009 that both Mauro and Thomas had resigned, effective as of the date of their suspensions. MCCF has now gone through four wardens in two years. Additionally, in January 2008, MCCF Captain John Corridoni was fired less than two weeks after being hired as third-in-command at the jail, when it was learned that he previously had been accused of assaulting prisoners at the Luzerne County Prison. And in March 2008, MCCF deputy warden Daniel B. Slashinski resigned amid an investigation into whether a prisoner's outgoing legal mail had been intentionally blocked or delayed.

Problems at MCCF continued fol-

lowing the resignations of Mauro and Thomas. Jail guard Jesse Cleare was suspended without pay after prisoner Mumun M. Barbaros committed suicide on March 22, 2009. Officials were investigating whether Cleare made required rounds in the unit where Barbaros choked himself with a T-shirt less than a week after he was denied his prescription for Paxil, an antidepressant. Cleare was later fired. Another MCCF guard, Michael John Parrish, was charged in July 2009 with killing his girlfriend and their infant son; he reportedly had racist, pro-Nazi beliefs. As a result, the Prison Board stated

it would more closely screen job applicants at MCCF.

In June 2009, Monroe County Commissioner Donna Asure took over administrative duties at MCCF until a permanent replacement warden could be found. Three months later, the Prison Board was still looking. Asure has since applied to fill the warden position herself, despite having no prior experience in corrections. The warden position pays \$3,000 more per year than she makes as a Commissioner. ■

Source: *The Pocono Record*

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Montana, Michigan Towns Vie to Fill Prisons with Guantanamo Detainees

by David M. Reutter

Despite winning a lawsuit which held that officials in Hardin, Montana could contract to receive out-of-state prisoners, the town's Two Rivers Detention Facility sits empty and the bonds issued to finance the prison are in default. In a desperate move, Hardin offered to take in prisoners from Guantanamo Bay, Cuba – also known as “Guantanamo” – which is slated for closure by the Obama administration.

Building prisons to create jobs is a concept that has been regularly adopted by rural communities over the past three decades. With one of the highest poverty rates in the nation and an unemployment rate over 10%, Hardin was in desperate need to find jobs and income for its 3,400 citizens.

Before the town built the \$27 million, 464-bed Twin Rivers prison, Hardin was assured by the former governor of Montana that the Department of Corrections needed space to house state prisoners. When that deal fell through with the election of a new governor, Hardin sought to contract for out-of-state prisoners. City officials planned to hire CiviGenics to operate the facility.

Their hope was dashed by an Attorney General's opinion which held that local authorities could not contract to house prisoners from other jurisdictions. Hardin filed suit in state district court to overturn the AG opinion, and succeeded when the court ruled in June 2008 that the Twin Rivers facility could incarcerate out-of-state prisoners. See: *City of Hardin v. State of Montana*, First Judicial District Court, Lewis & Clark County, MT, Case No. BDV-2007-955.

Despite that decision, Hardin officials have been unsuccessful in filling the prison's empty beds. With President Obama ordering the closure of Guantanamo Bay by January 2010, Hardin offered to take in an estimated 100 maximum-security Guantanamo detainees who cannot be tried or released.

Local residents were resigned to doing whatever it takes to fill the facility to generate jobs. “By and large, people don't want the Guantanamo prisoners here, but we want the prison open,” stated Joe Malensek, a Hardin business owner. “We

are open to anything.”

However, members of Montana's congressional delegation acted quickly to close that door. “I understand the need to create jobs, but we're not going to bring Al-Qaeda to Big Sky County – no way, not on my watch,” said U.S. Senator Max Baucus. “I don't think they know what they're asking for,” added Senator John Tester. Congress has since passed legislation that prevents Guantanamo detainees from being incarcerated in the U.S.

Nor did Hardin have any luck finding prisoners locally. Sheriff Jim Cashell in nearby Gallatin County refused to house prisoners at the Twin Rivers prison, saying it was “basically a warehouse.” The Montana Dept. of Corrections has declined to use the facility despite a May 2009 endorsement by the Corrections Advisory Council to build 920 new prison beds in the state. Prison officials found the open-dorm layout at Twin Rivers unsuitable for holding long-term prisoners.

With no prospective contracts to fill the vacant facility, Hardin officials had to lay off Two Rivers' only two employees. The town defaulted on its construction bonds in May 2008 and was forced to use \$900,000 from its reserve fund to make a debt payment. The prison has sat empty for years, which mirrors the empty return to bond investors who mistakenly believed in the axiom that “if you build it, they will come.” The big players in rent a beds, like Geo Group and Corrections Corporation of America, realize that building prisons isn't enough. It requires lobbying, schmoozing and cash donations to politicians to fill empty for-profit prison beds. A lesson lost on the officials of Hardin.

Institutional investors that purchased bonds to build the prison include the Lord Abbot High Yield Municipal Bond Fund (\$2.5 million), the BlackRock Long-Term Municipal Advantage Trust (\$4.1 million) and Pioneer Investments (\$2.6 million).

On September 10, 2009, the *Associated Press* reported that Hardin had signed a preliminary contract to house over 200 prisoners at Twin Rivers; the town is partnering with the American

Private Police Force Organization, Inc. American Private Police Force has no known track record of operating prisons or jails. The company was incorporated in California in March 2009, and their website went up in May. They claim to have an office in Washington, D.C., but the company is not a registered corporation in D.C. and the address listed on their website is incorrect.

A spokesman for American Private Police Force said he didn't want his last name used because he was engaged in security work overseas and “didn't want to get shot.” In their desperation to fill Twin Rivers, Hardin officials may have signed up with a shady company that has an even less realistic chance of success than housing prisoners from Guantanamo.

Hardin isn't the only impoverished town that tried to cash in on imprisoning Guantanamo detainees. Two Illinois cities have made bids, and Standish, Michigan made a similar offer in August 2009.

The unemployment rate in Standish, with a population of 1,500, stands at over 17 percent. “We'll take the most dangerous prisoners the world has to offer if we have to,” said Paul Piche, a local prison guard. The city is losing 289 jobs with the closure of the Standish Maximum Correctional Facility due to state budget cuts.

However, while residents of the prison-dependent town are worried about their economic survival, even to the point of actively seeking maximum-security prisoners, as in Hardin their elected leaders do not share their concerns. Michigan Governor Jennifer Granholm said she “continues to have concerns about the homeland security implications of relocating Guantanamo detainees to Michigan,” and “is not in favor of moving detainees” to her state.

Whether or not people object to having Guantanamo prisoners in their back yard apparently depends on whose back yard it is, exactly, and how badly they want to maintain the local prison-based economy. ■

Sources: *TIME Magazine*, *The Bond Buyer*, www.thenational.ae, *Associated Press*, www.montanane.wsstation.com, *Billings Gazette*

Michigan Changes Overtime Rules; \$4 Million Savings on Prison Budget

In order to cut operating costs, Michigan has changed the way state employees can receive overtime. Statewide, the change is expected to save \$8 million annually, with half of the savings coming from prisons.

The change, which became effective October 1, 2008, comes as the result of a contract with the state employees union. Under the old rules, overtime hours started as soon as the employee worked 80 hours. The new rules prohibit counting sick days toward regular work hours, but allow vacation time to be counted.

In October 2008, the state auditory general's office issued a report that said further saving could be gained if contract rules were changed to allow the Michigan Department of Corrections to assign guards temporarily to other prisons.

The guards' union, Michigan Corrections Organization (MCO), resisted that move during negotiations. While guards can be permanently reassigned, the union said temporary assignments are dangerous.

"You develop a certain trust with your

colleagues," says MCO's executive director, Mel Grieshaber. "You complement each other, working with your partners and people you know."

The union fails to see savings for the state by allowing it to assign guards to temporarily cover vacant slots at nearby prisons. "We think the department is exaggerating the need for temporarily moving guards to other prisons," says Grieshaber. "I don't see any particular savings from that." ■

Source: *Chicago Tribune*

\$4.7 Million Settlement for Brain Damage Caused by Washington Jail Negligence

Washington State's Kitsap County Jail paid \$4.7 million to settle a lawsuit that alleged its failure to properly care for a developmentally disabled man left him brain damaged from dehydration.

William E. Trask, 44, was born developmentally disabled. Despite that, he was healthy and led an active life. He even maintained a job as a dishwasher part-time. On July 27, 2006, he hit his mother, who he lived with, after she told him he could not go to a bowling alley.

She called 911. "When I called police, I thought they might just talk to him, scare him, let him know that when I said something I meant not to do it," said Trask's mother, Marie Watson.

Instead, police arrested Trask, who has the mental capacity of a child, on a misdemeanor assault charge. When he began acting out at the jail, he was placed in a crisis cell. Once there, guards did nothing but watch him through video surveillance cameras.

What they witnessed through all hours of the day and night was Trask repeatedly hitting his body against the cell walls, taking off his clothes, rolling around naked on the cell floor, and attempting to cover the cell's drain with his clothes. When he was given food or drink, he either threw it away or attempted to stuff the items down the drain of the cell.

As Trask's health began to deteriorate, neither guards nor Kitsap Mental Health Services (KMHS) took action. In fact, in the face of his behavior, a KMHS official said he did not have a "treatable

mental condition" on August 8, 2006.

On August 17, Trask was so ill and listless that he was taken by ambulance to a local hospital. Upon admission he was found to be dehydrated and had gangrene in the fingers of his left hand.

"He was sort of left to rot in his cell," said Trask's attorney, Tim Tesh. "By the time he was carried out of the Kitsap County Jail, he was dehydrated to the point that his kidneys were failing and ultimately that led to brain damage."

Trask now resides in a nursing home. "I'm devastated. Very devastated," said his mother. "Can't feed himself, clothe himself, bathe himself. He can't walk anywhere, which all he did before."

On June 12, 2009, a state court approved a settlement that establishes a special needs trust for Trask. Out of the \$4.7 million settlement, his attorneys receive \$1,880,000, plus costs of \$154,249.89.

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The settlement further pays \$101,000 in liens from Medicaid and Medicare. Trask was represented by Seattle attorneys Allen M. Ressler and Timothy R. Tesh. See: *Watson v. Kitsap County Sheriff's Office*, Pierce County Superior Court, Case No: 08-2-05296-1. ■



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Glomar Response to Prisoner's FOIA Request Insufficient

On February 28, 2008, U.S. District Court Judge Rosemary M. Collyer denied a summary judgment motion filed by the Bureau of Prisons (BOP) in a Freedom of Information Act (FOIA) suit challenging the BOP's refusal to confirm or deny the existence of disciplinary records related to a former BOP employee.

Monroe L. Coleman, a federal prisoner, submitted a FOIA request to the BOP for all investigative and disciplinary records related to Kimberley Moore, a former BOP staff member at United States Penitentiary Big Sandy who had been "terminated for indulging in wrongful acts." In response to Coleman's request, the BOP refused to confirm or deny the existence of the requested records, a so-called "Glomar" response. Dissatisfied, Coleman sued the BOP.

A Glomar response may be invoked when "to confirm or deny the existence of records ... would cause harm cognizable" under a FOIA exemption. In Coleman's case, the BOP relied on Exemption 7(C), which protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The BOP argued that summary judgment was appropriate because the records requested by Coleman constituted law enforcement records within the scope of Exemption 7(C) based on "Moore's status as a law enforcement officer or as a former employee of an agency with a law enforcement function." The district court disagreed. Moore's employment status alone, the court held, did not establish "a rational nexus between the investigation at issue and the agency's law enforcement duties."

Accordingly, the district court denied the BOP's motion for summary judgment without prejudice to the filing of a renewed motion for summary judgment. See: *Coleman v. Lappin*, 535 F.Supp.2d 96 (D.D.C. 2008).

Following the adverse ruling, the BOP acknowledged the existence of 164 pages of records responsive to Coleman's FOIA request, but sought to redact or withhold information from 122 of those pages under various FOIA exemptions. On March 18, 2009, the district court granted in part

and denied in part the BOP's third motion for summary judgment.

The district court upheld the BOP's decision to withhold or redact certain information from the records based on FOIA Exemptions 2 and 6, and found the records were compiled for law enforcement purposes under Exemption 7. However,

the BOP had failed to provide sufficient evidence that harm would result due to release of the records under Exemptions 7(C), 7(E) and 7(F) or combinations thereof, and thus summary judgment was denied as to those exemptions. See: *Coleman v. Lappin*, 607 F.Supp.2d 15 (D.D.C. 2009). ■

Texas Parole Board's Hearing on Imposition of Sex Offender Conditions Inadequate

by Matt Clarke

On March 24, 2009, a U.S. District Court ruled that hearings held by the Texas parole board before imposing sex offender parole conditions on prisoners not convicted of sex offenses were constitutionally inadequate.

Raul Meza, a Texas prisoner, was convicted of murdering an eight-year-old girl and sentenced to 30 years. When he was released on mandatory supervision, the parole board imposed extremely onerous special parole conditions. The Texas Civil Rights Project helped Meza file a federal civil rights suit pursuant to 42 U.S.C. § 1983, arguing that the conditions violated his due process and equal protection rights.

The parole conditions required Meza to be housed in the Travis County Jail-Del Valle facility, being allowed to leave the jail only with prior approval of the parole board and accompanied by a parole officer; to find a job and housing before being released from the jail, but not giving him adequate job search support and telling each potential employer that he was a sex offender; and to stay away from "child safety zones," among other restrictions. As a result, Meza was incarcerated at the Travis County Jail for six years "on parole," under the same conditions as jail prisoners in a work release program – conditions which were arguably worse than those in the state prison system. The state claimed that Meza was not "confined" at the jail. The district court disagreed.

Before Meza was paroled, the parole board sent him notice of a hearing on the imposition of sex offender conditions pursuant to *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004) [*PLN*, July 2006, p.27]. The *Coleman* decision required the parole board to provide an appropriate hearing

before imposing sex offender conditions on prisoners not convicted of sex offenses, but did not define an "appropriate" hearing. The parole board began sending notices to such prisoners 30 days before the hearing, informing them that they could submit evidence in their favor.

However, prisoners were not allowed to appear at the hearing in person or by counsel, to cross-examine witnesses, or to review the evidence against them. The board made no written findings of fact. The state argued that *Coleman* only applied to the requirement that parolees participate in sex offender treatment. The court disagreed, finding that many of the restrictions placed on Meza were as onerous as the treatment condition, including being labeled as a sex offender, which could prevent him from finding employment.

With no information regarding the evidence that would be used against him at the hearing, Meza was unable to prepare an informed response to the parole board's intent to impose sex offender conditions. Thus, the court held that the state's hearing process created a risk of erroneous deprivation, and that additional procedural protections were necessary.

Such protections should approximate those provided during parole revocation hearings, including (1) sufficient advance written notice of the hearing; (2) disclosure of adverse evidence, including the portions of the parole file to be considered at the hearing; (3) a hearing where the prisoner is heard in person, represented by counsel and allowed to present evidence; (4) an opportunity to call witnesses and usually cross-examine adverse witnesses; (5) an independent decision maker; and (6) a written statement by the fact finder as to the evidence relied upon and the reasons

for the board's decision.

To impose sex offender restrictions on prisoners not convicted of sex offenses, there must be a finding as a result of the hearing "that [the offender] 'con-

stitutes a threat to society by reason of his lack of sexual control.'" The district court found unpersuasive the state's argument that hearings which included such due process protections would be too

expensive. See: *Meza v. Livingston*, 623 F.Supp.2d 782 (W.D. Tex. 2009). ■

Additional source: *Austin American-Statesman*

PLN Prevails in Motion to Unseal Settlement in CCA Class Action FLSA Case

On August 28, 2009, the U.S. District Court for the District of Kansas unsealed a settlement agreement in a nationwide class-action lawsuit against Corrections Corporation of America (CCA), the nation's largest private prison firm. On July 27, 2009, *Prison Legal News* had filed a motion to intervene in the suit for the purpose of unsealing the settlement.

The lawsuit, brought under the Fair Labor Standards Act (FLSA), alleged that CCA had required some of its employees to perform work duties "without compensating them for all such hours worked as required by the FLSA." Specifically, CCA was accused of not paying certain employees for pre- and post-shift work, including roll calls, obtaining weapons and equipment, attending meetings and job assignment briefings, and completing paperwork.

The parties reached a settlement that was approved by the court on February 12, 2009; however, the settlement was sealed and did not become publicly known until June. *PLN* argued that as a matter of public policy, documents filed in federal court should remain open to the public. This was particularly true for CCA, since almost all of CCA's income is derived from public funds through government contracts.

Further, private prison firms, including CCA, often claim they can save money. Since about 70-80% of prison operating

expenses are related to staffing costs, it was noteworthy that CCA apparently "saved" money by failing to pay its employees the wages to which they were entitled.

"The public has a right to know how its tax dollars are being spent when government agencies contract with for-profit companies like CCA to operate prisons and jails, especially when such companies are accused of violating the law to increase their profit margins," said *PLN* associate editor Alex Friedmann.

In its August 28 order, the court agreed that the settlement and related documents should be unsealed. U.S. District Court Judge John W. Lungstrum wrote that the confidentiality of the settlement was insufficient "to outweigh the strong presumption in favor of public access to judicial records," and that "no evidence whatsoever" had been presented to show that unsealing the settlement agreement "would cause significant damage or prejudice to the parties. ..."

The unsealed documents reveal that the maximum gross settlement amount payable by CCA is \$7 million, which includes up to \$2.33 million in fees for the plaintiffs' attorneys who brought the FLSA suit. The actual amount of the settlement and attorney fees will depend on the total number of class members who opt-in to the settlement. Seven of the named plaintiffs in the case, including the lead plaintiff, will receive an additional

\$2,500 each.

CCA was responsible for providing a list of the potential class members – consisting of current and former CCA employees – so they could be notified of the settlement. There are over 30,600 potential class members nationwide. *PLN* is aware of at least one former CCA employee who did not receive notice of the settlement but who was later determined to be eligible by the claims administrator. The deadline for submitting claims was July 27, 2009.

The settlement provides that current CCA employees who opt-in to the settlement must agree, among other requirements, that they will "report any alleged instruction or suggestion by CCA or any CCA employee to work 'off the clock' or to otherwise under- or over-report the amount of working time." CCA expressly denied any liability or wrongdoing and wrote that the company had agreed to settle to avoid "the costs and disruption of ongoing litigation."

The class action FLSA suit against CCA is *Barnwell v. Corrections Corp. of America*, U.S.D.C. (D. Kan.), Case No. 2:08-CV-02151-JWL-DJW. *PLN* was ably represented pro bono in its motion to intervene by Stephen D. Bonney, Chief Counsel and Legal Director of the ACLU of Kansas and Western Missouri. The settlement and documents in the case are now available on *PLN*'s website. ■

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\$6 Million Settlement in Beating Death of California Detainee

California's Kern County agreed to pay \$6 million to settle a lawsuit in the beating death of a pre-trial detainee at the county's jail. The August 15, 2005, incident involved "as many as 14 detention officers [who] ... beat, hit, kicked, kneed, punched, choked, taunted, mocked, and tormented an inmate who was handcuffed and shackled," said attorney Daniel Rodriguez. "During this entire ordeal, the inmate was pleading, 'Help me, help me, they're killing me.'"

Without cause, the guards began their abuse of James Moore, 30, after he was arrested for threatening Michelle Tripp, the mother of his 5-year-old son Bryce. Moore, a big man, struggled off and on for hours with guards at the Kern County Detention Center.

In addition to the blows to his body and torso area, Moore was pepper sprayed and put in a carotid hold until he was rendered unconscious. As Moore lay severely injured in a cell, guard Ralph Contreras used the camera on his cell phone to take pictures of Moore. He then emailed those pictures with the message, "This dude got fucked up."

Moore was so seriously injured that on August 21 he was taken off life support and died. On December 1, 2005, five guards were arrested in connection with Moore's death. Contreras and guards Roxanne Fowler and Daniel Thomas Lindini face second degree murder charges. Two other guards, Angel Bravo and Lisa Romero, were only charged with assault and took plea deals that did not result in jail time.

The lawsuits filed in Moore's death were on behalf of his sons, Bryce and James Jr., 16. On April 14, 2009, attorneys representing them settled the matter for \$6,050,000 to avoid years of further litigation, even though they felt the case was worth more.

"A jury probably would have awarded something in the neighborhood of \$20 to \$25 million, it was that kind of case, it was outrageous," said Rodriguez, who represented Bryce. "But that meant another additional seven, eight, nine years."

"These boys would be well past the age where this would be of any benefit to them," said James Jr.'s attorney, David Cohn. The attorneys will receive \$1 million for fees and the court is to determine the appropriate annuity of the remainder for the boys' benefit.

The attorneys felt the settlement sent an important warning. "The message is

that law enforcement cannot avoid responsibility, avoid accountability, by virtue of the fact that they wear a uniform or badge," said Rodriguez. "No one, no one is above the law." However, as this issue of PLN goes to press, none of the guards who beat Moore to death have been con-

victed and they remain free on bail.

WhileSee: *Moore v. County of Kern*, USDC, E.D. California, Case No: 1:05-CV-0415. ■

Additional Source: *the Bakersfield Californian*

\$500,000 Settlement for Fatal Beating of Phoenix Jail Prisoner

by Matt Clarke

On June 3, 2009, the Maricopa County (Arizona) Board of Supervisors voted 4-0 to settle for \$500,000 a lawsuit brought by survivors of a man beat to death in the Fourth Avenue Jail of the Maricopa County Jail System. The jail is operated by sheriff Joe Arpaio, the self styled "toughest sheriff in America."

Robert Cotton, 28, had been a pretrial detainee in the maximum-security unit of the jail for a little over a year when he was beaten to death by Pete Van Winkle. Cotton had a history of psychiatric problems and was taking Thorazine, Seroquel and Wellbutrin, medications for schizophrenia, bipolar disorder and depression, when admitted to the jail. He also had assisted the Mesa Police Department as an informant against the Aryan Brotherhood, an organized crime group prevalent in prisons and jails, but also present outside them. Van Winkle is an alleged member of the Aryan Brotherhood.

A month before he was murdered, the jail stopped giving Cotton his medication after he was accused of holding it in his cheek instead of swallowing it. He said he was just having a hard time swallowing it. Over the ensuing weeks, Cotton, who spoke with his mother on the telephone almost daily, reported feeling that he was losing control. He also reported to her and jail officials having been attacked by other prisoners several times. Thus, "the County had a Seriously Mentally ill inmate who was not medicated, felt like he was getting out of control, had been identified as an informant against the Aryan Brotherhood, had been beaten on a number of occasions by other inmates, and was being housed in the maximum security unit and not where he belonged in the mental health unit." It is hardly surprising things went awry.

The jail has a hi-tech computerized digital camera monitoring and recording

system manufactured by NICE Systems. It captured Van Winkle and three other prisoners meeting with Cotton in a recreation room four minutes before the beating began. They hold what appears to be a kangaroo court against Cotton. Van Winkle then escorts Cotton to a cell in which the video monitoring view is imperfect. However, less than a minute later, Cotton emerges from the cell fighting for his life.

Van Winkle beats, kicks, chokes and cuts Cotton for the next fifteen minutes undisturbed. After crushing and cutting Cotton's throat and kicking his head, Van Winkle kicks the unresponsive Cotton multiple times to make sure he is dead. He tries unsuccessfully to throw the body off the walkway. Van Winkle then joins the other three prisoners, who have been loitering nearby, gets a drink of water, and lies down on the floor to await detention by guards who finally show up long after Cotton is dead.

Cotton's mother and three daughters entered into mediation with Maricopa County, asking for \$2 million. During mediation, it was discovered that Van Winkle was involved in another assault, captured on video and without intervention by guards. The same guard who was supposed to be monitoring the cameras when Van Winkle murdered Cotton was supposed to be monitoring the cameras during the new incident. Also, statements by the jail's commander made it clear that he knew little about prison gangs and how much of a problem he had with them at the jail. This spurred the county to settle for \$500,000, which officials claimed would be less than the cost of litigating. The survivors were represented by PLN subscriber and Phoenix attorney Joel B. Robbins. ■

Sources: Medication Documents, *Cotton v. Arpaio* before the Hon. Chris Skelly, *Arizona Republic*, www.kpho.com

Los Angeles County Agrees to Pay \$7,000,000 to Beaten Juvenile Prisoner

On March 27, 2009, Los Angeles County agreed to pay \$7,000,000 to a youth that was severely beaten at the Barry J. Nidorf Juvenile Hall (Nidorf) in Sylmar, California after the youth was pressured, but refused, to join a gang.

Raymond Amande, Jr. was attacked in a recreation room by four gang members after watching a movie. The room was filled with 35 youths and being supervised by only one staff member, three less than what was required.

Amande's neck was broken during the attack after Amande was slammed to the concrete floor. The staff member in the room at the time tried to intervene, but

was unable to do so. There were cameras in the room, but they were not working. Amande was left a quadriplegic as a result of the attack.

Amande's assault follows on the heels of a Department of Justice (DOJ) inquiry that found widespread violence, understaffing, and overcrowding at Nidorf. Amande relied on the DOJ's findings in his complaint.

Amande's attorney, Michael Louis Kelly, of Los Angeles based Kirtland & Packard, said Amande was "very happy" with the settlement. "It's going to allow him to move on with his life." Amande, now 20, plans to attend college.

The settlement requires the county to pay Amande \$3,800,000 upfront, with the remainder being disbursed through periodic payments. The settlement is inclusive of attorney's fees.

The county is in the process of improving conditions at its 22 juvenile facilities as a result of the DOJ's investigation and Amande's suit. Improvements include repair of all surveillance cameras. No staff were disciplined in connection with Amande's attack. See: *Amande v. The County of Los Angeles*, Los Angeles Superior Court, Case No. BCV 373715. 📄

Additional source: *Los Angeles Times*

Ohio County Jail Agrees to Pay \$75,000 For Locking Up Poor

On April 30, 2009, Hamilton County, Ohio agreed to settle a class action lawsuit brought on behalf of over 600 individuals who were jailed for non-payment of a fine without first being afforded an attorney or hearing to determine whether they could pay.

The Plaintiff in the case, Michael Powers, pled no contest to reckless operation of a motor vehicle and was ordered to pay a \$250 fine and placed on probation in lieu of serving 30 days in jail. Powers was later rearrested for failing to pay his fine and was ordered to serve his original sentence of 30 days. In spite of his indigence, Powers was not given an attorney or hearing to challenge the revocation of his

probation for non-payment of his fine.

Powers sued the Hamilton County Public Defender Commission alleging that its practice of not affording counsel for indigent defendants facing incarceration for non-payment of a fine violated the Sixth and Fourteenth Amendments.

The judge in the case granted summary judgment for Powers on his claims, but the United States Court of Appeals for the Sixth Circuit reversed, finding material facts in dispute.

On remand, the parties agreed to a settlement. The county agreed to set up a fund with \$75,000 for disbursement to defendants who were incarcerated for non-payment of a fine without first being

afforded an attorney or indigency hearing. The county also agreed to pay \$1,000 to Powers for his work in representing the class.

Hamilton County now provides an attorney and a hearing to defendants facing incarceration for non-payment of a fine.

Powers was represented by Robert Newman and Stephen Felson of Cincinnati, Ohio. See: *Powers v. Hamilton County Public Defender Commission*, USDC SD OH, Case No. 1:02CV605. 📄

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Audit Finds California Parolees Sometimes Slip Through Bureaucratic Cracks

At the request of the legislature, the Bureau of State Audits examined the adult parole discharge practices of the California Department of Corrections and Rehabilitation and found that parolees, even those regarded as violent or serious offenders, occasionally slip through bureaucratic cracks in policies designed to prevent their premature discharge from parole.

Upon completion of their prison terms, California prisoners are released into the community to serve statutory periods of parole which vary in length (from three years to life) depending on the type of commitment offense. State law, however, permits early discharge from parole upon service of a specified period of continuous parole (which varies in length from one to seven years, again depending on the type of commitment offense). Indeed, early discharge is required and occurs automatically, absent a finding of good cause by the parole board, 30 days following service of the specified continuous-parole period. Thus, and because California now discharges more than 40,000 felon parolees annually, failure of the parole board to exercise its discretion, in cases where retention is warranted, can have significant public safety implications.

In an August 2008 report, the State Auditor found that responsible parole units failed to submit discharge review reports for nearly 5,000, or 9 percent, of the parolees discharged over a 15-month period commencing January 2007. As a consequence of that failure, the parole board was not given an opportunity to exercise its discretion to retain any of those parolees – approximately 15 percent of whom had been convicted of violent or serious offenses.

The State Auditor also found 31 instances in which district administrators, acting within their lawful discretion, had discharged parolees despite retention recommendations by subordinate staff. In 15 of those cases, explanations for overriding the retention recommendations were not provided.

One district administrator, the State Auditor found, had discharged parolees after using corrective liquid to alter the retention recommendations of subordinate staff. He did so, he explained, because case records sometimes failed to notice that he

had overridden a subordinate's retention recommendation. Disturbingly, in five years – until the audit brought the practice to light – he had never been told that this was inappropriate. Since being so informed, he has reportedly ceased this practice.

In response to the audit, Corrections reported that it had taken steps to ensure, among other things, that discharge review

reports are prepared for every parolee eligible for discharge and that district administrators document their reasons for overriding staff-recommended parole retentions. The report is available on PLN's website. ■

Source: California State Auditor's Report, August 2008, Report #2008-104.

Maryland Prisoners Make Flags

Made in the U.S.A. got a whole new meaning with the passage of a recent Maryland law that requires all Maryland and United States flags to be produced in the United States.

For many years in Maryland, all but one flag that flies at the State House was made in Jessup, Maryland, home to Maryland Correctional Services (MCS), the prison labor division of the Maryland Division of Correction. Now, all flags will be made in Jessup under legislation signed by Governor Martin O'Malley.

The flag legislation came about after H. Wayne Norman, Jr., a delegate to the Maryland House, bought a United States

flag from Home Depot that was made in China. "When you see that symbol, it's a little ironic when it says, 'Made in China,'" said delegate B. Daniel Riley, a supporter of the bill.

While the flag legislation was designed to remedy a perceived slight on an important American symbol, it does nothing for the workers who will be making the flags. Prisoners working for MCS make \$1.25 to \$5.10 a day, well below the federal minimum wage in a prison system renowned for its brutality and corruption. How appropriate. ■

Sources: Foxnews.com

Small Amounts of Marijuana Not "Dangerous Contraband" Under New York Law, Court Rules

The possession or introduction of small amounts of marijuana into a New York state prison is not punishable as a felony, the New York Court of Appeals held.

Robert Finley, a New York state prisoner, was charged with felony promoting prison contraband in the first degree after three marijuana joints were discovered in a wad of toilet paper that he threw on the ground before a "pat frisk" near A-Block at the Orleans Correctional Facility.

Kyle Salters, another state prisoner, was charged with felony attempted promoting prison contraband in the first degree after his girlfriend was caught trying to smuggle 9.3 grams of marijuana to him during visitation at the Bare Hill Correctional Facility.

Both Finley and Salters were charged with felonies on the premise that marijuana constituted "dangerous contraband" within the prison setting, based on the decision in *People v. McCrae*, 297 A.D.2d

878 (N.Y. App.Div.3d Dep't 2002). Following separate jury trials, Finley and Salters were convicted as charged. They both appealed, and their appeals were consolidated.

The Court of Appeals, New York's highest state court, reversed. The small amounts of marijuana at issue in Finley and Salters' cases did not constitute "dangerous contraband" under Penal Law §§ 205.00(4) and 205.25(2), the Court held after a lengthy discussion. Rather, "dangerous contraband" refers to items that "will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security."

Accordingly, the Court modified Finley and Salters' convictions by reducing the charges to misdemeanor offenses, and remanded their cases for resentencing. See: *People v. Finley*, 891 N.E.2d 1165, 862 N.Y.S.2d 1 N.Y. 2008. ■

Clerk Erred in Refusing to File Unsigned 28 U.S.C. § 2255 Motion

The U.S. Court of Appeals for the Eleventh Circuit held that it was error for a district court clerk to refuse to file an unsigned 28 U.S.C. § 2255 motion.

On May 20, 2004, Georges Michel's co-defendant, James Armstrong, mailed a § 2255 motion prepared on Michel's behalf to the U.S. District Court for the Southern District of Alabama. The signature line of the motion contained the typed name "Georges Michel" but was otherwise unsigned. The clerk returned the motion to Michel with a letter explaining that an unsigned § 2255 motion would not be accepted.

Michel sent several unsigned copies of the motion back to the clerk, each of which were returned with instructions that the motion must be signed. On June 17, 2004, the clerk finally received and docketed a signed copy of Michel's § 2255 motion. The district court dismissed the motion as untimely because it was not properly filed by May 26, 2004 – the day the statute of limitations expired.

On appeal, Michel argued that the district court had erred in treating his § 2255 motion as untimely. According to

Michel the clerk should have filed his unsigned § 2255 motion in accordance with the recently amended Rules Governing Section 2255 Proceedings. The Eleventh Circuit agreed, holding that "[a]mended Rule 3(b) requires the clerk to file and docket the motion upon receipt, even if it does not conform to the technical

requirement in Rule 2 that the motion be signed."

Accordingly, the appellate court reversed the dismissal of Michel's motion as untimely and remanded the case to the district court for further proceedings. See: *Michel v. United States*, 519 F.3d 1267 (11th Cir. 2008). ■

Mississippi Prisoners Make Collect Call for Jesus

On April 15, 2009, the Mississippi Legislature passed legislation authorizing up to 25 percent, or \$25,000 annually, of the money collected from prisoner telephone calls to fund a Jail and Prison Ministry.

Since the late 1990s, the Good News Jail and Prison Ministry has provided church services at the Lauderdale County Jail, funded entirely by donations. In 2007, however, the Lauderdale County Board of Supervisors requested the introduction of legislation to divert prison phone revenues, through December 31, 2011, to the chaplaincy to pay for a full-time Chaplain, and non-denominational worship services.

Sheriff Billy Sollie believes the jail ministry is important because it gives "hope of changing the heart and mind of those individuals who have chosen to prey on society, and provides them with hope for the future." Sollie touted Ronny Shack, one of the first prisoners to join the jail ministry, as a chaplaincy success story. Sollie is convinced that Shack is now reformed, owning a local business, the Rib Shack, which provides catering for jail ministry fundraisers. "He acknowledges the message he received has led him to where he's at today," said Sollie. ■

Source: Senate Bill No. 3184 (2009), www.meridianstar.com

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Aramark Discontinues, Loses Prison Food Service Contracts

by David M. Reutter

The corporate philosophy of cutting corners to enhance profits is catching up with Aramark Correctional Services, causing the company to lose prison and jail food service contracts and putting other contracts in jeopardy. Aramark has discontinued its contract with Florida's entire prison system, while the company recently lost contracts in several other states as well as overseas.

In 2002, the Florida Department of Corrections (FDOC) was pushed into privatizing its food service at the behest of former Governor Jeb Bush, who forced many state agencies into privatization with disastrous results.

The first week after the FDOC's privatized food service went into effect, there were improvements. The initial meal trays were well-prepared with sufficient servings. Shortly thereafter, however, Aramark moved to cash in on the contract's lucrative provisions.

Not only did the FDOC contract provide Aramark with prisoner slave labor to perform all kitchen-related duties except supervision, it contained an incentive to cut every possible corner to increase the company's profit margin. Aramark had no qualms about doing just that, and provided its managers with incentive bonuses for coming in under budget.

The contract's golden egg was a provision that paid Aramark according to the FDOC's prison population at the midnight count rather than for each meal tray that was served. Consequently, a decrease in the number of trays served would result in an increase in the company's bottom line. Poor quality food became the norm, which led to fewer prisoners showing up to eat. In Florida prisons with Aramark food service, about 15 percent of prisoners did not attend meals.

The main tactic for making the food less palatable was to cut spices and fillers from the cooking process. The use of leftovers to plan future meals became a common practice. Further, shaking the spoon to reduce the amount of food that went onto each tray became a new technique taught to prisoners who served meals. Aramark supervisors considered the water that vegetables were cooked in or the grease from meat as part of the serving, so a serving full of water with floating vegetables was normal.

The FDOC helped boost Aramark's profit margin by changing the menu to allow lower-grade meats and cheaper foods, such as substituting turkey for beef. Indeed, a 2007 state Inspector General's report found that Aramark had made a \$10.5 million "windfall" by serving lower-cost food and because the company was not paid based on the actual number of meals served. Although Aramark was fined almost \$241,500 for contract violations in 2008 alone, that amount was dwarfed by the company's profits.

However, due to budget cuts demanded by the state legislature as a result of the economic crisis, the FDOC was required to slash \$9.25 million from its annual food budget. When the prison system's food service contract was rebid in 2008, Aramark's offer of \$96.1 million was about \$20 million over the FDOC's scaled back budget. The company offered to reduce costs by changing the menu and employing fewer workers, which would have shifted some responsibilities to prison staff, but the FDOC objected based on security concerns.

Therefore, on September 9, 2008, Aramark announced it was withdrawing from its contract with the FDOC, invoking a 120-day termination clause. "We have been unable to achieve the type of partnership consistent with our expectations for a positive long-term relationship," said Aramark president Tim Campbell. The company also cited rising food costs. A smaller company that contracted with the FDOC to provide meals at North Florida prisons, Trinity Food Services, also terminated its contract.

Prison kitchen operations reverted to state control in January 2009; the FDOC has contracted with U.S. Foodservices, Inc. to provide food for the prison system, which is prepared under the supervision of state employees. The result for Florida prisoners has been a slight increase in the quality of food and fuller portions. Also, the previous policy of "progressive cooking" was discontinued, so enough food is cooked in advance of each meal and prisoners no longer have to wait while more is prepared.

Taking back food operations from a private contractor is "quite unprecedented for a department of corrections," noted Aramark spokeswoman Sarah Jarvis. In

addition to Florida, Aramark has suffered recent setbacks in a number of other states and in the United Kingdom.

In October 2008, Aramark lost a contract valued at £40 million (\$68.6 million) to supply canteen operations for the U.K.'s Prison Service, similar to commissaries in U.S. prisons. The contract, which includes providing hundreds of food, hygiene and other consumer items for sale to prisoners, went to two other companies, DHL Exel Supply Chain and Booker Direct. Aramark was netting an estimated \$5 million a year by supplying U.K. prison canteens before it lost out when the contract was rebid.

On March 6, 2009, a Superior Court judge in Monmouth County, New Jersey set aside a contract awarded to Aramark to provide food service at the county jail. The court ordered the County Board of Freeholders to pass a resolution giving the contract to the lowest bidder, Gourmet Dining LLC. The Board, acting on the recommendation of the Sheriff's Department, had thrown out Gourmet's bid even though it was \$155,360 per year under Aramark's. Gourmet's bid was \$2.83 million annually compared with Aramark's \$2.99 million.

Aramark may be losing its \$12 million contract to provide food to Kentucky prisoners, too. On August 26, 2009, state Rep. Brent Yonts introduced a bill (BR 114) that would prohibit the privatization of food services in state prisons. The proposed legislation was introduced following complaints about the quantity and quality of food served by Aramark, which may have contributed to a major riot at the Northpoint Training Center on August 21.

Several buildings were burned and seriously damaged during the riot, and eight guards and eight prisoners received minor injuries. In October 2007, 60 to 70 prisoners at Northpoint had staged a peaceful sit-in to protest food quality and commissary prices, and prisoners' family members told local media sources that the recent riot had been sparked by similar complaints.

Aramark denied that food problems had contributed to the riot. Yet when an accreditation team visited Northpoint in October 2008, it cited a "common theme of complaints ... about the quality of

food service and the canteen prices.” The average cost per meal in Kentucky prisons was just \$.88 last year. “I don’t think the system is recognizing the problem with Aramark,” said Rep. Yont. “I’m hoping the administration will ... cancel the contract.” Aramark has provided food services for Kentucky’s prison system since 2005.

Most recently, in September 2009, the Monroe County Correctional Facility (MCCF) in Pennsylvania decided not to renew its food service contract with Aramark, instead opting to hire Canteen Correctional Services, a division of Compass Group USA, under a \$622,388 three-year contract. According to MCCF Acting Warden Donna Asure, prison officials were pleased with the improved

menu and larger servings under the new contractor. In regard to food service under Aramark, Asure said, “We have had several complaints” and “we tried to work things out.” Apparently the county decided that its contract with Aramark had left a bad taste in its mouth, and that it would be better served by going with a different company.

PLN has previously reported on problems with Aramark food services in prisons and jails. [See: *PLN*, Dec. 2006, p.10; June 2006, p.25].

Sources: *Keller Citizen*, *Palm Beach Post*, *Pocono Record*, *Herald-Leader*, *Asbury Park Press*, www.tampabay.com, www.zazona.com, www.caterersearch.com

Injunction Against Missouri Sex Offender Halloween Restrictions Issued, Then Vacated

by Matt Clarke

A Missouri federal judge issued an injunction against enforcement of a new Missouri law imposing Halloween-related restrictions on registered sex offenders. However, the Eighth Circuit Court of Appeals lifted the injunction on October 30, 2008.

As part of the general demonizing and harassment of registered sex offenders nationwide, the Missouri legislature passed a statute, R.S.Mo. § 589.426, that requires all registered sex offenders (RSOs) to: (1) avoid all Halloween-related contact with children; (2) remain inside their residences between 5:00pm and 10:30pm on Halloween unless required to be elsewhere for just cause such as employment or medical emergencies; (3) post a sign at their residences stating “No candy or treats at this residence”; and (4) leave all outside residential lighting off after 5:00pm on Halloween.

Assisted by the American Civil Liberties Union, two female and two male RSOs – three of whom had sole custody of minor children and old convictions for statutory rape – filed suit in U.S. District Court challenging the statute and seeking a declaratory judgment that it was unconstitutional under the federal and Missouri Constitutions. The suit, filed under 42 U.S.C. § 1983 and other state and federal laws, alleged the statute violated the federal Due Process Clause because it interfered with RSOs’ family obligations and was too vague to allow the plaintiffs to know

how to deal with their own children and/or grandchildren or reasonably understand what constituted “just cause.”

Further, the plaintiffs claimed the statute violated the federal constitutional prohibition against ex post facto laws and a state constitutional prohibition against retrospective laws because it was enacted after their crimes were committed and was being applied retrospectively.

On October 27, 2008, U.S. District Court Judge Carol E. Jackson issued a preliminary injunction enjoining the enforcement of the statute, finding that the plaintiffs had met their burden of establishing irreparable harm and a reasonable likelihood of success on the merits for provisions (1) and (2) of the statute, but not (3) and (4). The preliminary injunction covered all RSOs affected by the statute. See: *Doe v. Nixon*, U.S.D.C. (SD MO), Case No. 4:08-cv-01518 (CEJ); 2008 U.S. Dist. LEXIS 87314.

The state sought an emergency appeal, and on October 30, 2008 the Eighth Circuit granted the state’s motion to stay the preliminary injunction. The parties subsequently agreed to dismiss their cross-appeals. The lawsuit is still pending; the plaintiffs are represented by ACLU of Eastern Missouri attorney Anthony E. Rothert, and a resolution of this case hopefully will be reached by next Halloween.

Additional source: *New York Times*

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\$145,000 Settlement in Iowa Prisoner's Self-Mutilation Mental Health Claim

by David M. Reutter

The Iowa Department of Corrections (IDOC) paid \$144,523.20 to settle a civil rights action that claimed prison officials sat idly watching a mentally ill prisoner physically maim herself.

In 1976 at the age of 13, Shane Elizabeth Eggen was placed in state custody by her parents, who could not control her "tumultuous, aberrant behavior." Between then and 1997, Eggen was in and out of mental health facilities. After stabbing a police officer in 1997 at her special needs facility, she was sent to prison.

A month after her release from prison August 2000, Eggen was back in jail for stabbing another man and setting her apartment on fire in a suicide attempt, which was her second such known attempt. While in the Winneshiek County Jail, "demons" inside Eggen's head quoted a Bible passage, "If thy eye offends thee, pluck it out." As a result, she gouged out her right eye.

After receiving a prison sentence, Eggen was sent to the Iowa Correctional Institution for Women (ICIW) in April 2001. Between then and October 2003, she was in and out of the "hole" for her behavior, which included assaults on other prisoners and staff.

At the heart of the civil rights complaint filed on her behalf was self-destructive behavior that caused her physical injuries while she was in solitary confinement. On December 21, 2002, Eggen mutilated her left eye, leaving her totally blind. In June 2003, she pulled out four teeth and chewed off one of her fingers. Finally, in October 2003, Eggen spent weeks digging at her cheeks, filling the cavity she created with feces and vaginal secretions.

The complaint charged prison officials did nothing to protect Eggen from her "mad self" other than to place her in isolation, exacerbating her psychiatric condition. Despite their knowledge of her history, the defendants "watched" Eggen "mutilate herself on multiple occasions and failed to stop it, or ... provide prompt medical attention."

Eggen finished her prison sentence

in 2005, and she was taken to the state Mental Health Institute, where she remains. Her tragedy was used in *Crazy in America*, a nationally promoted book that illustrates how prisons are misused as psychiatric facilities.

To avoid "the potential for a very large damage award," IDOC settled with Eggen's guardian in May 2009. The settlement provides \$50,000 in a trust

for Eggen, \$70,000 to attorney Patrick Ingram, and \$21,532 to the Constitutional Litigation Law firm in Detroit for attorney fees.

See: *Jewell v. Iowa Department of Corrections*, USDC, S.D. Iowa, Case No: 4:04-CV-710. ■

Additional sources: *Des Moines Register*; *wcfcourier.com*

Mentally Ill NC Prisoners Injured in Separate Incidents

by Gary Hunter

Timothy E. Helms remains paralyzed from the neck down following a confrontation with guards after he lit a fire in his cell at North Carolina's Alexander Correctional Institution in Taylorsville. The next day, on August 4, 2008, Helms arrived at Catawba Valley Medical Center in the back of a squad car, suffering from what Dr. Jon Giometti described as extreme blunt force injuries.

"The patient has [welt] markings consistent with [being] struck by a Billy club across his upper extremities. Across his trunk, he has contusions on the chest wall as also on the back consistent with multiple blows from a Billy club," Dr. Giometti wrote.

A CT scan revealed hemorrhaging in Helms' brain stem and bleeding in both temporal lobes, as well as a broken nose and fractured skull. Helms said in an interview that guards had beat him and slammed his head into a wall while he was handcuffed and shackled. He also said he was restrained with a collar and leash, like a dog. Staff at the Alexander facility had been ordered to discontinue the use of nylon leashes to control prisoners in 2006.

"They tried to break me," said Helms, his voice now slurred. "They couldn't break me." He claimed that guards had shoved a battery in his anus; according to medical records, batteries were found in his rectum and removed by hospital staff.

The North Carolina Department

of Corrections (NCDOC) asked the State Bureau of Investigations (SBI) to investigate the circumstances surrounding Helms' injuries. Six months later, in March 2009, the SBI began its investigation. The following month they reached a conclusion.

On April 29, 2009, district attorney Sarah Kirkman stated in an email, "After discussing the case with agents from the SBI and reviewing the report, which included witness statements, medical records and video footage, I have determined that there is insufficient evidence to prosecute any crime in the matter." In short, the SBI could not determine how Helms was injured.

However, the *Charlotte News & Observer* reported that during Helms' incarceration he had spent almost 1,500 days, including the last year, in solitary confinement. Not only did this violate NCDOC policy, which disallows solitary confinement for more than 60 consecutive days, it also called into question who the witnesses might be since the incident occurred in the segregation unit, and who else but prison guards could have caused such extensive injuries.

According to the SBI, surveillance video showed Helms being removed from his smoke-filled cell by guards with no billy clubs. He was walking and able to speak. Prison officials initially refused to release the video, which did not record the entire incident – including after guards took Helms to another cell that was not

monitored by video cameras.

Dr. Giometti later back-pedaled from his original statements, saying that Helms' broken nose had occurred before August 3, 2008 and that his comments regarding Helms having been beaten were based solely on Helms' own assertions.

Helms, who has an IQ of 79, is accused of setting fire to his cell and becoming combative when guards tried to extract him and extinguish the blaze. During his 14 years in prison he had amassed 125 disciplinary cases and cut himself repeatedly.

Now largely paralyzed, Helms is incontinent and unable to walk or feed himself. In February 2009, North Carolina's Disability Rights group requested that he be released to a medical facility better able to care for his needs. Dr. Paula Smith, the NCDOC's medical director, recommended that Helms be released, stating he no longer poses a public threat.

"His condition is so debilitating that he is highly unlikely to be considered a significant public safety risk," Smith wrote.

NCDOC Secretary Alvin Keller, Jr. denied the request. Helms remains in prison, serving three life sentences for a 1994 DUI accident that left three people dead. He has regained some use of his limbs through physical therapy, and faces criminal charges for setting the fire in his cell.

On May 16, 2009, guards responded to a disturbance in the hospital ward at Central Prison in Raleigh, where Helms had been transferred, and found Helms, now confined to a wheelchair, banging on his cell door. He was sprayed with pepper foam. One guard later resigned as a result of that incident.

"This agency's job is to protect the public safety and the safety of inmates and employees in our facilities," said Keller, in response to the May pepper spraying. "I will not tolerate anyone who operates outside of established policies and procedures and puts that safety at risk." There was no explanation from Keller as to why the pepper spraying was outside established policy while the serious injuries that Helms had received earlier, which resulted in paralysis, did not warrant similar concerns.

Another mentally ill North Carolina prisoner, Jamal Delvon Gurley, 29, was involved in an altercation with guards at Central Prison on May 5, 2009. Gurley, who was awaiting trial

on two murder charges, was beaten with batons after he allegedly tried to attack prison staff through a slot in his cell door using a toothbrush made into a weapon.

Following a violent melee when he was subdued by guards, Gurley complained that his arm hurt. A prison nurse decided he was not injured, but X-rays later revealed he had a broken arm. An NCDOC spokesman said guards had acted appropriately.

"He is the most mentally ill person I have ever seen, and I have represented a lot of seriously mentally ill people" stated Gurley's attorney, Paul Herzog. Gurley had been found not mentally competent to stand trial; he was held at Central Prison on safekeeper status because he was deemed too dangerous to house at a state mental hospital. ■

Sources: *Charlotte News & Observer, Wilmington Journal*

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Missouri DOC Permits Gift Books in Response to PLN Demand Letter

On September 15, 2009, the Missouri Department of Corrections (DOC) agreed to revise its policy prohibiting prisoners from receiving books purchased for them by third parties or sent to them free of charge. The DOC also agreed to eliminate any prior approval requirement as applied to book vendors and distributors. The decision was made in response to a demand letter sent the DOC's attorney by general counsel for Prison Legal News (PLN) Daniel Manville.

At some point, Missouri DOC facilities began enforcing a policy prohibiting prisoners from receiving books unless the books were paid for with funds from the prisoner's trust account. This policy was enacted despite the fact that DOC permits prisoners to receive magazine and newspaper subscriptions purchased for them by a third party or sent to them free of charge. Some facilities also required prior approval for books from vendors to be distributed to Missouri prisoners.

Earlier in 2009 Missouri prisoners informed PLN that books ordered from PLN on their behalf by third parties were being censored. Various DOC facilities refused to deliver the books and failed to provide notice of the censorship to either the prisoner or PLN. PLN Editor Paul Wright sent a letter to the DOC director requesting that the policy and corresponding lack of notice be revised, but the letter went largely ignored.

On August 17, 2009, attorney Daniel Manville, general counsel for PLN's parent company the Human Rights Defense Center, sent the director a final demand letter as a prelude to initiating legal action. Mr. Manville asserted that refusing prisoners access to gift or free books, and failing to provide notice of the censorship of those books, violated PLN's constitutional rights. Mr. Manville requested that DOC change these policies or face litigation. In a letter authored by its legal counsel, Matthew Briesacher, DOC capitulated and agreed to change its policies to permit Missouri prisoners to receive books regardless of whether they paid for them or not and to eliminate any prior approval requirement for book vendors and distributors.

PLN is pleased the Missouri DOC was willing to resolve this issue without

unnecessary and costly litigation in a manner that respects the constitutional rights of the prisoners in its custody and of publishers like PLN who wish to

communicate with them. We would like to thank the Missouri prisoners who alerted us to this issue and sent us documentation of the problem. ■

Hawaii to Remove Prisoners from CCA Facility Over Abuse Charges

by Ian Urbina

Hawaii prison officials said Tuesday that all of the state's 168 female inmates at a privately run Kentucky prison will be removed by the end of September because of charges of sexual abuse by guards. Forty inmates were returned to Hawaii on Aug. 17.

This month, officials from the Hawaii Department of Public Safety traveled to Kentucky to investigate accusations that inmates at the prison, the Otter Creek Correctional Center in Wheelwright, including seven from Hawaii, had been sexually assaulted by the prison staff.

Otter Creek is run by the Corrections Corporation of America and is one of a spate of private, for-profit prisons, mainly in the South, that have been the focus of investigations over issues like abusive conditions and wrongful deaths. Because Eastern Kentucky is one of the poorest rural regions in the country, the prison was welcomed by local residents desperate for jobs.

Hawaii sent inmates to Kentucky to save money. Housing an inmate at the Women's Community Correctional Center in Kailua, Hawaii, costs \$86 a day, compared with \$58.46 a day at the Kentucky prison, not including air travel.

Hawaii investigators found that at least five corrections officials at the prison, including a chaplain, had been charged with having sex with inmates in the last three years, and four were convicted. Three rape cases involving guards and Hawaii inmates were recently turned over to law enforcement authorities. The Kentucky State Police said another sexual assault case would go to a grand jury soon.

Kentucky is one of only a handful of states where it is a misdemeanor rather than a felony for a prison guard to have sex with an inmate, according to the National Institute of Corrections, a policy

arm of the Justice Department. A bill to increase the penalties for such sexual misconduct failed to pass in the Kentucky legislature this year.

The private prison industry has generated extensive controversy, with critics arguing that incarceration should not be contracted to for-profit companies. Several reports have found contract violations at private prisons, safety and security concerns, questionable cost savings and higher rates of inmate recidivism. "Privately operated prisons appear to have systemic problems in maintaining secure facilities," a 2001 study by the Federal Bureau of Prisons concluded.

Those views are shared by Alex Friedmann, associate editor of Prison Legal News, a nonprofit group based in Seattle that has a monthly magazine and does litigation on behalf of inmates' rights.

"Private prisons such as Otter Creek raise serious concerns about transparency and public accountability, and there have been incidents of sexual misconduct at that facility for many years," Mr. Friedmann said.

But proponents say privately run prisons provide needed beds at lower cost. About 8 percent of state and federal inmates are held in such prisons, according to the Justice Department.

"We are reviewing every allegation, regardless of the disposition," said Lisa Lamb, a spokeswoman for the Kentucky Department of Corrections, which she said was investigating 23 accusations of sexual assault at Otter Creek going back to 2006.

The move by Hawaii authorities is just the latest problem for Kentucky prison officials.

On Saturday, a riot at another Kentucky prison, the Northpoint Training Center at Burgin, forced officials to move about 700 prisoners out of the facility,

which is 30 miles south of Lexington.

State investigators said Tuesday that they were questioning prisoners and staff members and reviewing security cameras at the Burgin prison to see whether racial tensions may have led to the riot that injured 16 people and left the lockup in ruins. A lockdown after a fight between white and Hispanic inmates had been eased to allow inmates access to the prison yard on Friday, the day before the riot. Prisoners started fires in trash cans that spread. Several buildings were badly damaged.

While the riot was an unusual event – the last one at a Kentucky state prison was in 1983 – reports of sexual abuse at Otter Creek are not new. “The number of reported sexual assaults at Otter Creek in 2007 was four times higher than at the state-run Kentucky Correctional Institution for Women,” Mr. Friedmann said.

In July, Gov. Linda Lingle of Hawaii, a Republican, said that bringing prisoners home would cost hundreds of millions of dollars that the state did not have, but that she was willing to do so because of the security concerns.

Prison overcrowding led to federal oversight in Hawaii from 1985 to 1999.

The state now houses one-third of its prison population in mainland facilities.

The pay at the Otter Creek prison is low, even by local standards. A federal prison in Kentucky pays workers with no experience at least \$18 an hour, nearby state-run prisons pay \$11.22 and Otter Creek pays \$8.25. Mr. Friedmann said lower wages at private prisons lead to higher employee turnover and less experienced staff.

Tommy Johnson, deputy director of the Hawaii Department of Public Safety, said he found that 81 percent of the Otter Creek workers were men and 19 percent were women, the reverse of what he said the ratio should be for a women’s prison. Mr. Johnson asked the company to hire more women, and it began a bonus program in June to do so. ■

This article was originally published in the New York Times on August 26, 2009,

and is reprinted with permission. Hawaii has since removed all of its prisoners from Otter Creek. The Kentucky DOC, which houses over 400 female prisoners at Otter Creek, has demanded that CCA make changes as part of a two-year contract renewal; the state is unable to move its prisoners to a state-run facility due to a lack of bed space. Kentucky also has denied CCA’s request for a rate increase, stating Otter Creek “has not performed to a level that warrants a rate increase” and citing “broader facility security and operational weaknesses.”

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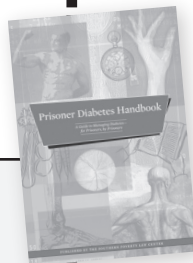
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Military Psychologist Implicated in Abusive Interrogations

by David M. Reutter

A lawsuit against the Louisiana State Board of Examiners of Psychologists (LSBEP) accuses retired Army Col. Larry C. James of professional and ethical violations stemming from his former role as chief psychologist at the U.S. military prisons in Abu Ghraib, Iraq and Guantanamo Bay, Cuba.

The suit was filed by Ohio psychologist Trudy Bond after the LSBEP dismissed her February 29, 2008 complaint seeking an investigation of James. Specifically, Bonds alleged that while James was chief psychologist and deputy director of the Guantanamo Behavioral Science Consultation Team from January to mid-May 2003, and chief psychologist at Abu Ghraib in 2004, he “supervised, condoned, authorized, and was aware or should have been aware” of abusive interrogation protocols and techniques at the two military prisons.

Those improper interrogation techniques allegedly included waterboarding, stress positions, isolation, sexual humiliation, threats of rape and other types of psychological abuse. [See: *PLN*, April 2005, p.1].

Bond’s complaint also alleged that military psychologists “reverse engineered” a program designed to train U.S. troops at high risk of capture how to resist interrogation and torture. The Survival, Evasion, Resistance and Escape (SERE) training program includes sleep deprivation, sexual humiliation, stress positions and the “religious dilemma,” which involves desecration of religious materials.

“Instead of using this knowledge to aid U.S. military personnel ... the psychologists involved in interrogations at Guantanamo, including Dr. James, utilized this information ... in interrogations which resulted in serious harm, abuse, and ill-treatment of detainees at Guantanamo during the time of Dr. James’ assignment there,” Bond stated in her complaint.

The involvement of military psychologists in the SERE program to develop interrogation techniques for terrorism suspects was documented in a sworn statement by the former chief officer of the Interrogation Control Element at Guantanamo, and was discussed during a May 2009 Congressional hearing.

James has been a licensed psycholo-

gist since 1990, and was named the dean of Wright State University’s School of Professional Psychology in Dayton, Ohio on August 1, 2008. He also has served on the governing board of the American Psychological Association (APA) and as president of the APA’s Division for Military Psychology.

While the American Medical Association and the American Psychiatric Association have prohibited their members from participating in interrogations, until recently the APA resisted such restrictions for psychologists.

Following years of contentious discussions, activism and a vote by its entire membership, in September 2008 the APA approved a resolution barring members from working at locations where “persons are held outside of, or in violation of, either International Law (e.g. the UN Convention Against Torture and the Geneva Conventions) or the U.S. Constitution (where appropriate), unless they are working directly for the persons being detained or for an independent third party working to protect human rights.”

APA president James H. Bray issued a statement following the adoption of the resolution. “Let’s set the record straight: It is a clear violation of professional ethics for a psychologist to have played a role in the torture of CIA detainees ...,” he wrote in an April 22, 2009 editorial. “It is unthinkable that any psychologist could assert that stress positions, forced nudity, sleep deprivation, exploiting phobias, and waterboarding ... cause no lasting damage to a human being’s psyche. And yet an emerging record strongly suggests that some did.”

In May 2009, listserv emails from the APA’s Presidential Task Force on Psychological Ethics and National Security (PENS) were made public. According to Physicians for Human Rights, prior to the adoption of the APA’s September 2008 resolution, the PENS task force had “developed its ethics policy to conform with Pentagon guidelines governing psychologist participation in interrogations.”

“These emails show that several of the military psychologists formulating APA ethics policy were giving themselves get-out-of-jail-free cards. Their report asserted that it was ethical to follow military policy while ... memos allowing torture

were still in effect,” said Stephen Soldz, a board member of Psychologists for Social Responsibility.

“In the context of these revelations, the American public needs to know why a supposedly independent [APA] ethics policy was written by some of the very personnel allegedly implicated in detainee abuse,” added Nathaniel Raymond, Director of Physicians for Human Rights’ Campaign Against Torture.

James, who participated in the PENS listserv, has denied that he contributed to or oversaw improper interrogations. In a 2008 book that he co-authored, titled “Fixing Hell: An Army Psychologist Confronts Abu Ghraib,” James said he was sent to Abu Ghraib to right the wrongs that occurred at the facility, which became widely known after photos of U.S. military personnel abusing Iraqi detainees surfaced in April 2004. [See: *PLN*, Dec. 2004, p.26].

The book reportedly “debunks many of the false stories and media myths surrounding the actions of American soldiers at both Abu Ghraib and Guantanamo Bay,” according to a description on Amazon.com. Yet there is no question that detainees were tortured at Abu Ghraib, as indicated by the photographic evidence and the military’s own reports.

Bond’s lawsuit against the LSBEP for failing to investigate James was originally filed by New Orleans civil rights attorney Mary Howell, but later was turned over to the law firm of Nixon Peabody, LLP for pro bono representation. The Nixon Peabody firm had prepared habeas petitions filed in the U.S. Supreme Court for detainees held at Guantanamo Bay absent any formal charges.

The district court dismissed Bond’s lawsuit on July 13, and she appealed the dismissal to the Louisiana Court of Appeals on August 6, 2009. See: *Bond v. Louisiana State Board of Examiners of Psychologists*, 19th Judicial District Court, Parish of East Baton Rouge, Case No. 569127 § 24.

Also on August 6, the Center for Constitutional Rights and the Canadian Centre for International Justice asked the Canadian government to investigate James for war crimes in connection with his work at Abu Ghraib and Guantanamo, after it was reported that James planned

to attend the APA's annual convention in Toronto.

Further, in a letter made public on August 7, 2009, the U.N. Special Rapporteur on Torture, Manfred Nowak, informed the APA that conditions at Guantanamo Bay were in violation of

international law, and requested that psychologists no longer take part in interrogations at Guantanamo and other sites "where international law is being violated."

Thus far, Dr. James has avoided any criminal investigation or discipline for

ethics violations related to his work at Guantanamo and Abu Ghraib. ■

Sources: www.2theadvocate.com, *National Public Radio*, *Physicians for Human Rights* press release, www.salon.com, www.when-healersharm.org, www.ethicalapa.org

Indigent Connecticut Prisoners Entitled to Copies of Records Under FOIA Without Charge

On April 29, 2008, the Superior Court of Connecticut upheld the Connecticut Freedom of Information Commission's decision to invalidate a state prison rule that prevented indigent prisoners from obtaining copies of records under the state's Freedom of Information Act (FOIA) without charge.

Richard Quint, a Connecticut prisoner, requested various records under FOIA from the prison food services division. The prison provided Quint with the requested records, but then assessed a \$137.25 charge against Quint's trust fund account. Under then-existing rules, Connecticut prison officials were required to obtain reimbursement for copying fees incurred by indigent prisoners.

Quint filed an appeal with the Freedom of Information Commission. The Commission sustained Quint's challenge to the prison's policy of requiring reimbursement for copying fees by indigent prisoners. The prison officials appealed.

The Superior Court found the Commission's decision was reasonable. Under the prison's current policy, a prisoner "with no assets at all will have an encumbrance placed on his trust account," which was inconsistent with the FOIA statute. Prison officials do not "have discretion to define indigence in a way that makes it impossible to obtain a complete fee waiver," the court held. Truly indigent prisoners, the court explained, "are entitled by law to copies of records with no financial consequences."

Accordingly, the Superior Court upheld the Commission's decision to invalidate the prison's definition of "indigence" as it applied to the FOIA statute. See: *Food Services Division v. Freedom of Information Commission*, 2008 Conn. Super. LEXIS 1013 (Conn. Super. Ct., Apr. 29, 2008). ■

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Duration of Confinement in Segregation Affects Due Process Inquiry

On May 12, 2008, the U.S. Court of Appeals for the Sixth Circuit held that the length of a prisoner's confinement in administrative segregation (ad seg) affects whether there has been a due process violation.

Carey Harden-Bey, a Michigan prisoner at the Alger Maximum Correctional Facility, was placed in ad seg on September 12, 2002 after prison officials received reports from other prisoners and staff that he was "using his position as a ranking member of the Moorish Science Temple of America to direct and influence his followers to strong arm other prisoners, collect debts, approve prisoner assaults, and [was] involved in the approval and planning of a major serious assault on staff and a takeover of the housing unit and/or facility ... at Alger."

Harden-Bey requested an investigation into his ad seg placement. After conducting a hearing on the matter, prison officials upheld his placement. In 2003, 2004 and 2005, Harden-Bey filed grievances complaining about his continued confinement in ad seg without periodic reviews. Each grievance was denied.

In December 2005, he filed a 42 U.S.C. § 1983 action against several prison officials, alleging that his continued confinement in ad seg violated his constitutional rights. The district court dismissed Harden-Bey's complaint for failure to state a claim. According to the court, "placement in administrative segregation is never 'atypical and significant' and ... the 'length of the placement' does not affect the inquiry." The district court also rejected Harden-Bey's Eighth Amendment claim related to his ad seg confinement. Harden-Bey appealed.

Framing the question on appeal as whether Harden-Bey's "allegedly indefinite confinement in administrative segregation, three years and running at the time of the complaint, amounts to an 'atypical and significant hardship on [him] in relation to the ordinary incidents of prison life,'" the Sixth Circuit disagreed with the district court's dismissal of the suit.

"[T]he duration of prison discipline bears on whether a cognizable liberty interest exists," the Court of Appeals explained. Rather than prejudge the issue, though, the Court remanded the matter

to the district court to assess in the first instance "whether the nature and allegedly 'indefinite' duration of Harden-Bey's segregation" was "atypical and significant in relation to the ordinary incidents of prison life."

The Sixth Circuit agreed, however, with the district court's handling of Harden-Bey's Eighth Amendment claim. The Eighth Amendment protects prisoners from only the deprivation "of the minimal civilized measure of life's necessities." Placement in ad seg is but "a routine discomfort that is a part of the penalty that criminal offenders pay for their offenses against society," the appellate court held.

Accordingly, the judgment of the

district court was affirmed in part and reversed in part. See: *Harden-Bey v. Rutter*, 524 F.3d 789 (6th Cir. 2008).

Following remand, the district court conducted a screening review of Harden-Bey's complaint pursuant to the PLRA. The court dismissed his conspiracy, equal protection and retaliation claims for failure to state a claim, but ordered service of the complaint as to Harden-Bey's due process claims and a new Eighth Amendment claim raised in an amended complaint related to seizure of his medical devices (ankle braces and orthopedic boots). See: *Harden-Bey v. Rutter*, 2008 U.S. Dist. LEXIS 82567 (W.D. Mich., Oct. 16, 2008). This case is ongoing, and Harden-Bey is now represented by counsel. ■

Second Circuit Reinstates New York Jail Guard's Excessive Force Conviction

by Matt Clarke

The Second Circuit Court of Appeals reinstated the federal conviction of a New York jail guard for intentionally using excessive force on a prisoner in violation of 18 U.S.C. § 242.

Zoran Teodorovic, a pre-trial detainee at the Westchester County Jail, was housed in a special section of the facility for prisoners with mental problems. After Teodorovic refused to clean up his unkempt cell, Sgt. John Mark Reimer ordered him out of the cell and had a trusty clean it. When Reimer ordered Teodorovic back into the cell, Teodorovic refused to go, saying, "No, no, TV." Reimer approached Teodorovic to lead him into the cell and Teodorovic threw up his hands, hitting Reimer.

Reimer grabbed Teodorovic in a bear hug and took him down to the floor. While Reimer was on top of Teodorovic and restraining him, guard Paul Cote came into the cell block, approached them and began hitting, kicking and stomping Teodorovic while screaming obscenities and exclamations to never hit a guard. Reimer told Cote to stop but was ignored. Teodorovic lost consciousness; he remained in a coma until he died fourteen months later.

Cote asked Reimer to help him cover up the beating. Reimer initially went along with the cover-up, but changed his mind when he discovered that Teodorovic was brain dead. Before Teodorovic died, Cote

was indicted for intentional assault by a state grand jury. The state court convicted him of the lesser-included charge of reckless assault and he was sentenced to three months incarceration. He served two months.

When Cote's attorney discovered the federal government was also considering charging Cote, he asked to discuss the prosecution with various federal officials. This was allowed, but the lengthy discussion process exceeded the statute of limitations on the potential charges. Therefore, Cote's attorney signed a waiver of the statute of limitations in exchange for assurances that the government would not charge Cote with causing Teodorovic's death, possibly making him eligible for the death penalty.

At trial, the prosecution offered the testimony of Reimer and three prisoners who were eyewitnesses to the beating, as well as expert medical testimony. The evidence showed that Teodorovic suffered severe deep skull fractures and many other serious injuries which could not have been caused by a single blow. Cote's defense was that the most serious, fatal injuries occurred during the initial takedown. The judge did not allow the jury to hear evidence that Teodorovic had died, because "it does set kind of an inappropriate and a shocking tone for a case that really does not involve a charge of

homicide and a statute which really does not require significant bodily injury to be violated....” Nonetheless, the federal jury convicted Cote.

Cote filed a motion for judgment of acquittal and for a new trial. The district court found the waiver of the statute of limitations invalid; discounted all of the eyewitnesses; called the prisoners unreliable because they were felons and vindictive because they didn’t agree on the number of hits, kicks and stomps; and described Reimer’s testimony as suspect because it was self-serving. The judge also stated that the testimony did not comport to the physical appearance of Teodorovic’s injuries in photographs, and the state jury’s prior failure to find intentional injury should be considered correct, precluding a conviction on the federal charges. For essentially the same reasons, the judge alternatively granted Cote’s motion for new trial. The government appealed.

The Second Circuit held that the district court judge had abused his discretion when he found the statute of limitations waiver invalid, substituted his credibility assessment for that of the jury, incorrectly took the state trial results into account in

a federal prosecution, and substituted his lay opinion on the photographic evidence of the injuries for that of the government’s expert medical witnesses.

The Second Circuit also denied Cote’s cross appeal, which claimed his federal and state prosecutions constituted double jeopardy. Accordingly, the appellate court reversed both the judgment of acquittal

and grant of a new trial, and returned the case to the district court for sentencing. See: *United States v. Cote*, 544 F.3d 88 (2d Cir. 2008).

Following remand, Cote was sentenced on June 1, 2009 to 72 months in prison and two years supervised release. His motion to set aside the sentence was denied. ■

California: City Liable for \$237,000 Hospital Bill for Prisoner’s Medical Care

On May 22, 2003, indigent prisoner Kenneth Lee Denham was arrested and detained by Oakland police officers at the city jail. He was later taken to the county jail, but the county refused to accept him because he was too sick. Oakland police then transported Denham to ValleyCare Medical Center in Pleasanton, where he received surgery and was hospitalized for more than a month at a cost of \$237,167.88.

When ValleyCare demanded payment, both the city and county declined to cover Denham’s hospital bill. ValleyCare then sued the county and city in state court.

The Alameda County Superior Court ruled that the California Penal Code required reimbursement to ValleyCare. The county was dismissed from the suit as it did not have custody of Denham when he was taken to the hospital. The city was held liable and ordered to pay the cost of treatment, because Denham had been removed from the city jail to ValleyCare. See: *Hospital Committee for the Livermore-Pleasanton Areas v. County of Alameda*, Superior Court of Alameda County, Case No. VG04155957 (April 21, 2008). ■

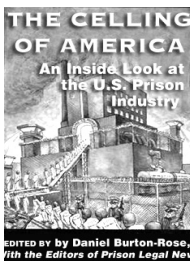
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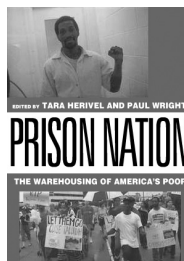
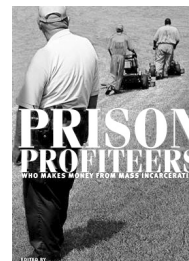
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Florida: For Sentence Calculation Purposes, Civil Commitment Detention Same as Jail Confinement

Florida's Fourth District Court of Appeal has held that there is no meaningful distinction between incarceration in prison or jail and confinement in a sex offender civil commitment facility for the purposes of sentence calculation.

The Court's ruling came in a Fla.R.Crim.P. 3.800(a) proceeding involving Florida state prisoner William J. Sutton, which was dismissed by the trial court. After Sutton had fulfilled his fifteen-year prison sentence (including gain time awards), he was released under Florida's Conditional Release Program Act (CRPA), which requires prisoners to remain under supervision of the Florida Parole Commission for a period of time equal to their gain time.

Upon his release Sutton was transferred to Florida's civil commitment center for sex offenders, to await a trial where a jury would determine whether he qualified for indefinite commitment under the Jimmy Ryce Act (JRA). Under the JRA, a jury must decide if a prisoner is likely to commit new sex offenses, resulting in indefinite civil commitment upon such a finding.

Thus, upon completion of a prison sentence, prisoners who are deemed to qualify under the JRA pass from criminal to civil confinement. If the jury finds the prisoner is not likely to commit new sex offenses, he is released. Sutton sat in the civil commitment center for four years awaiting trial; in June 2004, the State Attorney dropped the JRA case against him.

Rather than being released, however, Sutton was transferred back to prison without credit for his time in JRA custody applied against his sentence. Additionally, the Parole Commission revoked Sutton's CRPA, causing loss of all his accrued gain time, because he refused to participate (on the advice of counsel) in sex offender treatment while at the civil commitment facility, and had refused to submit to a drug test ordered by his supervising officer.

The Court of Appeal noted that Sutton did not in any way appeal or challenge the Parole Commission's revocation or the failure by prison officials to credit the time he spent in JRA custody. Rather, he was challenging the manner in which his 15-year term was being calculated or administered. As Rule 3.800(a) is the remedy

to correct illegal sentences, it could not be used for this purpose. Nonetheless, the Court elected "to address the issue and say what the law is."

The appellate court found that *Mason v. State*, 515 So.2d 738 (Fla. 1987) holds "there is no meaningful distinction ... between incarceration before trial in a county jail, and state enforced confinement in a mental hospital in preparation for trial," requiring the time served in either case under those circumstances to be credited against a prison sentence.

The JRA was not intended to extend or enlarge a criminal penalty, the Fourth District found. The Court further agreed with *David v. Meadows*, 881 So.2d 653

(Fla. 1st DCA 2004), which held that "in the event that Meadows is found unable to comply with his release program because of his civil confinement, he should not be found in violation and should receive credit for the time during commitment."

Therefore, the Court of Appeal found that Sutton was entitled to have his time in JRA confinement credited against his prison sentence. However, the Court did not grant habeas corpus relief, as it expected the relevant state agencies to comply with its findings when Sutton's sentence expired "day for day" within two weeks of the Court's ruling. See: *Sutton v. Florida Parole Commission*, 975 So.2d 1256 (Fla. Dist. Ct. App. 4th Dist. 2008), rehearing denied, review denied. ■

Oakland, CA Police Policy of In-Field Public Strip Searches Without Arrest or Warrant Found Unconstitutional

The U.S. District Court for the Northern District of California held on March 27, 2008 that the Oakland Police Department's (OPD) policy permitting non-medical strip searches of detainees in the field, conducted in public view without either a warrant or an arrest, was partly unconstitutional. Three plaintiffs, all minorities, sued for damages and declaratory relief after OPD officers pulled their pants down and publicly inspected their genital and anal areas.

Darnell Foster, with two months remaining on his successful five-year term of unsupervised probation, was stopped by OPD. Upon telling the officers that he was on probation, he was handcuffed and pat searched in front of a market. No contraband was found and there was no evidence of illegal activity. Next, the police removed him from the back seat of the police car, bent him over the hood, pulled his pants down and publicly inspected his genitals and anus. Finding no contraband, the police then drove Foster two blocks and asked him to make an undercover drug purchase, which he refused to do. Before being released he was cited for loitering with intent to sell narcotics; the charge was dismissed when neither citing officer appeared in court.

Rafael Duarte was stopped by OPD while driving. He was handcuffed and taken in front of a nearby house, where he was publicly strip searched. After Duarte was placed in the police car, his friend was strip searched in direct view of a gathering crowd in the street. Duarte was taken to jail and cited two hours later, but no charges were filed.

Yancie Young was pulled over by OPD late one night and handcuffed. He was walked to the back of the car where OPD pulled down his pants and briefs. The officers shined a flashlight on his genitals for one minute. No contraband was found on Young or in his car, and no charges were filed.

Foster, Duarte and Young all filed Citizens' Police Review Board complaints and civil rights complaints under 42 U.S.C. § 1983, alleging that OPD's strip search policy was unconstitutional. The unique question of law presented was what privacy rights attach to a person who is stopped, but not arrested, for observed criminal behavior or for an exigent warrant. On the plaintiffs' motion for summary judgment, the district court found that OPD's 1998 and 2004 strip search policies met most but not all constitutional requirements.

Notably, field strip searches must be

conducted only upon reasonable suspicion that the arrestee harbors weapons or contraband such as drugs. Such searches presuppose a lawful arrest, and require probable cause to search that is independent of probable cause to arrest. Moreover, body cavity searches must be administered by authorized medical personnel. The court found that OPD's 1998 policy failed only the latter requirement.

However, the 2004 policy was worse; it did not require probable cause

to search independent from probable cause to arrest. Additionally, the policy was unconstitutional because it permitted warrantless strip searches in the field. The district court therefore granted the plaintiffs' motion for partial summary judgment as to declaratory relief, but denied summary judgment as to liability to permit facts involving individual strip search violations to be developed at trial. See: *Foster v. City of Oakland*, U.S.D.C. (N.D. Cal.), Case

No. C 05-3110 MHP; 2008 U.S. Dist. LEXIS 24610.

Previously, in January 2007, the district court had denied a motion to certify the suit as a class action, and on January 12, 2009 the court denied a renewed class action motion even though the number of lawsuits alleging improper strip searches by OPD officers had increased to 13, involving a total of 39 plaintiffs. See: *Foster v. City of Oakland*, 2009 U.S. Dist. LEXIS 1970 (N.D. Cal. Jan. 12, 2009). ■

District Court Erred in Sua Sponte Dismissal of Prisoner's Challenge to Conditions of Confinement

The U.S. Court of Appeals for the Second Circuit reversed a district court's sua sponte dismissal of a prisoner's challenge to his conditions of confinement.

Sala-Thiel Thompson, a federal prisoner, filed a habeas petition under 28 U.S.C. § 2241 alleging that his conviction was entered without jurisdiction and that several of his conditions of confinement were unlawful. The district court sua sponte dismissed Thompson's suit.

According to the district court, Thompson should have pleaded a civil rights action rather than a habeas petition under § 2241; the court could not decide a habeas petition containing claims for relief under § 2241 and civil rights law; and Thompson's claims concerning the jurisdiction of his sentencing court were not cognizable under § 2241. Thompson appealed.

The Second Circuit quickly disposed of Thompson's jurisdictional challenge to his conviction, agreeing with the district court that it was not cognizable under § 2241. The appellate court disagreed, however, with the lower court's handling of Thompson's conditions of confinement claims.

First, the Court of Appeals was puzzled by the district court's conclusion that Thompson's conditions of confinement challenge had to be brought in a civil rights action rather than in habeas. "This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence," the Second Circuit explained, "including such matters as the administration of parole, ... prison disciplinary actions, prison transfers, type of detention and prison conditions."

Nevertheless, the appellate court did not base its decision to reverse the

dismissal of Thompson's claims on this ground. Instead, the Court of Appeals emphasized that as Thompson was a pro se litigant, the lower court was required to construe his claims liberally. In doing so, even if the claims were mislabeled as a habeas petition, the district court should have treated his allegations "as properly pleaded, or at least given the petitioner leave to file an amended pleading identifying the proper source of law without dismissing the action."

Florida Gain Time Law Application Violates Ex Post Facto Clause

Florida's First District Court of Appeal has held that application of a 1983 gain time statute to a prisoner who committed his offense in 1981 violated the ex post facto clause. Before the appellate court was a petition for writ of certiorari filed by Florida state prisoner Reginald Burks.

After his parole was revoked, the Florida Department of Corrections (FDOC) forfeited all the basic gain time that Burks had earned prior to parole. Burks contended that the FDOC's application of the 1983 version of § 944.275, Florida Statutes was disadvantageous to him.

That statute awards basic gain time. Under the 1983 version, it awards a lump sum of 10 days a month for each month served on a sentence, or one-third off. Under the prior version of the statute in effect at the time of Burks' offense, basic gain time was earned under a 3-6-9 formula on a monthly basis. According to the FDOC's pre-1983 rules, the gain time was to be awarded or withheld monthly, rather than as a

lump sum under the current version of the law.

Accordingly, the judgment of the district court was affirmed in part and reversed in part.

See: *Thompson v. Choinski*, 525 F.3d 205 (2d Cir. 2008), cert. denied. ■

lump sum under the current version of the law.

The Court of Appeal granted the certiorari petition, finding that the FDOC's application of the gain time statute in this case adversely effected Burks. The matter was remanded to determine what amount of basic gain time should be forfeited under the 1981 statute. See: *Burks v. McNeil*, 984 So.2d 619 (Fla. Dist. Ct. App. 1st Dist. 2008). ■

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Ninth Circuit: Refusal to Allow Cross-Examination of Lab Technician Violates Due Process

by *Brandon Sample*

The U.S. Court of Appeals for the Ninth Circuit held it was a violation of due process for a district court to deny a criminal defendant the right to cross-examine a lab technician who tested a urine sample that showed positive for illegal drugs, when the sample was clearly adulterated by someone other than the defendant.

In 1998, Janice L. Perez pleaded guilty to bank robbery. She was sentenced to 77 months imprisonment to be followed by three years of supervised release. Perez started her supervised release term on March 8, 2007. On March 21, the day after she passed a urine test at the probation office, Perez reported to Freedom Recovery Services (FRS), an outside contractor used by probation officials to monitor persons on supervised release.

Perez voluntarily submitted to a urine test at FRS. She was under direct visual supervision by FRS personnel when the sample was taken and had no opportunity to adulterate or dilute the sample. According to the test results, Perez's urine tested positive for cocaine. A second urine sample was not taken.

Perez's urine was sent to Scientific Testing Laboratories, Inc. (STLI), the designated testing laboratory for U.S. Probation and Pretrial Services. The STLI report also showed that Perez's urine tested positive for cocaine. However, the report indicated that the sample had been adulterated and contained abnormally low readings for creatine and the urine's specific gravity.

Following a hearing, the district court revoked Perez's supervised release. The court credited an assumption by Perez's probation officer that Perez had adulterated the urine sample, notwithstanding testimony from FRS officials that Perez did not dilute or alter the sample. Further, the court disregarded testimony from FRS staff that several of its drug tests had previously been shown to be unreliable. Finally, the court rejected Perez's request to cross-examine the STLI technician who had tested her urine. Perez appealed.

A term of supervised release may only be revoked based on credible evidence. In this case, the Ninth Circuit found the results from Perez's urine test to be "ineluctably unreliable." The cocaine found

in the urine sample could have come from "Perez' urine, an added substance, or another liquid." Under such circumstances, it was a violation of Perez's due process rights to deny her the opportunity to cross-examine the lab technician. Absent cross examination, the appellate court held, the urinalysis results should not have been admitted as evidence.

The Court of Appeals was careful to make clear, however, that it was not holding that a supervised releasee always

has the right to cross-examine a technician who tests a urine sample. The facts in Perez's case were "unusual," the Ninth Circuit noted. There was no other evidence offered to support the revocation, such as possession of illegal drugs or multiple urine samples that tested positive, for example.

Accordingly, the revocation of Perez's supervised release was reversed. See: *United States v. Perez*, 526 F.3d 543 (9th Cir. 2008). ■

Ohio Jail Officials Face Federal Charges, Investigation

by *Brandon Sample*

A federal grand jury has returned indictments against two Lucas County, Ohio jail guards in connection with the death of a prisoner. Additionally, Lucas County's sheriff and another jail employee face charges of lying to investigators.

According to the indictment, guards John Gray and Jay Schmeltz beat and choked jail prisoner Carlton Benton, 25, leaving him unconscious without medical attention. Benton was awaiting trial on charges of double homicide; he was naked and handcuffed at the time of the incident, and later died at a hospital.

The coroner ruled that Benton's June 1, 2004 death was due to natural causes related to a seizure, despite having found "recent abrasions on [his] neck, hands, and feet." But the coroner did not have the whole story. Gray and Schmeltz tried to cover-up what happened by writing false reports, according to the indictment, and they were supported by Capt. Robert McBroom, an internal affairs investigator at the jail, and by Sheriff James Telb. McBroom and Telb were charged with making false statements during an investigation by the FBI.

The cover-up came to light after former guard Tina Anaya (AKA Tina Hill) came forward on March 10, 2008, the same day that jail officials recommended she be fired due to an unrelated incident in which she had lied to a state trooper. In April 2009, nearly five years after Benton

died, the county coroner's office said it may revise his cause of death upon learning that he had been placed in a "sleeper hold" by Gray.

"This poor man was laying butt naked on his stomach on the bed, and the officers were jumping and jumping, and stomping and kicking and punching and smothering his face and choking him," Anaya stated. Sheriff's officials acknowledged that Benton was likely placed in a choke hold but denied he was jumped on, kicked or punched.

Benton's family has since sued Lucas County, alleging violations of his constitutional rights in connection with his death. The lawsuit, which was removed to federal court, has been stayed pending the outcome of the criminal charges against Gray, Schmeltz, McBroom and Telb, who have not yet gone to trial. See: *Coley v. Lucas County*, U.S.D.C. (N.D. Ohio), Case No. 3:09-cv-00008.

Federal authorities are also looking into the August 20, 2006 death of a prisoner at the Summit County Jail in Ohio. Mark D. McCullough, Jr., 28, died in a cell in the jail's mental health unit after he was Tasered, handcuffed, pepper sprayed, hog tied while kneeling over his bunk, and injected with drugs by a jail nurse. An autopsy found he also had an "unspecified anal injury."

In August 2008, jail guard Stephen Krendick was acquitted of state murder charges for allegedly stomping on

McCullough's head five or six times and then pepper spraying him while he was restrained. Four other guards were charged with felonious assault or reckless homicide: Sgt. Brett Hadley and deputies Brian Polinger, Mark Mayer and Dominic Martucci. However, those charges were dropped when Krendick was found not guilty following an eight-day trial.

The state's case against Krendick

was hampered after Taser International, Inc. filed suit and obtained a court order requiring the Summit County medical examiner to change the cause of McCullough's death from homicide to "undetermined." [See: *PLN*, Jan. 2009, p.28]. The court held that the medical examiner had erred in concluding that Taser contributed to McCullough's death, and Krendick used the change in

the death certificate as a defense during his state court prosecution.

In May 2009, the FBI and U.S. Attorney General's Office announced they would conduct their own investigation to determine whether federal charges should be filed. █

Sources: *U.S. Department of Justice*, www.wtol.com, www.ohio.com, *Toledo Blade*

BOP Warden Does Not Have Authority to Reduce Prisoner's Sentence Under Rule 35(b)

by *Brandon Sample*

A federal Bureau of Prisons (BOP) warden does not have authority to reward a prisoner's cooperation with prison officials with a reduced sentence under Fed.R.Crim.P. Rule 35(b), the First Circuit held on May 23, 2008.

Edward B. Ellis, a federal prisoner serving 20 years, provided assistance to the warden of the federal prison in Lompoc, California while incarcerated there in 1994. In return for Ellis' cooperation, the warden promised to transfer Ellis to a lower-security facility and write a letter to Ellis' sentencing judge describing his assistance so the court could consider reducing his sentence.

The warden fulfilled both of his promises. Ellis was transferred to a lower-security prison, and his sentencing judge received a letter describing Ellis' assistance. Neither the court nor the U.S. Attorney, however, took any action in response to the warden's letter.

Some thirteen years later Ellis filed a motion in his criminal case seeking a reduced sentence, arguing that the government was required to file a Rule 35(b) motion on his behalf. According to Ellis, the government was bound by what was essentially a "promise" by the warden that Ellis would receive a reduced sentence. The district court disagreed.

The court found no evidence that the warden had in fact "promised" Ellis a reduced sentence, and that even if he had,

the warden had no authority to make such a promise. Ellis appealed.

Putting aside the question of whether the warden had actually "promised" Ellis a reduced sentence, the appellate court agreed with the district court that even if such a promise had been made, it was done without authority and could not be enforced. Under Rule 35(b), only the "government" may move for a reduced sentence. A warden of a federal prison is not the "government" within the meaning of Rule 35(b), the Court of Appeals held.

The First Circuit also rejected Ellis' argument that the warden had the authority to bind the U.S. Attorney's Office to file the Rule 35(b) motion. When a private party seeks performance of a promise allegedly made by the government, "it must

show that the government representative alleged to have entered into the agreement had actual authority to bind the United States," the appellate court explained. Wardens, while possessing broad authority to run federal prisons, lack "the power to reward helpful inmates with sentence reductions by the filing of a motion under Rule 35(b)."

Accordingly, the judgment of the district court denying Ellis' motion was affirmed. See: *United States v. Ellis*, 527 F.3d 203 (1st Cir. 2008). █

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News in Brief:

Alabama: On July 23, 2009, former prison guard Kenya Morton, 27, was sentenced to a year in jail and 3 years supervised release for promoting contraband. He was caught during a routine search at the Bibb County Correctional Facility with two bags of marijuana and hydrocodone on February 29, 2008. He subsequently resigned. Another former Bibb County Correctional Facility guard, Woodrow W. Richardson, 37, pleaded guilty on August 25, 2009 to felony charges of smuggling marijuana to a prisoner in exchange for \$800.

California: On August 28, 2009, Jorge Zorrilla, 52, a vocational instructor at the San Quentin Prison for 23 years, was charged with smuggling heroin into the facility. Zorrilla was arrested and then released on bail. He resigned from his job and faces up to six years in prison if convicted.

Colorado: In July 2009, BOP officials at Florence ADX, the federal government's supermax prison, announced that two of President Barack Obama's books have been banned because they allegedly contain material "potentially detrimental to national security." Prisoner Ahmed Omar Abu Ali, who is serving a 30-year sentence at ADX for joining Al-Qaeda and plotting to kill then-President George W. Bush, attempted to order Obama's books, *Dreams from My Father* and *The Audacity of Hope*. Citing guidance from the FBI, prison officials denied his request and banned the books.

Florida: On August 14, 2009, guards at the Brevard County Jail discovered a .38 derringer pistol in a legal mail package addressed to Justin Heyne, who was convicted of a triple murder and faces the death penalty. Officials say Heyne conspired with fellow prisoner Phillip McCullough to take him "hostage" so they could escape. Police have charged Heyne and McCullough, as well as two other people, Lamont A. Lewis and McCullough's wife, Arnesha, in connection with the escape plot.

Florida: On August 5, 2009, Jonathan Bleiweiss, 29, a Broward County sheriff's deputy, was charged with a series of sexual crimes for assaulting undocumented immigrant men. Bleiweiss targeted illegal immigrants who feared reprisal and whose culture would discourage them from reporting sexual assaults. His targets were men between 17 and 30, mostly Latino. The charges include Bleiweiss performing

oral sex on one man on at least four occasions. He ordered the man to comply or risk deportation. He also is suspected of intimidating at least eight other men into performing sex acts during on-duty traffic stops. Bleiweiss faces 27 charges, including false imprisonment and battery. Ironically, in March, Bleiweiss was the first openly gay Broward County deputy to be named employee of the year.

France: In June 2009, 196 French prisoners from around the country were allowed to participate in what was dubbed the Penitentiary Tour de France, a bicycling tournament with a 1,400 mile course that starts in Lille, passes through 17 other towns and ends in Paris. The prisoners were accompanied by 124 guards during the event. "This project aims to help these men re-integrate into society by fostering values like effort, teamwork and self-esteem," said Sylvie Marion of the prison authority. "We want to show them that, with some training, you can achieve your goals and start a new life." This type of program is not new to France and other parts of Europe, where officials have long had a correctional philosophy aimed at rehabilitating prisoners as opposed to the punitive mindset in the United States.

Illinois: On August 4, 2009, eleven prisoners were stabbed at Chicago's Cook County Jail when a riot broke out during breakfast. Three of the prisoners required treatment at a local hospital; the rest were treated in the jail's infirmary. No guards were injured and the cause of the riot was not reported.

Indiana: On July 12, 2009, Mark Booher, 46; Lance Battreal, 45; and Charles Smith, 48, escaped from the Indiana State Prison. The prisoners broke out by means reminiscent of the movie *The Shawshank Redemption*: They used tunnels under the Civil War-era prison that connected to sewer lines outside the facility. Prison officials believe they took money with them earned by illegally selling tobacco, drugs and cell phones while incarcerated. Three guards were placed on administrative leave for allowing the prisoners access to the tunnels. Booher, Battreal and Smith have since been captured and are serving the remainder of their sentences at other facilities.

Iowa: On July 24, 2009, Jim Trentin, 59, formerly a guard at the Prairie du Chien Correctional Institute, reported to jail to begin serving a 9-month sentence. Trentin was originally arrested in March

2008 on 22 counts of custodial sexual assault and six counts of delivering contraband, for giving prisoners tobacco in exchange for oral sex. The charges were reduced in October 2008 when he agreed to plead guilty to one count of delivering contraband and three counts of felony bail jumping. Trentin will serve his sentence in a work release program.

Kentucky: In December 2008, Shawn Freeman and Wesley Lanham, both former guards at the Grant County Detention Center, were found guilty of conspiracy to violate civil rights and obstruction of justice. The convictions stem from the guards placing a teenage boy in a cell with adult prisoners and telling them the boy would make a "good girlfriend." The boy was raped repeatedly. Lanham was sentenced to 15 years in prison followed by three years of supervised release. Freeman received a 14-year sentence with three years of post-release supervision.

Maryland: On September 2, 2009, former prison guard Jason Weaver, 36, was convicted of conspiring to commit assault in the beating of prisoners at the North Branch Correctional Institution. The jury acquitted Weaver of six counts of assault. Prosecutors contended that Weaver and five other guards beat six prisoners transferred to North Branch following a riot at the Roxbury Correctional Institute in March 2008. Three of the five guards were convicted of assault in separate trials and one was acquitted. The fifth guard has yet to go to trial. [See: *PLN*, Aug. 2009, p.20].

Massachusetts: On the evening of July 28, 2009, Christine Callahan, 43, was arrested by Quincy police for possessing eleven oxycodone pills for sale. She had her 11-year-old daughter in her vehicle with her at the time. This was not Callahan's first run-in with the law. In 2002, she was convicted of manslaughter and sentenced to 2½ years in prison for giving a prisoner heroin when she worked as a guard at the Norfolk County Jail. That prisoner, Anthony Marchetti, 34, died of an overdose on May 7, 2002.

Mexico: On August 14, 2009, nineteen people were killed and twenty-six were injured during a two-hour riot at the Gomez Palacio town prison in the state of Durango. Local and federal security forces stormed the facility wearing bullet proof vests and carrying machine guns. A crowd gathered outside the prison, and some people reportedly threw sticks at the troops.

New Jersey: On September 2, 2009, Roy Solomon, 33, formerly a guard at the Southern State Correctional Facility, pleaded guilty to smuggling cocaine and a syringe to an unnamed prisoner. The prisoner was not charged. Solomon had been on unpaid administrative leave since April; his sentencing is scheduled for November 13.

New Mexico: On August 11, 2009, guard Juan Ramirez, 29, and three prisoners, Robert Grado, 21; Luis Garcia, 22; and George Milanez, 25, all were charged with false imprisonment, conspiracy and aggravated battery for attacking prisoner Avery Hadley, 47, at the Metropolitan Detention Center. Hadley was in a segregation cell when Ramirez opened the door so the other prisoners could attack him. Hadley was beaten a second time by another guard, Roslyn Juanico. That assault nearly killed him and he now requires around-the-clock care. Juanico has been charged with attempted murder.

New York: A state audit released on August 11, 2009 found that 11 prisoners had collected unemployment benefits while incarcerated. Auditors recommended that the state Department of Labor recover all inappropriate payments and assess penalties. They also suggested the Departments of Labor and Corrections work together to find out how prisoners were certified for unemployment benefits, and to share information, including a monthly report of prisoners' names and Social Security numbers, so it doesn't happen again. Both agencies promised to make the needed changes.

Ohio: On July 23, 2009, Ryan D. Hunt, 27, a former probation officer with the Drake County Jail, was charged with rape for assaulting a woman in late June. He had resigned from his position on July 2 after being placed on administrative leave.

Ohio: Summit County sheriff's deputy Joshua Griffin, 26, was charged with five counts of felony perjury and one misdemeanor count of falsification on September 2, 2009. The charges stem from Griffin's testimony during an investigation into the death of prisoner Mark McCullaugh, Jr. McCullaugh died in August 2006 following an altercation with jail guards in which he was placed in restraints, injected with sedatives, Tasered and pepper sprayed. Griffin was released on a \$5,000 bond and placed on administrative leave.

Pennsylvania: In July 2009, 42-year-old Colleen Tupi, formerly a nurse at the SCI

Greensburg prison, was fired and charged with institutional sexual assault for performing sex acts on an unnamed prisoner when she was supposed to be checking his blood pressure. Authorities say Tupi also brought the prisoner candy and cigarettes, and used an alias to deposit \$595 into his trust account over a two-year period.

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Texas: On August 27, 2009, Harris County Criminal Court-at-Law Judge Donald W. Jackson was charged with misdemeanor official oppression. The charge stems from Jackson, a 17-year veteran of the bench, allegedly offering to help a young woman get a case dismissed in exchange for her agreeing to have a rela-

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News in Brief (cont.)

tionship with him that was "more than a one-night stand." The woman, Ariana M. Venegas, 27, who had been charged with DUI, is now cooperating with authorities. Jackson was released on \$1,000 bail.

Texas: On May 22, 2009, two Gregg County Jail guards, 20-year-old Gracie Carrillo and 25-year-old Yvonne Oliver, were arrested and charged with facilitating the escape of two prisoners who broke out of the jail on May 19. The prisoners, Desmond Dewayne Jackson, 27, and Bruce Danjuane Kelly, 22, were both quickly captured. Kelly was caught as he stood beneath a nearby carport just hours after the escape. Jackson was arrested the next day when police stopped a van he was riding in. Jail officials have not disclosed

how the guards facilitated the escape, but said policies have been changed to prevent similar occurrences. Both women are being held on \$175,000 bail.

Uruguay: On August 24, 2009, prison-

ers at the Comcar prison in Montevideo set fire to several mattresses. The fire spread quickly throughout the small facility, killing five prisoners during the blaze. ■

Oregon Illegal Detention Suit Settled for \$30,000

The State of Oregon and Multnomah County paid a former detainee \$30,000 to settle his illegal detention claims.

In 2006, Irving Robinson was confined in the Multnomah County Jail, facing criminal charges. The State failed to bring him to trial within 60 days as required by OR5136.290, and the charges were dismissed. Robinson was entitled to immediate release from confinement, but

was confined another 90 days before he was released.

Robinson sued the State and County in federal court, alleging unlawful detention. He sought \$35,000 in damages. On October 29, 2008, the case was settled for \$30,000 with the State and County each paying Robinson \$15,000. Portland attorney Kevin Lucey represented Robinson. See: *Robinson v. Multnomah County*, USDCm D OR, Case No. 08-CU-821-HU. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

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Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Ceiling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$35.95. Exposes the dark side of America's 'lock-em-up' political and legal climate. 1041

The Ceiling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 pages. \$22.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$14.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

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States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$15.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

Marijuana Law: A Comprehensive Legal Manual, by Richard Boire, Ronin, 271pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

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Hepatitis and Liver Disease: What you Need to Know, 2004 Rev Ed, by Melissa Palmer, MD, 470 pages. **\$17.95**. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow and exercises to perform. 1031 ☐

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Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$16.00**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

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Ten Men Dead: the story of the 1981 Irish hunger strike, by David Beresford, 334 pages. **\$16.95**. Relies on secret IRA documents and letters smuggled out from the IRA political prisoners during their 1981 hunger strike at Belfast's infamous Long Kesh prison. 1006 ☐

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Sixth Circuit: Dismissal of Due Process and Equal Protection Claims Upheld; Exhaustion of Administrative Remedies Issue Remanded

The Sixth Circuit of Appeals has affirmed a district court's dismissal of a prisoner's due process and equal protection claims, but reversed the dismissal of Eighth Amendment claims based on failure to exhaust administrative remedies.

Before the Court was the appeal of Kentucky State Penitentiary prisoner Henry David Grinter, following the district court's dismissal of all his claims after conducting the PLRA's mandatory screening process pursuant to 28 U.S.C. § 1915(e).

According to the facts alleged in Grinter's complaint, on January 4, 2003, Sgt. Chad Knight came to Grinter's segregation cell to investigate an incident report that had been filed. Knight refused to add witnesses to the report as requested by Grinter; he then closed the cell's food slot and slid the incident report under the door.

A sort time later, Lt. Tim White and another guard dressed in full riot gear approached Grinter's cell. Grinter was ordered to remove his cloths; he was pinned to the wall while his linens and personal property were removed, then was placed in four-point restraints. Grinter remained in restraints for four hours. The next day he was charged with a disciplinary violation for allegedly wadding up and throwing the incident report. He was also charged

with striking Knight on the wrist, causing a "small red spot."

Grinter's complaint alleged four due process violations. The first related to the four-point restraints. The Sixth Circuit held that the use of four-point restraints and the conditions in which they were administered – for four hours and without a nurse present – were expected adverse consequences of incarceration. Additionally, Grinter had been accused of hitting a guard when he was placed in the restraints. Furthermore, he did not demonstrate an "atypical and significant hardship" under *Sandin v. Conner*, 515 U.S. 472, 484 (1995), and had no liberty interest in freedom from four-point restraints or in having a nurse present before he was placed in restraints.

The Sixth Circuit further held that Grinter did not have a substantive or procedural due process right to have prison officials follow proper procedures in providing him with evidence or allowing him to question witnesses at the disciplinary hearing. Also, Grinter had no right to accumulate good time credits; that claim was based on the forfeiture of 60 days future good time for his disciplinary violation. Finally, there was no due process right related to prison officials' supervisory acts or for their denial of his administrative grievances.

Turning to Grinter's equal protection claim under 42 U.S.C. § 1981, which was

based upon Knight subjecting Grinter to cruel and unusual punishment "for no other reason than [Knight] does not like 'black inmates,'" the Court found that claim also failed. Such a claim could only be filed under 42 U.S.C. § 1983, as race discrimination claims in an official capacity cannot be brought under § 1981 pursuant to *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1981).

Finally, the Court of Appeals addressed Grinter's Eighth Amendment excessive force claim relative to the four-point restraints. The Sixth Circuit held that the district court had improperly dismissed this claim on the grounds that Grinter failed to exhaust his administrative remedies. As exhaustion of administrative remedies is an affirmative defense that must be pleaded, his claim could not be dismissed on that basis at the initial screening stage.

The case was remanded for further proceedings on Grinter's Eighth Amendment excessive force claim, but affirmed in all other respects. See: *Grinter v. Knight*, 532 F.3d 567 (6th Cir. 2008).

Following remand, the case was dismissed for failure to prosecute on November 21, 2008, as Grinter had been released on parole but did not advise the district court of his current address and did not respond to notices from the court or pursue the suit. ■




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November 2009

Pennsylvania County Prisons Mired in Conditions Litigation

by David M. Reutter

Whether or not a large number of lawsuits is indicative of management or operational problems at a prison or jail is a matter of debate that depends on one's perspective—that is, which side of the fence you're on. One thing is certain, though. Correctional facilities in Pennsylvania, including the Lancaster County Prison (LCP) and Bucks County Correctional Facility (BCCF), have been the subject of dozens of lawsuits over the past several years.

LCP has faced litigation due to claims involving illegal strip searches, denial of adequate medical care, wrongful deaths, and physical and sexual abuse by guards, while BCCF and the Northampton

County Prison have been sued for failing to prevent and treat dangerous staph infections.

LCP's warden, Vincent Guarini, believes prisoners file lawsuits as a way to pass the time. "They spend a day in the law library. They read about a case in a law book, and all of a sudden it becomes theirs. They manipulate it," said Guarini, who has served as LCP's warden since 1981. "In many cases, an inmate is rolling the lottery. The vast majority of lawsuits are dismissed. There isn't anything there."

Guarini is correct that most prisoners' lawsuits are tossed out. The reasons for such dismissals include inexperience, an inability to procure evidence to overcome summary judgment motions, having to face skilled defense counsel with better legal and monetary resources, and a reluctance by attorneys to take prisoner lawsuits due to limits on attorney fees under the PLRA, among other factors.

However, the very fact that so many lawsuits against LCP are attracting lawyers willing to represent prisoners, and are resulting in settlements, appears to indicate that Guarini is investing more time in fighting lawsuits than in changing the conditions and practices at LCP that result in such suits being filed in the first place.

"Our whole system is documentation," Guarini explained when describing the files maintained on prisoners at LCP. "A guy could be in prison for a week and have a thick file because everything is reported. You never know when you're going to use it." Such as when the prison is sued, for example.

Overcrowding the Castle

LCP's original structure was built in 1851, upon high ground, patterned after an old castle in Lancashire, England. Its massive stone façade was designed to reassure the public that its 160 prisoners could not escape. Numerous expansions since that time have increased the size of the facility to a city block, spanning seven stories. LCP is now designed to hold 1,029 prisoners, but had a population of 1,250 in November 2008, including almost 140 women. More than 6,000 people cycle through the prison each year.

Staff shortages are a serious problem. "We're busy nonstop. We have 102 people on a block and one officer," stated LCP guard Jodi Barone, a 10-year veteran.

Prison guard Bob Barley said he hears of 7 to 10 fights per month among prisoners, but most are minor and not reported "because of fear of retaliation from other inmates." Assaults on guards occur regularly, too. "If you're here long enough, eventually [every guard] is going to get assaulted," he said. Barley acknowledged that some of the difficulties at LCP are caused by prison staff. "Ten percent of the [guards] create 90 percent of the problems," he stated.

Squeezing too many prisoners into LCP is the root cause of most violence. "When you start putting a bunch of people into a small area, you start getting into other people's space," Barley explained. "Sooner or later it's going to erupt, because they want their space back."

Violent incidents are not limited to prisoners assaulting guards or other prisoners, according to lawsuits filed against

Inside

From the Editor	9
Prison Radio Shows	10
American Methods Book Review	14
Mississippi Medical Care	16
Texas Prison Legislation	18
Erie County Jail Conditions	20
\$1 Million Washington Rape Suit	24
ICE Detainee Death Cover Up	26
Colorado Lockdown	28
PLN Sues Virginia DOC	32
\$21 Million Wrongful Conviction	40
Philadelphia Strip Search Settlement	46
News in Brief	50

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Penn. Prison Litigation (cont.)

LCP officials. Whether it is the stressful environment caused by overcrowding or the sadism of individual employees that results in abuse by prison staff is unknown. Whatever the cause, LCP has settled several lawsuits related to abusive guards, and is facing several more.

Encouraging an Assault

When Jonathan B. Eichelman, 42, was booked into LCP in June 2005, he was asked how he felt. "Want to lay down," Eichelman responded, "and die."

Although he didn't die while incarcerated at LCP for five days, Eichelman believes the experience ruined his life. "Everything was taken from me," he said. "I don't know if my life can be fixed – medically, physically, and spiritually."

Eichelman was arrested for shooting a two-year-old boy. He was treated harshly by prison staff; despite maintaining his innocence, LCP guards allowed vigilante justice by other prisoners to occur.

The child Eichelman was accused of shooting was Hispanic. Eichelman's subsequent lawsuit alleged that within minutes of his arrival at LCP, a Hispanic prisoner punched him in the side of the head "in full view of the correctional officer."

An LCP guard, Dave Riley, had identified Eichelman as the child shooter before he was assaulted by the other prisoner. Riley told Lancaster County constable Michael Aponte not to worry about the incident.

After Eichelman arrived at a maximum security cell block, guard Michael King told other prisoners that Eichelman was the child shooter and "something should happen" to him. It was not until his third day at the prison that something did happen.

Upon entering Eichelman's cell block on June 6, 2005, LCP guard Luis Torres told several Hispanic prisoners that Eichelman had shot a Hispanic child. "I don't care what happens to him. Are you going to let him get away with shooting that kid?" Eichelman recalls Torres saying.

"Torres was what I would call recruiting various prisoners or inciting various Spanish prisoners to assault Mr. Eichelman because of the kid he had shot," testified prisoner Carlos Colon, who was recruited by Torres to beat

Eichelman but declined. Colon said similar incidents had happened previously at LCP, and "the guards would look the other way."

As Eichelman was taking a nap one afternoon, Torres opened his cell door and allowed several prisoners to enter, including Jose Santiago, 36, and Carlos Dominguez, 37. While Eichelman screamed, "help, help, someone help me," Torres "observed the assault, heard [Eichelman's] cry for help, but deliberately and maliciously failed to do anything to intervene or stop the assault."

Following the attack, Eichelman stumbled from his cell bleeding from his left eye. He observed several guards "standing nearby, laughing." Although his injury was treated, he was not allowed to shower, change his bloody clothes or clean up the blood in his cell. Guards continued to allow other prisoners to threaten and harass him.

It was later learned that Eichelman was innocent; a review of video footage taken from a surveillance camera revealed that he was not involved in shooting the two-year-old child. Immediately following his release from LCP, Eichelman went to a local hospital. He was hospitalized for four days for treatment of an "orbital fracture, liver laceration, and contusions and abrasions," plus he suffered psychological trauma.

Eichelman filed suit, naming the county, Warden Guarini, Torres, a prison doctor and other LCP staff as defendants. Three prisoners provided statements that guards had encouraged prisoners to attack Eichelman. On the second day of a federal jury trial in August 2007, county officials settled the lawsuit for \$500,000. See: *Eichelman v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 2:06-cv-00547-DS.

Torres was suspended and then fired, but did not face criminal charges. LCP guard Michael King later resigned. Guarini, for his part, continued to downplay prisoner lawsuits. "Our procedures were fine," he said. "Everything had been done accordingly except for the one officer – the human element."

Jean Bickmire, who monitors LCP for the Pennsylvania Prison Society and for Justice & Mercy, a prisoner advocacy group, sees it differently. "Other correction officers have done what was done to Jon Eichelman," she said. "It could happen in any prison unless you have the correct oversight.... I don't think our

Penn. Prison Litigation (cont.)

prison has that.”

Eichelman’s attorney, Jeffrey Paul, was more blunt. “It’s an incredible cess-pool over there [at LCP],” he remarked.

More Settlements

LCP prisoner Felix Nieves was not beaten by other prisoners at the urging of guards; rather, he said he was assaulted by the guards themselves. On September 23, 2002, without provocation, guards John Nygard and Sean Hetrick “willfully, maliciously, and intentionally attacked [Nieves], pushing his face and head into the wall, throwing him to the floor, and striking him with their fists and feet causing [Nieves] to suffer contusions and lacerations.”

Afterwards, Nieves was handcuffed and beaten again, causing injuries to his back and neck. His subsequent federal lawsuit stated that LCP staff wrote investigative reports “to vindicate the use of force.” Lancaster County settled the case on November 20, 2007 for \$7,500. See: *Nieves v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 2:04-cv-04452.

Warden Guarini, of course, considered Nieves’ suit to be a “nuisance.” Guarini conducted an investigation into allegations that LCP guards had beaten Nieves. “We wanted to make sure they were not heavy handed. They were clean,” he said. “Basically, [Nieves] had a disciplinary write-up and the two officers escorted him and they all went down in a hump. They did not use unnecessary force.”

In June 2008, James Wilson settled a federal lawsuit against LCP for \$20,000. His claim concerned a lack of medical treatment provided by prison nurse

Stephanie Brodt after Wilson complained of stabbing pains in his stomach.

“There is nothing wrong,” Brodt told him. Despite pain so severe that he “cried himself to sleep,” the following day Brodt insisted Wilson wasn’t sick, but gave him Mylanta. She told a guard that Wilson was “another inmate trying to get medication.”

Then Wilson began throwing up blood. Brodt gave him two injections of medication. Another nurse saw Wilson the next day; she had him taken to a local hospital, where a doctor ordered emergency surgery for a perforated appendix with multiple abscesses. Wilson had been incarcerated at LCP following his arrest for possession of a small amount of marijuana. See: *Wilson v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 2:07-cv-01488-TMG.

On July 20, 2009, LCP prisoner Luis Rivera Marquez settled his federal lawsuit against Lancaster County and prison guard James G. Hinkson, Jr. for a total of \$45,000. Marquez was being held at LCP when he was sexually assaulted by Hinkson in a supply room in October 2006. Hinkson was later fired, then charged with institutional sexual assault; he pleaded guilty and was sentenced on August 8, 2008 to 4 years probation. The County agreed to pay \$20,000 and Hinkson will pay \$25,000 to settle Marquez’s lawsuit. See: *Marquez v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 5:08-cv-05152-JS.

A class-action strip search suit was filed against Lancaster County by Sajan Kurian and Michael Rhodes on October 22, 2007. Their suit alleged that all prisoners who entered LCP were required to undergo a strip search and visual body cavity search “absent particularized suspicion that those detainees possess weapons or contraband.” Without such particularized suspicion, arrestees booked into jail on charges that do not involve drugs or violence generally cannot be strip searched.

Kurian, who was arrested on a parole violation due to a DUI offense, claimed it was “particularly troubling” that LCP had “continued to engage in this misconduct [strip searches] notwithstanding an overwhelming number of cases ... that have squarely declared these practices to be unlawful and unconstitutional.” Rhodes was strip searched twice at LCP, both times after he was arrested on a bench warrant for missing a domestic relations

hearing.

The class-action suit settled in July 2009, with Lancaster County agreeing to pay a maximum of \$2,507,200 to the class members – the total amount of the settlement will depend on the number of current and former prisoners who file claims. The county paid an initial \$1.9 million into the settlement fund. Previously, in April 2009, LCP had made policy changes to ensure that arrestees were not subject to blanket strip searches absent reasonable suspicion. Class counsel will be paid up to \$750,000 from the settlement; Kurian received \$15,000 and Rhodes received \$7,500 as class representatives. See: *Kurian v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 2:07-cv-03482-PD.

When Lancaster County settles prisoner lawsuits it is only responsible for paying up to \$25,000, which is its insurance deductible. The county’s insurer, Travelers Insurance, pays the remainder. Thus, there is little incentive for county officials to force LCP to remedy problems and conditions that result in litigation. How long they keep their insurance remains to be seen.

Other Lawsuits Filed Against LCP

In addition to the settlements in the above cases, at least nine other lawsuits are pending against LCP that involve claims of abusive guards, inadequate medical care, suicides, and injuries caused by an accident in the prison’s kitchen. Notably, the plaintiffs in all of these suits are represented by attorneys – which is unusual given the reluctance of most lawyers to take prison-related cases.

The parents of Juan Martinez, Jr. filed suit against Lancaster County, LCP guards and prison medical staff in January 2009. Their lawsuit claims that Martinez was denied proper medical treatment and monitoring, which resulted in his death. Martinez, 23, was arrested on January 5, 2007 for public drunkenness and possession of a small amount of marijuana; he had ingested narcotics when he was arrested, which posed “an imminent danger to his health.” Prison staff placed Martinez in general population and failed to provide him with medical care, which led to seizures, a coma and Martinez’s death on January 12, 2007. See: *Martinez v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 09-cv-00026-LS.

Another lawsuit was brought by LCP prisoner Talmadge Johnson, who slipped

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while working in the prison's kitchen, which is operated by Aramark Correctional Services. The suit, filed on July 20, 2007, alleges that Johnson suffered injuries to his head, neck, back and elbow as a result of the fall on a wet floor, and that LCP "failed to use ordinary care in maintaining the premises to prevent an unreasonable risk of harm...." The case is still pending. See: *Johnson v. Lancaster County*, Lancaster County Court of Common Pleas (PA), Case No. CI-07-07227.

LCP is also facing three federal suits that claim prison staff failed to properly treat and watch prisoners who committed suicide. The first involves the death of James Hodapp, Jr., who hanged himself with a sheet from the bars of his cell on December 14, 2003. A lawsuit filed by his estate claims that LCP staff failed to provide Hodapp with medication needed to treat his clinical depression and ignored his threats to commit suicide. Further, the suit alleges that Hodapp was "subjected to excessive use of force" by LCP guards.

According to the complaint, LCP "permitted, encouraged, tolerated and ratified a pattern and practice of unjustified, unreasonable and illegal use of force as well as a pattern and practice of unjustified, unreasonable deliberate indifference to the serious medical needs of inmates."

Claims against several defendants, including prison nurse Stephanie Brodt, were dismissed between March and May, 2007. The case remains open but is in inactive status because one of the principal defendants, an LCP guard, is serving overseas with the U.S. military. See: *DeMascolo v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 2:04-cv-03557-TMG.

The second prisoner suicide case involves the death of Joseph Keohane, 22, who was found hanging from a sheet attached to the vent grate of his cell on November 23, 2006. After spending two days in LCP's medical unit for "consistently threatening to commit suicide," Keohane killed himself within hours after being released to general population. In addition to failing to provide "appropriate monitoring for a suicide watch," LCP "established a system which fails to identify, track or report instances of improper denial of medical or psychiatric care," according to the suit filed by Keohane's parents. See: *Keohane v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 2:07-cv-03175-MSG.

On June 17, 2009, Marva Baez, who represents the estate of former LCP prisoner Luis Villafane, filed a federal suit against Lancaster County, Warden Guarini, and prison security and medical staff. Villafane was violently assaulted by LCP guards in November 2008 when he requested to see a supervisor after being ordered to return to his cell; following that incident he was placed on suicide watch in LCP's mental health unit.

Vallafane was removed from suicide watch on November 19, 2008 and put in a segregation cell, which was not "suicide proof." Prior to his placement in segregation, Villafane was informed (incorrectly) that his mother had died. Other prisoners stated that Villafane had told an LCP guard he was going to commit suicide, but prison and medical staff failed to take any action. Nor did guards respond when Villafane hung himself while other prisoners screamed for help. A prison nurse was reportedly overheard saying, "we shouldn't have taken him off suicide watch." See: *Baez v. Lancaster County*, U.S.D.C. (E.D. Penn.), Case No. 5:09-cv-02745-LS.

Other lawsuits pending against LCP allege physical abuse by guards, including a case filed by prisoner Paul Barbacano, who said he was handcuffed when he was beaten by prison guards Villarreal, Riley and Wolfe (whose first names were not included in the suit).

Villarreal said Barbacano was resisting him. To remedy that, Villarreal slammed Barbacano's head onto a desk several times. On the way to an elevator, Riley and Wolfe continued to bang Barbacano's head against a wall; once inside the elevator they "pummeled Barbacano with closed-fist punches to the head." He was then placed naked in solitary confinement, where he was repeatedly punched in the face.

Barbacano alleges that "Lancaster County Prison has implemented policies and acquiesced to a culture of violence in its prison," and "has fostered an environment and culture of abuse." The suit, which was filed on October 24, 2008, is still ongoing.

See: *Barbacano v. Guarini*, U.S.D.C. (E.D. Penn.), Case No. 5:08-cv-05098-AB.

In January 2006, former LCP prisoner Robert M. Bourne filed a lawsuit against the prison, Warden Guarini and former LCP employee Troy Waltz. After more than two years of litigating the case pro se, the court appointed an attorney to represent Bourne on February 12, 2008.

Bourne stated that while he was held at LCP on March 29, 2005, he was taken to the infirmary to see a doctor regarding his medication. When Bourne refused to sign a medical malpractice waiver form, Waltz "brutally assaulted him ... lifting him into the air, and throwing him to the ground violently." The attack was

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Penn. Prison Litigation (cont.)

witnessed by the doctor.

According to his complaint, Bourne was then placed in disciplinary confinement for more than 100 days; he did not have a disciplinary hearing, was denied access to grievance forms, and did not receive medical treatment. Waltz was reportedly fired by LCP "because he suffered from extreme emotional problems and anger management deficiencies" The case is presently pending a ruling on the defendants' motion for summary judgment. See: *Bourne v. Lancaster County Prison*, U.S.D.C. (E.D. Penn.), Case No. 2:06-cv-00293-WY.

LCP prisoner Charles Anton filed a federal lawsuit on June 29, 2009, claiming the prison had "implemented policies and acquiesced to a culture of violence," which led to a brutal beating by LCP guards. Anton's complaint noted that such assaults not only violate the U.S. Constitution but also the U.N. Convention Against Torture, which prohibits the intentional infliction of severe physical or mental pain or suffering.

Anton was complying with a strip

search during the intake process at LCP when guard James Zimmerman, the brother of the police detective who had arrested Anton, slammed Anton's face into a wall. When Anton called for help, other guards restrained him while Zimmerman punched him in the face; Anton was stripped naked, handcuffed, and then beaten some more and placed in segregation for 45 days. He also was denied his prescription medication. See: *Anton v. Guarini*, U.S.D.C. (E.D. Penn.), Case No. 5:09-cv-02899-LS.

The final suit pending against LCP involves former prisoner Vance Laughman, who was assaulted by prison guard Silvestre Villarreal, 57, on August 5, 2008. According to Laughman's complaint, he was shackled to a bed at Lancaster General Hospital when Villarreal climbed onto the bed, straddled him, and "repeatedly punch[ed] him about the face, head and shoulders" until nurses intervened. Villarreal reportedly broke his hand while beating Laughman, who claimed that prison officials offered him \$5,000 if he didn't report the incident. Villarreal was criminally charged and released on bond.

Laughman stated he was at the hospital because prison staff had substituted "a cheaper, less effective drug" for his prescription for Depakote, a medication used to treat seizures. As a result he developed pancreatitis, which will require the removal of his pancreas. His lawsuit includes claims related to denial of adequate medical care. See: *Laughman v. Guarini*, U.S.D.C. (E.D. Penn.), Case No. 5:09-cv-02252-AB.

Some Cases Dismissed, Lose at Trial

Lancaster County has prevailed in several other lawsuits, including one filed by LCP prisoner Andrey Yudenko, who incurred serious injuries at the facility. While walking on an injured ankle, Yudenko fell on the medical housing unit's steps, injuring his back. That, however, was not the only claim in his suit.

When he was moved to a general population cell on August 4, 2006, Yudenko leaned against the bunk bed for support. The whole structure fell off the wall, taking Yudenko with it and causing additional injuries. "My face hit the sharp edge of [the bunk bed] and I injured my head against the wall," Yudenko stated in his complaint. "After I fell, I could not move my legs and there

was severe pain in my lower back." He also alleged that his pain medications were discontinued.

Following the dismissal of several defendants in the case, an Americans with Disabilities Act (ADA) claim went to a jury trial on August 25, 2009. U.S. District Court Judge Lawrence F. Stengel allowed the defendants to present evidence related to five of Yudenko's past criminal charges, and the jury found in favor of the defendants at trial. Yudenko was represented by the Pennsylvania Institutional Law Project. See: *Yudenko v. Guarini*, U.S.D.C. (E.D. Penn.), Case No. 2:06-cv-04161-LS.

Traci M. Guynup, 40, alleged that while incarcerated at LCP following an arrest in December 2005, guards assaulted her, called her names, stepped on her toes, bruised her arm and harassed her in various other ways. She said she was subjected to solid door segregation and given an inadequate diet that caused her to lose 25 pounds. The case went to trial in December 2008, and the jury found for Lancaster County and the other defendants. On September 24, 2009, costs were assessed against Guynup in the amount of \$4,511.68, pursuant to 28 U.S.C. § 1920. See: *Guynup v. Lancaster County Prison*, U.S.D.C. (E.D. Penn.), Case No. 2:06-cv-04315-MMB.

Melody M. Martinez, 25, was on probation when she was mistakenly arrested on August 7, 2005 and strip searched when she entered LCP. According to her complaint, Martinez was five months pregnant and LCP medical staff told her she was dehydrated and should drink water; however, prison employees refused to give her water. The strip search claim survived a motion to dismiss but the case was later voluntarily dismissed in November 2008. See: *Martinez v. Warner*, U.S.D.C. (E.D. Penn.), Case No. 2:07-cv-03213-GP.

On February 10, 2009, a federal suit filed by the estate of LCP prisoner Devon Lee Reid went to a bench trial, and the U.S. District Court found in favor of the sole remaining defendant in the case, prison guard James Flaherty.

Reid died at LCP on September 17, 2004; he had a history of mental illness, was on medication, and had been placed on suicide watch multiple times. In the weeks prior to his death, Reid had exhibited "bizarre behavior," urinating and defecating on himself, singing, refusing to eat, and drinking his own urine. He was



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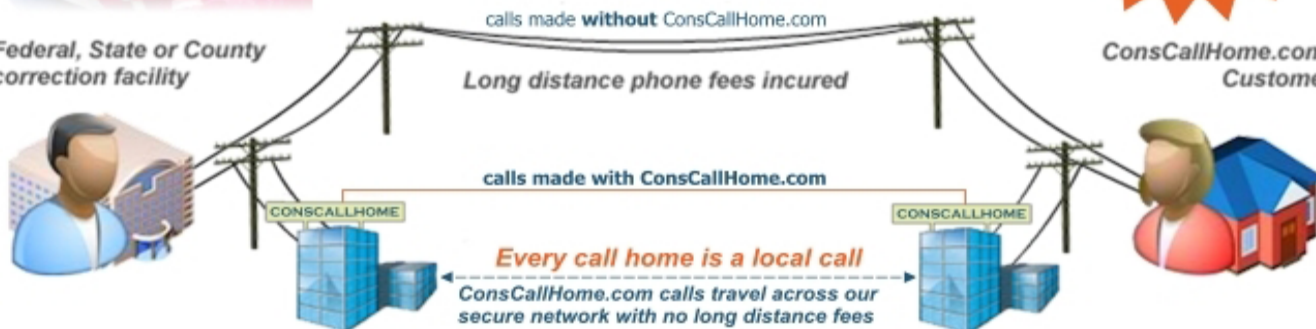


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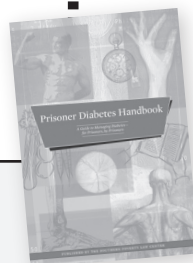
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not seen by medical staff during the three days before he died.

Video footage indicated that while making his rounds, Flaherty saw Reid was unresponsive in his cell but did not take immediate action to summon medical assistance. According to the coroner's report, Reid died due to massive pulmonary emboli. At trial, the district court found Flaherty was not liable for Reid's death; Reid's estate has since appealed the trial verdict to the Third Circuit Court of Appeals. See: *Wood v. City of Lancaster*, U.S.D.C. (E.D. Penn.), Case Nos. 2:06-cv-03033-SD and 2:06-cv-04135.

MRSA Litigation

The failure by corrections officials to treat prisoners for Methicillin Resistant *Staphylococcus Aureus* (MRSA), and to correct deplorable conditions that spread the infection, has resulted in lawsuits against several other Pennsylvania county prisons. One suit ended in improved conditions and \$60,000 in attorney fees, while at least 34 current and former prisoners have filed separate cases that remain pending.

In 2002, attorneys representing prisoners at the Bucks County Correctional Facility (BCCF) filed a federal class action lawsuit to stem the spread of MRSA at the prison. The lawsuit was not about money; rather, it was about enacting changes to stop rampant MRSA infections and ensure medical treatment for prisoners.

Prior to the class action suit being filed, it was the official policy of Bucks County to "do nothing to prevent infectious disease at BCCF unless specifically ordered to take precautions by a federal judge." On August 27, 2002, the U.S. District Court did just that, ordering all BCCF prisoners and guards to be tested for MRSA and the Pennsylvania Department of Corrections to be informed about the MRSA outbreak.

Of the approximately 1,100 people who were tested, 34 were positive for MRSA. What no one was told, including those who tested positive, was that 376 other individuals had tested positive for Methicillin Susceptible *Staphylococcus Aureus* (MSSA). The test results were kept "confidential" without regard to public health implications.

Some BCCF guards had tested negative for MRSA, but subsequent tests by a private doctor indicated they were positive

for the infection. They were threatened with loss of their jobs if they identified themselves or their families as having MRSA.

The guards' children attended public schools, which increased the risk of spreading MRSA infections. Moreover, the public was exposed by interactions among guards, prisoners and free world citizens when prisoners appeared at court hearings. To protect themselves from infection, some guards would kick open doors at BCCF to avoid touching doorknobs.

The deteriorated physical structure of BCCF increased the spread of MRSA, creating "an incubator for infectious disease." For years BCCF had a leaky roof, discolored ceilings, dampness, rusted vents clogged with dirt, peeling paint, mold, and filthy showers. Bedding and laundry were not properly cleaned or disinfected. Women prisoners were forced to share razors.

After more than five years of litigation, the class members and county officials reached a settlement in March 2008 that included improved conditions at BCCF related to laundry, housing arrangements and screening for MRSA. The prisoners' attorneys received \$60,000 in fees as part of the settlement agreement. See: *Inmates of the Bucks County Correctional Facility v. County of Bucks*, U.S.D.C. (E.D. Penn.), Case No. 2:02-cv-07377-RB.

Separately, officials at the Northampton County Prison (NCP) in Easton are facing lawsuits filed by dozens of prisoners who were infected with MRSA. Thirty-four former or current prisoners claim they contracted MRSA due to appalling conditions at NCP similar to those that existed at BCCF. Such conditions included water leaks, dirty blankets and cells, insufficient sanitation, and inadequate fresh air ventilation. The lawsuits allege that "Mattresses that had been defecated and urinated on were not cleaned or changed between inmates, and instead were quite often left in place for the next inmate's use."

The individual suits, which are still pending, have been consolidated for discovery purposes. In addition to the county, the complaints name PrimeCare Medical, Inc., the county's prison medical contractor. The NCP prisoners who most recently filed suit due to MRSA infections, in March 2009, include Ramon San Miguel, Alex Torres, Antonio Fucci and

Dorian Rawlinson. See, e.g., *Fernandez v. Northampton County*, U.S.D.C. (E.D. Penn.), Case No. 5:09-cv-00320.

PLN has previously reported on serious MRSA problems in Pennsylvania county prisons, including a lawsuit filed by two former BCCF prisoners who won a \$1.2 million jury award in 2005 for injuries suffered during a MRSA outbreak. [See: PLN, Feb. 2009, p.48; Dec. 2007, p.1; Aug. 2005, p.37; July 2005, p.20].

Seeking Solutions

Lancaster County commissioners realize that LCP is a problem and are seeking solutions. One proposal is to build a new prison at a cost of \$150 million to accommodate an estimated population of 2,114 prisoners by 2025. The commissioners are looking at re-entry initiatives to reduce recidivism and are exploring options to avoid prison sentences through alternative sentencing. "We are doing everything we can to look at alternatives to relieve overcrowding without building a new prison," said Lancaster County Commission Chairman Dennis Stuckey.

To curtail lawsuits related to medical care, in November 2007 the county entered into an \$11.5 million, three-year contract with PrimeCare Medical to replace the jail's healthcare employees. Under PrimeCare's contract, the company is required to fully staff medical positions at the facility. Regardless, PrimeCare has since been named in several suits alleging inadequate medical treatment at LCP.

As for lawsuits regarding brutality by prison guards, that issue is still unresolved. Due to, or despite, the economic crisis, little money is available to reduce overcrowding at LCP – which creates tensions among both guards and prisoners. Further, some prison officials, including Warden Guarini, apparently prefer to ignore the systemic culture of abuse at LCP that has been cited in a number of the above cases.

In regard to MRSA infections at BCCF, infectious disease and sanitation experts will monitor the facility and prisoners' medical care as part of the class action settlement. Bucks County "is more conscious of the transmission of the disease in the prison. But it doesn't mean everything is addressed," said class attorney Anita Alberts. "It's hard. It's ongoing, as it has to be." ■

Sources: *Lancaster New Era*, *Bucks County Courier Times*, *The Morning Call*

From the Editor

by Paul Wright

As the holidays approach people should consider subscriptions to *Prison Legal News* or some of the books we distribute as holiday gifts. Some titles, like *PLN's* first book publishing project, the *Prisoners Guerrilla Handbook to Correspondence Programs in the US and Canada* offers the possibility of self improvement far beyond the book itself.

PLN is currently working on our next book project, a cite book of successful habeas corpus cases, that we hope to have ready for distribution around the beginning of the year. We are interested in publishing non fiction, self help, reference books aimed at prisoners which have useful information not readily available elsewhere which would be of interest to US prisoners. If you are a qualified author please send a one page letter of inquiry describing your proposal and qualifications for the project. *PLN* pays the most competitive royalties in publishing.

We continue to encounter censorship and harassment from prison officials. As the article in this issue of *PLN* notes, we have sued the Virginia prison system for censoring *PLN* and the books we distribute and we have several more in the process of being filed. If your subscription to *PLN* or books you have ordered are

censored please send us all the documentation. As a general rule, prison officials do not notify *PLN* when they censor us. Your help is vital in enabling us to challenge these illegal practices and win.

By now all readers will have received *PLN's* annual fundraiser. Please make a donation. Every little bit helps. *PLN* is currently running at a monthly deficit due to the loss of some grant funding due to the economic downturn. If each *PLN* subscriber donated an additional \$10 a year above the cost of their subscription or if each person who reads *PLN*, but doesn't subscribe, sent in one dollar it would compensate our loss. Even if you cannot afford to make a donation, if you know someone who can, please ask them to do so.

In addition to our monthly magazine, *PLN* remains the only publisher in the United States who challenges prison and jail censorship policies. And we are remarkably successful in doing so. Likewise, *PLN* has become a leading media source of information for information on the rights of prisoners and advocates for less and better prisons and accountability for prison and jail officials. Your support is what makes this possible.

Enjoy this issue of *PLN* and please encourage others to subscribe and donate. ■

\$395,000 Settlement in Los Angeles Jail Prisoner's Lung Infection Death

The Los Angeles County Sheriff's Office paid \$395,000 to settle a lawsuit claiming it provided inadequate medical treatment to a prisoner, causing his death. The claim was brought by the estate of Michael Buford.

When Buford, 32, was arrested on September 7, 2005, he complained of respiratory problems. A laboratory screening test was performed on September 23. While Buford remained under continuous evaluation of jail medical staff, the positive HIV test results were never communicated to jail physicians.

It was determined that Buford had a lung infection, which was treated at the jail and a local hospital. Buford's condition continued to deteriorate, and he died on November 25, 2005. An au-

topsy determined he died from Chronic Obstructive Pulmonary Disease, or emphysema.

Buford's estate, mother, and son alleged in their lawsuit negligence and civil rights violations for the failure to provide adequate treatment. In May 2009, the matter was settled for \$395,000. The Sheriff's Office also established a directive that requires all future HIV positive reports to be faxed to each facility, and it created an interface between a prisoner's electronic medical record and the contract laboratory.

Buford's estate was represented by attorney Robert Mann. See: *Estate of Michael Buford v. County of Los Angeles*, USDC, C.D. California, Case No. 06-CV-7940. ■

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Prison Radio Beams Love, Hope and News through the Bars

by Matt Clarke

Radio broadcasts aimed at prisoners are an uncommon media phenomenon in the United States. For prisoners incarcerated far from home with limited language skills and resources it can represent the only lifeline to family and the world outside the walls. Its importance is magnified for prisoners in segregation--especially those in super segregation who are allowed only limited contact with any other human beings. For them, it can be a lifeline to sanity and a reminder that someone cares about them even if their entire environment has been structured to give them the opposite message.

Prison radio shows vary across the nation. Some feature nothing more than "shout outs," the radio announcer reading a brief greeting to specific prisoners during a show that features music or perhaps a gospel message. The best-known prison radio show is hosted by Ray Hill on Pacifica station KPFT-FM at 90.1 MHz in Houston, Texas. That Friday night show--which reaches about one-fifth of the approximately 156,000 Texas prisoners--features an hour of talk about prison-related topics, often with guests from the criminal justice system, followed by an hour or more of phone-in messages from families and friends of Texas prisoners. As a rule, prison radio shows are broadcast once a week. The exception that proves this rule is the prison radio station KLSP-FM, 91.7 MHz, which is broadcast from the Louisiana State Penitentiary in Angola.

KLSP started in 1987 after prominent televangelist Jimmy Swaggart donated old equipment from his radio network to the prison. In 2001, Chuck Colson, who founded Prison Fellowship Ministries after serving time for his part in the Watergate scandal, came to Angola along with executives from a South Carolina Christian radio station. Broadcasting from Angola, they raised \$120,000 for new equipment that allowed an expansion to 20 hours a day of broadcast time and an increase in broadcast power. Even so, the station's 100 Watts barely allow it to reach beyond the more than 18,000 acres of prison farm.

All of the music played on KLSP is donated and censored by prison officials who eliminate negative, violent or sexual lyrics as well as gangsta rap and heavy

metal. Most of the music is gospel, but for a salary of 20 cents an hour, the station's six DJs also spin a unique blend of blues, hip hop, bluegrass, rock, cajun, oldies and local music. Once an hour, there is a five-minute news broadcast via satellite from the Moody Bible Institute in Chicago and many famous Christians have been interviewed live at the station, including former heavyweight champ George Foreman and evangelist Kenneth Copeland.

Warden Burl Cain sees the station as integral to rehabilitation of the 5,100 prisoners at Angola where the average sentence is 89.9 years and few prisoners have a chance of making parole and most will die in captivity.

"Our greatest challenge is to give hope where there is hopelessness," he said. "This radio station helps do that -- it beams out positive information, positive gospel music, even gospel rap."

On the other side of the prison radio spectrum are stations that allow "shout outs" during shows aimed at prisoners. One example of this is KKHT, 100.7-FM in Houston's "Zeke and Grandma Show," in which lively talk and gospel music is interspersed with "shout outs" to specific prisoners.

When 58-year-old Jose Masso began his "Con Salsa" show on WBUR-FM, 90.9 MHz in Boston in 1975, he envisioned it as a salsa music show and Spanish-language community forum. He began reading brief messages from prisoners' relatives and the show gained a new purpose--to help community members maintain a connection with family and friends behind bars. "Con Salsa" is aired between 10 p.m. Saturday and 3 a.m. Sunday and can be received in most of Massachusetts, parts of Connecticut and southern New Hampshire.

Art Lahoe, 83, has been a DJ since the 1940's. His current oldies and R&B music show, "Art Lahoe Connection," is aired Sunday nights and syndicated on 13 commercial stations in California, Nevada, New Mexico and Arizona. Like Masso, Lahoe can't remember exactly when the "shout outs" began, but knows that dedication requests, often to prisoners, come in "at least once every minute" of the show.

The granddaddy of all prison radio shows, hosted by Ray Hill in Houston, experienced a similar evolution. Hill

helped found KPFT in 1968 before he was convicted of 20 burglaries and sent to prison. He says that the radio station "fed his head" the whole time he was in prison. Upon his release in 1973, Hill started the show as an hour of chat on prison politics. One fateful day, a woman called in from roadside. She had a son in prison and had saved her money for a long time to be able to drive down for a visit. On the way, she had an accident and wouldn't be able to make it. She knew her son listened to the show, so she asked Hill to tell her son that she couldn't make it this time, but she loved him. Hill told her, "Ma'am, he's listening, so why don't you just go ahead and tell him yourself."

That "tiny lady's voice full of anxiety, fear and frustration," and backed up with highways sounds went out across the air and tore at the hearts of listeners. From then on, the phone lines at KPFT were jammed with people wanting to pass on a message to prisoners and the current format of "The Prison Show" was born.

"We call KPFT 'Keeping Prison Families Together,'" says Hill.

To some, the success of the show is surprising. In the Bible Belt State of Texas where most prisoners try to out-macho one another, Hill is openly gay, a recovering alcoholic and promotes an unwavering anti-gang message. Sometimes prisoners take issue with him. Hill's attitude is "that's O.K., they can tune into the straight or pro-gang prison shows," knowing full well that there are none.

The greatest challenge to Hill's show may come from a development he lobbied for--the introduction of prisoner phones into the Texas prison system. When asked whether the phones will make his show obsolete, Hill noted that there will still be thousands of prisoners in segregation, close custody and medium security who will not have access to phones. He intends to limit future phone calls to people sending messages to those prisoners, but anticipates continued need for his show in the future.

In 2006, Rice University film professor Brian Huberman produced a 60-minute documentary on The Prison Show which played to favorable reviews. That, a full-show segment of Ira Glass's "This American Life," and Hill's one-man play called "Ray Hill: The Prison Years,"

which played around the country make "The Prison Show" the most famous of all prison radio shows.

But, there is competition for that distinction. The Thousand Kites Project of WMMT-FM and Appalshop in Whiteburg, Kentucky is a national project to both raise awareness of the public about prison issues and send prisoners nationwide the message that they are not forgotten. Amelia Kirby and Nick Szuberla, co-hosts of the only hip-hop radio show in the region, became involved in prisoner issues when, in 1998, they started receiving hundreds of letters from prisoners transferred from distant cities to two new super max prisons in the region. The letters described racism and human rights violations in the prisons. Their response was to raise public awareness with radio broadcasts for prisoners' families and artistic events bringing local musicians together with urban hip-hop artists. The Thousand Kites Project sponsors the Calls From Home radio broadcast which, once a year, airs messages from the public to prisoners on over 200 radio stations nationwide.

California's Prison Radio Project of The Redwood Justice Foundation seeks

to frame prison issues in a human rights context and is broadcast on many community service stations. Noelle Hanrahn, the show's host, has also been involved in a number of non-broadcast projects intended to publicize prison issues, including the publication of *Jailhouse Lawyers: Prisoners Defending Prisoners v. the USA*, a recent book by Mumia Abu-Jamal.

In Portland, Oregon, KBOO-FM's Prison Pipeline advocates for prison reform while keeping listeners informed about criminal-justice legislation, news from prison-related programs such as C.U.R.E. and Books for Prisoners. It also airs interviews with agency officials, film producers, authors, former prisoners and prisoners' families on prison-related topics such as the difficulties families of prisoners face and the obstacles to successful reintegration of former prisoners into society.

The U.K.'s Ministry of Justice is funding a radio service to send messages and educational programming to the 81,748 prisoners incarcerated in England and Wales to the tune of 2 million pounds, bringing an international flair to prison radio. The opposition decries the move as a placebo for the worst prison overcrowd-

ing in the history of the Prison Service. Certainly the overcrowding should be dealt with, but, if the American experience is any measure, prison radio is a good idea regardless of the amount of crowding in the prison system. ■

Sources: *Mother Jones Magazine*, *Associated Press*, *Chicago Tribune*, *Houston Chronicle*, kpft.org, *New York Times*, women.timesonline.co.uk, news.bbc.co.uk, www.thousandkites.org, www.prisonradio.org, kboo.fm, www.consalsa.org, www.theprisonshow.org

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\$1.55 Million Awarded in Female Colorado DOC Prisoner's Rape by Guard

by Mark Wilson

On February 3, 2009, default judgment was entered in a lawsuit filed against a Colorado prison guard who had raped and sodomized a female prisoner. Afterwards, several other individual defendants and the Colorado Department of Corrections (CDOC) agreed to settle the prisoner's suit for \$250,000, including attorney's fees. The rapist guard was later ordered to pay \$1.3 million in compensatory and punitive damages.

Colorado prisoner Amanda Hall worked in the kitchen at the Denver Women's Correctional Facility under the supervision of CDOC Sergeant Leshawn Terrell. "Beginning in or about May of 2006 and continuing until October 7, 2006, and despite Hall's protests that she did not want to have sex with him, Terrell coerced Hall into having a sexual relationship," U.S. District Court Judge David Ebel found. Terrell made Hall a "virtual sex slave," repeatedly sexually abusing her in exchange for coffee, stamps and money. "On or about October 7, 2006, Terrell became violent and angry when Hall said she did not want to have sex with him," the court stated. "He forced her to perform oral sex and then anally raped her. The anal rape was sufficiently violent to tear Hall's rectum," which caused her to lose "control of her bowel functions." She required surgery for her injuries. "She's been assaulted in ways that are so inhumane and so offensive we can't talk about them on TV," said Mari Newman, Hall's attorney.

Before he raped Hall, Terrell had "coercive and violent sexual relationships" with other prisoners, the court observed. Newman agreed that Hall was not alone. "What I've learned after the filing, I've got many, many e-mails about other similar cases, and this is a problem system-wide in the Colorado Department of Corrections," she said.

Indeed, according to a September 6, 2009 *Denver Post* article, from 2005 to 2007 the CDOC had 62 confirmed cases of sexual misconduct by prison employees or private contractors. In one case, a prison commissary worker posted pictures of the prisoner she was having a sexual relationship with on her MySpace page. In another, a prisoner at the CCA-operated

Kit Carson Correctional Center had sex with a female guard and kept a nude photo of her in his cell. The *Post* article noted that prosecutions of sexually abusive prison staff were difficult, and few convictions resulted in jail time.

Terrell was prosecuted for sexually abusing Hall; on October 28, 2008, he pleaded guilty to a misdemeanor charge of unlawful sexual contact and received a 60-day jail sentence plus five years probation. [See: *PLN*, May 2009, p.1]. Prosecutors defended the plea bargain, saying they faced "credibility problems" with Hall since she was a prisoner. Others were not pleased with Terrell's light punishment, including Newman. "This was a case in which a guard was essentially treating female inmates, including my client, as playthings for his own sexual gratification," she said.

When entering default judgment against Terrell, Judge Ebel found that "there is no question that Terrell's sexual assault of Hall was carried out solely to cause harm, and thus that Terrell violated Hall's Eighth Amendment right to be free from cruel and unusual punishment." Turning to Hall's substantive due process claim, which alleged an invasion of bodily integrity, the district court observed that it had to assess "whether the infringement ... was 'narrowly tailored to serve a compelling state interest,'" an inquiry that "rings hollow in the context of rape, for which there is no imaginable 'compelling state interest.'" The court concluded that "under the fundamental rights analysis, Hall has demonstrated a substantive due process violation." Additionally, Hall had shown a substantive due process violation under the "shocks-the-conscience analysis."

The state defendants, including the CDOC, agreed to settle the case in February 2009, paying Hall a lump sum of \$30,000 and an annuity of \$131,250.28 to be disbursed over a four-year period. They also paid Hall's attorney's fees of \$88,749.72, for a total of \$250,000.

While the state defendants did not admit wrongdoing, they agreed to let Hall's attorney review and propose improvements to the CDOC's Prison

Rape Elimination Act (PREA) training, and to install additional security cameras in the kitchen area where Hall was raped. Further, prison officials emphasized that as part of a zero-tolerance policy for staff-prisoner relationships, "CDOC employees must mandatorily report any information regarding CDOC employee-on-inmate sexual contact. A CDOC employee's failure to make such a mandatory report leads to a disciplinary action up to and including termination."

Following the district court's entry of default judgment against Terrell, a bench trial on damages was held on April 20, 2009. The court issued an opinion and order on June 10, 2009, stating that Hall's "right to be safe from sexual assault and rape by one of her guards turned out to be worth no more than the paper upon which [the CDOC's policy prohibiting sexual misconduct] was printed." Judge Ebel criticized the light sentence in Terrell's criminal case, and also noted that Hall did not receive adequate medical care from prison staff for her physical injuries that resulted from being raped, including anal bleeding and a torn rectum, until after she filed suit.

The district court issued a judgment against Terrell in the amount of \$354,070.41 in compensatory damages and medical costs, plus \$1 million in punitive damages. The court later assessed an additional \$1,898.41 in expenses and \$84,261.03 in attorney fees. Since Terrell had resigned from the CDOC and was not represented or indemnified by the state, however, it is unlikely that Hall will be able to collect much – if any – of the judgment entered against him.

PLN assisted Hall's counsel in this case by providing verdict and settlement information from other lawsuits involving sexual assaults against prisoners, for damages valuation purposes. Further, *PLN*'s May 2009 cover story, "Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic," was submitted to the court as an exhibit to Hall's supplemental post trial brief. See: *Hall v. Zavaras*, U.S.D.C. (D. Col.), Case No. 08-CV-00999-DME-MEH. ■

Additional sources: *The Denver Post*, *Associated Press*

Texas Jail Strip Search Policy Unconstitutional

by *Brandon Sample*

On May 19, 2009, U.S. District Court Judge Walter S. Smith, Jr. denied a motion to dismiss filed by McLennan County, Texas in a suit challenging the constitutionality of the county jail's policy of strip searching all pre-trial detainees.

The lawsuit, filed by William Robert Bradshaw and Randall Lee Gerik, was prompted after they were strip searched at the McLennan County Jail following their separate arrests for drunk driving. Bradshaw and Gerik alleged that the jail's policy of strip searching all arrestees violated the Fourth Amendment because the searches were performed without reasonable individualized suspicion that weapons or contraband would be discovered.

McLennan County moved for dismissal, arguing that its policy of strip searching all arrestees did not amount to a constitutional violation. The court disagreed.

For over 20 years, Judge Smith explained, the Fifth Circuit had recognized the particularly intrusive nature of strip searching pre-trial detainees, and had limited such searches to only those detainees arrested for "major offenses."

Adopting the so-called minor/major offense inquiry, the Fifth Circuit had struck down as unconstitutional a Lubbock County jail policy that permitted strip searches of all arrestees regardless of the severity of their offenses. The appellate court held in that case that the county's policy "was applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband." See: *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985).

Applying *Stewart* to Bradshaw and Gerik's suit, Judge Smith concluded that they had alleged a constitutional violation. Driving under the influence of alcohol, Judge Smith wrote, "unaccompanied by any other illegal activity, fits more appropriately with the minor offenses." Consequently, the district court held that "the strip search of a driving under the influence of alcohol arrestee without a reasonable suspicion that the strip search will yield contraband or weapons is a constitutional violation," and denied the county's motion to dismiss as to that claim.

Bradshaw and Gerik had sought damages against the Sheriff of McLennan County, but Judge Smith found the sheriff was entitled to qualified immunity because the state of the law regarding strip searching

DUI arrestees was unclear when the searches were conducted. Further, the court rejected the plaintiffs' requests for injunctive and declaratory relief, finding they lacked standing based on a hypothetical possibility that they might be re-arrested and again strip searched at the McLennan County Jail.

This was not a ruling on the merits; the

case is still ongoing, with a pending motion for class certification and a scheduled trial date of March 1, 2010. Bradshaw and Gerik are represented by the Texas Civil Rights Project and Sacramento attorneys Joshua Kaizuka and Mark E. Merin. See: *Bradshaw v. McLennan County*, U.S.D.C. (W.D. Tex.), Case No. 6:08-cv-00246. ■

Indiana DOC Directive Limiting Educational Credit to Only One Associate's Degree Violates Ex Post Facto Clause

by *Brandon Sample*

A directive issued by the Indiana Department of Corrections (IDOC) that limits the award of educational sentence credit to only one Associate's Degree cannot be applied retroactively without running afoul of the ex post facto clause of the U.S. and state Constitutions, the Indiana Court of Appeals decided on June 19, 2008.

Steven I. Paul was convicted of aggravated battery and sentenced to twenty years imprisonment following a fatal shooting incident in 2002. On July 23, 2007, he filed a motion with the sentencing court requesting educational sentence credit. Paul complained that he had been denied educational credit for a second Associate's Degree that he earned while incarcerated in 2006. The court denied Paul's motion, relying on IDOC directive 05-29, which limits the award of educational credit to only one Associate's Degree. Paul appealed.

At the time of Paul's offense of conviction, Indiana law allowed prisoners to earn one year of educational credit for completing an Associate's Degree. Educational credit was capped at the lesser of four years or one-third of the prisoner's sentence, and could be achieved through the earning of multiple degrees.

In 2003, however, the state legislature changed the educational credit statute. Specifically, lawmakers authorized the IDOC to set guidelines for the award of educational credit for multiple Associate's Degrees. In response the IDOC established directive 05-29, which took effect on January 1, 2006.

On appeal, Paul argued that the directive could not be applied to him without

violating the ex post facto clause of both the U.S. and Indiana Constitutions. The Court of Appeals agreed. The ex post facto clause prohibits retroactive application of laws that "disadvantage the offender," the court wrote. Paul's offense of conviction occurred in 2002, before the directive took effect. Consequently, the appellate court held, the directive could not be used to deny credit for his second Associate's Degree.

In the same ruling, the court rejected Paul's other challenges to his 20-year sentence. See: *Paul v. State of Indiana*, 888 N.E.2d 818 (Ind. Ct. App. 2008), *appeal denied*. ■

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Indiana Supreme Court Holds Sex Offender Registration Act Unconstitutional When Applied Retroactively

In a courageous and controversial ruling, a unanimous Indiana Supreme Court held on April 30, 2009 that state statutes collectively referred to as the Indiana Sex Offender Registration Act, when applied to Richard Wallace, a child molester who had already served his sentence, imposed burdens that constituted additional punishment beyond that which could have been imposed when Wallace committed his offense. Thus, the Act violated the state constitutional prohibition against ex post facto laws.

What began with Megan's Law in New Jersey as an effort to provide local communities with information about sex offenders in order to protect potential victims has become, in the words of the Indiana Supreme Court, "something much greater." No longer strictly tethered to the public-safety concerns over sex offender recidivism that prompted its enactment in 1994, the Indiana Sex Offender Registration Act (Ind. Code §§ 11-8-8-1 to 11-8-8-22) now imposes "a severe stigma on every person to whom it applies."

For those affected by its provisions, the Act mandates registration, periodic re-registration (as often as every 90 days for some offenders), disclosure of public and private information, and updating of that information—all under threat of prosecution. Additionally, every registrant must acquiesce to an in-home visit (so their address can be verified), and must carry a valid ID card at all times. Some offenders are required to inform local law enforcement authorities of their plans to travel whenever such travel takes them away from their primary place of residence for more than 72 hours.

These "aggressive" notification requirements, the Indiana Supreme Court held, expose registrants to "profound humiliation and community-wide ostracism" and subject them to "vigilante justice," which may include lost employment opportunities, housing discrimination, threats and violence.

The Court applied the seven-factor intent-effects test articulated by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to determine whether, despite the Indiana legislature's intent that the Act was regulatory and non-punitive, it nonetheless was so punitive in effect that it must be construed as

imposing a criminal penalty. Applying state standards to the federal factors, the Court found that all but one of the *Mendoza-Martinez* factors weighed in favor of treating the Act as being punitive in effect. As such, the Act violated ex post facto provisions when applied to Wallace, who had completed his sentence before the Act became law, and was therefore unconstitutional. See: *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), *rehearing denied*.

PLN readers should note that the Indiana Sex Offender Registration Act now applies not only to sex offenders but also to former prisoners convicted of murder,

attempted murder, voluntary manslaughter and attempted voluntary manslaughter. As anticipated by many civil rights advocates, laws placing restrictions on sex offenders have expanded to include people convicted of non-sex-related crimes.

On December 29, 2008, the Indiana Court of Appeals largely upheld the state's registration requirement for certain violent offenders who had not been convicted of sex offenses, but found the statute was unclear as to whether such offenders were subject to the law's lifetime registration requirement. [See: *PLN*, August 2009, p.24].

American Methods: Torture and the Logic of Domination, by Kristian Williams, South End Press, 279 pages

Reviewed by David Preston

19⁷⁹. How well I remember it. My freshman year at college. In an effort to expand my consciousness and do good in the world, I joined a campus human-rights group and wrote dozens of letters to repressive governments around the world, pleading with them to stop torturing prisoners. Who knew that thirty years later I'd be too busy reading about torture in the Homeland to worry about what was going on *over there*. Needless to say, I'm humbler at 48 than I was at 18. Still, it was nice, once upon a time, to feel morally superior to a dictator in some obscure, benighted place: Uruguay, China, Romania, Chad.

In *American Methods*, a new monograph from venerable South End Press, author Kristian Williams has created a primer on torture in modern America. Using source material as varied as the Geneva Conventions, Stanley Milgram's studies on obedience, and post-9/11 White House legal memoranda, Williams reveals an America in which torture has become a kind of new normal. As each new abuse scandal breaks, responsible parties gyrate through the motions of ignorance or denial, publicly distancing themselves personally from torture as an official policy while doing little to change the culture of domination and cruelty that prevails within the system. Ironically, in some cases (Abu Ghraib, Guantánamo)

bringing torture to light has only helped to legitimize it. The Obama government takes a few of the most awful methods, like water boarding, off the table, while leaving indefinite detention, solitary confinement, and "moderate" stress positions on. Hairs are split, language is massaged. Thus, like the proverbial frog in the stewpot, we come to accept the unacceptable. By degrees.

Far from seeing even the worst torture as an aberrant, Williams perceives the essential role of brutality and domination in the American prison model. In discussing prison rape, for example, he explains that violence is a built-in feature of the system, as well as being a kind of product, like license plates or office furniture. Imprisonment is itself degrading, he notes, "marked by a pronounced lack of power over even the most basic elements of life. It is a regimen of imposition and deprivation, isolation and overcrowding. Food, fresh air, sunlight, social contact, showers, information and entertainment, meaningful work, medical care—all these are restricted, rationed, doled out as privileges, or prohibited altogether. Rote labor, isolation, and pain can be readily imposed. To be a prisoner is to be subject to control. It is also, as a means to such control, to be subject to violence. [. . .] One cannot maintain these conditions without also creating opportunities for abuse."

"Violence is also the product of the prison system," he adds. "Torture is not only the means by which the state gains control, it is also an expression of triumphant power." Brutality will never go out of style in America, it seems, until prison itself does.

Williams' writing benefits from a scrupulous attention to detail—sources are exhaustively cited and indexed—and a comprehensive selection of case studies. By considering wide-ranging aspects of the prison experience—from bullying interrogation tactics to oppressive prison regimens to inmate-on-inmate violence—he is able to give us the broadest possible view of how state power operates against the individual. Unfortunately, such breadth of view can also be a weakness. By devoting so much time to describing case studies, Williams has left himself little space in which to craft his arguments. As a result, his conclusions often come off as rushed and even shrill. In the concluding chapter, "Torture, Terror, and the State" he attempts to toss the whole laundry list of prison evils into the basket of political oppression, offering a one-size-fits-all remedy:

We must seek to radically reduce—ideally, to eliminate—the state's ability

to launch aggressive wars, to spy on the populace, to incarcerate, to keep dossiers, to patrol. It is, in short, necessary that we radically transform the institutions of political power, that we smash the state and break down the mechanisms of coercion so that they operate at a scale directly controllable by local communities.

Smash the state, eh?

Uh . . . What was Plan B again?

Perhaps there is simply too much brutality in the prison system for anyone to be able to make sense of it in 280 pages. Williams might have been better off shucking a few of his subthemes and making the scope of the work a little narrower. For example, he might have stuck to domestic jails and prisons instead of devoting so many pages to drawing analogies between the abuses of Abu Ghraib and those of say, Corcoran State in California. Granted, those connections are real enough. And they're important too. But they are probably too complex to explore adequately in a work of this size, especially with so much other material tossed in the pot.

Buried in the middle of the book is a chapter titled "Ethics and Emergencies," which discusses the notorious "ticking

time bomb" scenario as a justification for torturing an interrogation subject. For me, this was the most interesting part of the work, since it goes to the heart of how Americans have become so inured to the evils done in their name. Williams does a good job of outlining the philosophical issues in this chapter, but what the question calls for is really a book of its own. Or maybe two.

In spite of its cursory handling of some points, *American Methods* is a remarkably brisk and enlightening read—if you don't mind the subject matter—and I would recommend it to students of penology or anyone interested in the recent literature on American prisons. If nothing else, the book makes a concise and powerful case that the American prison system is rotten to the core.

Perhaps discussion groups could be organized around it. Or maybe a human rights club on campus. Students could even quote passages from the book when sending out appeals to those brutish and retrograde governments who still torture in the name of the state. By now, perhaps, you're more familiar with some of the postmarks: Baghdad, Kabul, Rangoon, Washington. ■

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Privatized Prison Medical Care in Mississippi Still Problematic

by David M. Reutter

Anyone looking for evidence that privatized prison health care is a complete failure need look no further than Mississippi. In 2001, the per capita death rate for Mississippi prisoners was around the national average. By 2006, however, the state's prison death rate was the second highest in the nation, and prisoner deaths increased again in 2007. Only Tennessee had a higher death rate among prisoners.

Despite those statistics, Mississippi Dept. of Corrections (MDOC) Commissioner Chris Epps said he had full confidence in the prison system's private medical contractor, Pittsburgh, PA-based Wexford Health Sources, Inc., which has a \$95 million three-year contract to supply medical services to MDOC prisoners. *PLN* has previously reported on the inept care provided by Wexford, similar to other for-profit prison medical companies such as PHS and CMS.

In December 2007, the Mississippi Legislature's Joint Committee on Performance Evaluation and Expenditure Review (PEER) issued a report critical of Wexford. The PEER report indicated the company had failed to meet medical care standards required by its contract with the state. [See: *PLN*, Nov. 2008, p.20].

A recurring failure cited in the report was not providing timely access to medical treatment for Mississippi prisoners. The PEER report found the MDOC could not ensure that Wexford had implemented a system of quality chronic medical care; further, medical staffing shortages of up to 20% were reported at state prisons in Pearl, Parchman and Leaksville.

Wexford's failure to provide adequate medical care has turned some prisoners' sentences into death sentences. That was what happened to William Morris Byrd, Jr., who died on November 21, 2008 at the Central Mississippi Correctional Facility.

The cause of Byrd's death was Crohn's Disease, a chronic but treatable inflammation of the digestive path that blocked his esophagus. In the months before he died, Byrd wasted away. "He literally starved. We watched him turn into a skeleton," said his sister, Charlotte Boyd.

Commissioner Epps responded to claims that Byrd had received inadequate medical treatment by saying, "We provided timely, quality medical care for the inmate, as we do for all of our inmates."

Former MDOC prisoner David McGowan, who spent seven years in Mississippi prisons, disagreed. McGowan had medical problems prior to his incarceration. After entering the prison system, obtaining the type of medical care he received in the free world was difficult.

"The nurses were telling me there wasn't anything wrong with me," McGowan said. "I was getting substitute medications. They weren't controlling my blood pressure." He suffered a heart attack and stroke while imprisoned and said he often was not provided any medication.

McGowan's condition resulted in an early medical release. Such releases save the prison system money by transferring the cost of treatment to the released prisoner or another public agency. From January through May 2008, MDOC released an average of 13 prisoners a month due to medical conditions. That figure more than doubled from June to October last year, which saw an average of 31 medical releases.

Wexford's failure to provide necessary, timely care to chronically ill prisoners has resulted in an influx in mail to Mississippi CURE, a state chapter of National CURE, a criminal justice reform group. "We are getting tons of letters from inmates, for instance, who have been diagnosed with diabetes. They are not getting their [blood] sugar checked daily, as they are supposed to," said Patti Barber, Mississippi CURE's executive director. "Things just plain aren't getting done."

The first two years of incarceration are the most dangerous for MDOC prisoners, as half of all prisoner deaths occur in that period. "Natural causes" is listed as the reason for 93% of those deaths; however, the rate of violent MDOC deaths is three times higher than the national average and the prisoner suicide rate is 40 percent higher.

In 2002, thirty-three MDOC prisoners died. The number of deaths reached 78 in 2007 – a 236 percent increase. Commissioner Epps said the prison system was not to blame. "When you combine this with mandatory sentences, habitual sentences, a population entering prison that is not healthy anyway – 70 percent has an alcohol or drug problem or both, [the average education] level is sixth grade – this is what you end up [with]," he said.

Economics is almost certainly a contributing factor, too. In fiscal year 2007-08, MDOC spent \$50.8 million on prisoner health care, or an average of \$8.22 per prisoner per diem. That figure is expected to increase, as Mississippi's prison population of 22,335 is projected to grow by 3 percent in 2008-09.

The bottom line that prison officials like to ignore is that private medical contractors cut costs by shorting staff, delaying treatment until medical release, or denying necessary medications and medical care. This has caused problems for Wexford in other states besides Mississippi.

On August 1, 2007, Illinois prisoner Brian Parks, 38, died at the Stateville prison in Joliet. Parks was addicted to pain killers, including Vicodin and Tramadol. When he complained about back pain, a prison doctor gave him 30 Tramadol pills. Parks died of an overdose about a day later; investigators found only 10 of the pills left in his cell.

"I don't understand why they would give an addict pills while he's in there for being a prescription drug addict," said Elizabeth Green, Parks' wife.

The physician who gave Parks the Tramadol, Dr. Constantine Peters, was employed by Wexford. Green has since filed a lawsuit, which is still pending; her attorney, Michael Clancy, said it was more cost effective for private medical companies to provide medications to prisoners in volume rather than having staff dispense the pills every day. Cost effective, perhaps, but it also cost Brian Parks his life. See: *Green v. Wexford*, Will County Circuit Court (IL), Case No. 09L-626.

In New Mexico, a federal lawsuit was filed on July 5, 2009 against Wexford, prison medical staff and state prison officials. The plaintiff, Martin Valenzuela, was incarcerated at a Santa Fe facility in 2006 when he developed a urinary tract infection. His suit alleges inadequate medical care resulting in the need for surgery, a lack of follow-up treatment, and the loss of his medical records. See: *Valenzuela v. Breen*, U.S.D.C. (D. N.M.), Case No. 1:09-cv-00561-GBW-WDS.

Another lawsuit against Wexford is being pursued by the estate of New Mexico prisoner Michael Crespin, who died on July 2, 2008. The suit accuses Wexford and prison medical staff of deliberate indifference.

ence, gross negligence, recklessness and medical malpractice. Crespín, who was serving a three-year sentence, had colon cancer. According to the federal lawsuit, while he was incarcerated at the Central New Mexico Correctional Facility, "Wexford essentially lost track of [Crespín] for purposes of his cancer treatment." As a result he missed 14 to 16 medical appointments, most of which were for chemotherapy; additionally, Wexford was accused of delaying surgery to remove a tumor that had developed in Crespín's abdomen. The lawsuit remains pending. See: *Crespín v. Ulibarri*, U.S.D.C. (D. N.M.), Case No. 1:08-cv-00246-WJ-RHS.

Following a May 2007 audit by New Mexico's Legislative Finance Committee, Wexford lost its contract to provide medical care in the state's prison system. The audit found major deficiencies in the company's services, including staffing shortages and a failure to file timely reports related to the deaths of 14 prisoners.

Despite similar findings in Mississippi's 2007 PEER report, Wexford continues to provide medical services for MDOC prisoners. "Even a dog needs medical attention," noted Charlotte Boyd, sister of William Byrd, the Mississippi prisoner

with Crohn's Disease who died after being denied care by Wexford.

It comes down to a matter of perspective. Dogs are seen as loveable and man's best friend, while prisoners are viewed as contemptible trash to be locked up until they waste away and die. Private prison

medical contractors such as Wexford have simply learned how to turn a profit within that context. ■

Sources: *Clarion Ledger*, www.chicagobreakingnews.com, *New Mexico Independent*



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This Petition will seek an avenue to provide assistance to all those in each state that have been wrongfully convicted, that do not always qualify with DNA evidence to challenge their convictions.

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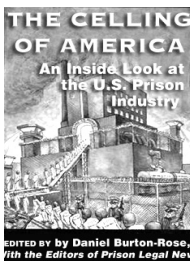
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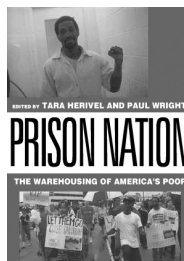
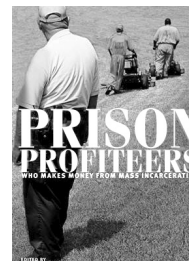
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Texas Grand Jury Rules Jail Guards Not Negligent in Prisoner's Death

by Gary Hunter

Despite a finding of homicide by the Dallas County Medical Examiner, an Angelina County grand jury ruled that jail guards involved in physically subduing a prisoner were not negligent in causing his death.

In November 2008, Thomas Joseph Kirksey, 28, died while in the custody of the Angelina County Jail. He had been arrested earlier that evening and was under the influence of Phencyclidine (PCP), a hallucinogenic. Jail officials described Kirksey's behavior as combative; they said the drug's influence made him difficult to restrain.

"He was delusional And he was extremely powerful in his resistance," said Sgt. Pete Maskunas, the Texas Ranger who investigated the case. "He literally lifts four officers off his body while being restrained in the restraint chair." Kirksey, who was 5'11" and weighed 300 lb., reportedly was Tasered by jail staff, too.

Maskunas stated that as the effects of the drug appeared to wear off, Kirksey became calm and was subsequently taken to a less restrictive area to "alleviate some of the symptoms associated with PCP." During his fifteen hours in jail, Kirksey was moved from the restraint chair to a padded room and eventually to a holding cell.

"They got him in [the holding cell] and left him in there a while. Then he became psychotic again. They could see he was going to hurt himself and they felt their only other option was to put him in the padded cell," said Maskunas.

This last decision proved fatal for Kirksey, who never had a chance to hurt himself as guards entered the cell and piled on top of him. According to Maskunas, it became "imperative to restrain him with the force of their bodies They held him there for a period of time until he quit fighting."

The coroner's report indicated they also held him there until he quit breathing, permanently. In other words, in an attempt to save Kirksey from himself, the guards ended up killing him. Maskunas insisted "there is evidence that showed that [the jail staff] were acknowledging and giving verbal direction to let him breathe."

But acknowledgements and directions weren't enough, and at 5:10 p.m. on No-

vember 10, 2008, Kirksey was pronounced dead at a local hospital. The Dallas County Medical Examiner determined his death was due to restraint asphyxia, also known as positional asphyxia, which is when a person is suffocated as the result of physical restraint that deprives them of the ability to breathe. The asphyxia was complicated by Kirksey's other conditions, including heart disease, obesity, stress and being under the influence of PCP.

Addressing the Medical Examiner's finding of homicide as Kirksey's cause of death, Maskunas explained that "If an offense had been committed, the death of a person caused by someone's negligence is considered criminally negligent

homicide in the state of Texas."

Yet despite documented evidence that numerous jail guards engaged in physical restraint that resulted in Kirksey's death by suffocation, in April 2009 the Angelina County grand jury decided the guards were not negligent in causing his death.

District Attorney Clyde Herrington, who sent the case to the grand jury, said he had never anticipated an indictment. Kirksey is survived by his wife, Natassha, and three daughters, ages 6, 7 and 8. "He was a good person," said Natassha. "He was just under the influence at the time." ■

Sources: *Lufkin Daily News*, www.ktre.com

Justice Reinvestment Initiative Eliminates Texas Prison Overcrowding

by Matt Clarke

Despite a massive prison-building program in the 1990s, in 2007 the Texas legislature had to deal with an overcrowded prison system. Some lawmakers proposed including \$523 million in the biennial budget for prison construction. Surprisingly, the legislature decided to reject that plan, instead appropriating \$241 million for a Justice Reinvestment Initiative (JRI) project.

The JRI, developed with the assistance of the Justice Center of the Council of State Governments and the U.S. Department of Justice's Bureau of Justice Assistance, emphasizes the expansion of substance abuse, mental health and intermediate sanction programs. The focus of the JRI is to assist people on probation or parole who are in danger of being sent to prison. The results in Texas were dramatic.

From 2007 to 2008, the state's prison population increased by a remarkably low 529 prisoners. The projected population increase for that time period was 5,141 prisoners. During the same 24-month period, probation revocations resulting in re-incarceration dropped by 4% and returns-to-prison due to parole revocations declined 25%, while the parole approval rate rose from 26% to 31%.

In 2007, the Legislative Budget Board (LBB) had projected an increase in the prison population of 17,000 prisoners by 2013, necessitating \$2 billion in new prison construction. Based on the LBB's estimate, the Texas Department of Criminal Justice (TDCJ) submitted a FY 2008-09 biennial budget request that included \$523 million for building new prisons and \$184 million in "emergency" funds for contract bed space in county jails. As it turned out, the \$523 million wasn't needed and the county jail contracts have been cancelled. The state's prison capacity is now expected to be sufficient until 2013.

"Our prisons were increasingly filled with people sentenced for substance abuse problems, mental health issues, or technical violations," said state Representative Jerry Madden. "The result has been a huge burden on our state budget and fewer beds for serious, violent offenders. We needed to be smarter about how we spent taxpayers' dollars on public safety while ensuring that we continued to be tough on those offenders who pose the greatest risk to our communities."

The JRI program began with an investigation into the causes behind the historic growth of the state's prison population. The investigation was conducted

by a bipartisan group of legislative leaders led by state Senator John Whitmire, Chairman of the Senate Criminal Justice Committee, and Rep. Madden, who chairs the House Corrections Committee. They requested assistance from the Justice Center, which identified three main causes of prison growth: 1) Probation revocations resulting in re-incarceration had increased 18% between 1997 and 2006, despite a 3% reduction in the number of people on probation. 2) A decrease in funding for community-based mental health and substance abuse services in the 2003 legislative session had caused many of those programs and facilities to close, leaving insufficient capacity. Over 2,000 people were on waiting lists for placement in such programs. 3) Parole grant rates were lower than the lowest rates recommended by parole guidelines. Merely paroling low-risk prisoners at the lowest suggested rate would have resulted in an additional 2,252 parole releases in 2005.

Based on these findings, the legislative group and the Justice Center developed JRI policy options for cost-effective and safe management of TDCJ's prison population. The JRI was adopted by the legislature and signed into law by the governor in May 2007; it increased treatment program capacity and expanded prison diversion options for parole and probation revocations. A total of 5,200 new treatment slots and 4,500 new diversion beds were funded. Impressively, this was accomplished at a savings of \$210.50 million in FY 2008-09 compared to the proposed cost of expanding the prison system through new construction.

"Ten years from now, I expect that we will look back and realize that these policies marked the most significant re-direction in Texas' criminal justice policy history and that we have been all the safer for them," said Rep. Madden.

One aspect of the JRI was not as successful, as it met with community opposition: the creation of Transitional Treatment Centers (TTCs) to provide residential treatment programs for newly-released prisoners. Both a lack of certified counselors and a "not in my backyard" attitude among local residents prevented the construction of a sufficient number of TTCs.

The TDCJ requested a net biennial budget of \$6.85 billion for FY 2010-2011, which includes full support for all programs adopted in the 2007 legislative session. Further, the state legislature continued the trend started with JRI, passing the following bills in its most recent session, which have been signed into law:

- SB 1940 establishes a Veterans Diversion Court Program for veterans charged with criminal offenses who can prove their conduct was affected by brain injuries or mental illness resulting from military service. Qualified defendants are diverted from prison, and upon completion of the program their record may be expunged.

- HB 3226 establishes a housing voucher program for new parolees.

- HB 93 provides for the restoration of good conduct time lost in prison disciplinary proceedings.

- HB 963 allows some people with felony convictions to be eligible for certain

occupational licenses.

- HB 1711 requires the TDCJ to establish a reentry and reintegration plan for releasees that includes educational, vocational, like-skills and life-management programs, encouragement of family interaction, assistance with obtaining identification documents upon release, and help with finding post-release housing.

- HB 2161 provides for the issuance of a personal identification certificate by the TDCJ to current or former prisoners, which can be used to obtain a state identification card or driver's license.

It is encouraging to see Texas make serious efforts to keep people out of prison. However, most of the JRI programs are aimed at diverting criminal defendants and former prisoners from future incarceration, and do little to help current TDCJ prisoners who did not have the benefit of such programs when they received prison terms.

The Justice Center is presently working with ten other states in regard to criminal justice reform efforts, including Kansas. According to testimony from Kansas Dept. of Corrections Secretary Roger Werholtz, the state's parole revocation rate has dropped by 48% since 2003 and its prison population has declined by 7.5% since 2004, in large part due to assistance from JRI programs and prison risk management strategies. ■

Sources: "Assessing the Impact of the 2007 Justice Reinvestment Initiative," Council of State Governments Justice Center, March 2009; www.justicereinvestment.org

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CRIPA Investigation Finds “Woefully Inadequate” Conditions in Erie County, NY Jails; Lawsuits Filed

by Jimmy Franks

An investigation conducted by the Civil Rights Division of the U.S. Department of Justice uncovered significant civil rights violations at two New York detention facilities – the Erie County Holding Center (EHC) and the Erie County Correctional Facility (ECCF), which house both pre-trial detainees and sentenced prisoners.

The investigation was initiated on November 13, 2007 pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997, following numerous complaints from state agencies and prisoners who had experienced the violations first-hand. Although the initial focus of the probe concerned issues related to medical care, mental health care and protection from harm, federal officials soon widened the investigation to include environmental and sanitary conditions at the two jails.

The inherent difficulty of such a complex investigation was compounded by the uncooperative attitude of Erie County officials, who denied investigators access to the detention facilities, staff and prisoners. CRIPA investigators noted that “the County’s denial of our request for access to Erie County inmates, even during regular visiting hours, is unreasonable and devoid of any legal or penological support. Prisoners have a First Amendment right to speak with government representatives about the conditions of their confinement and the County has no legitimate penological basis to deny the inmates access to United States government representatives.”

In December 2008, with the assistance of the U.S. Marshals and various New York state prisons, investigators were able to communicate with current and recently-transferred EHC prisoners. Following those interviews, Erie County officials conducted videotaped interviews with some of the same prisoners in an attempt to discover what they had told federal investigators. The investigators noted that “such interviews could be construed as retaliation, which is unlawful under CRIPA.”

Protection from harm is a basic right for both sentenced prisoners and pre-trial detainees, safeguarded by the Eighth and Fourteenth Amendments, respectively. Even so, the CRIPA investigation into

conditions at EHC and ECCF found numerous violations of prisoners’ right to personal safety. Not only were Erie County prisoners subjected to excessive or unnecessary use of force by guards, there was also a high number of prisoner-on-prisoner assaults.

Many of those assaults were allegedly instigated by jail guards who used “pet” prisoners to punish other prisoners. In some cases guards revealed that detainees had been arrested for sex offenses, which placed them at risk of being attacked. Investigators also learned about what was euphemistically known as “elevator rides,” which involved deputies taking a handcuffed prisoner to an isolated elevator not equipped with security cameras, and then violently assaulting him.

Other serious deficiencies were found by CRIPA investigators in the areas of medical and mental health care, policies and procedures, use of force reporting, suicide prevention, prisoner supervision, classification, sexual misconduct, grievance procedures, and sanitation and environmental conditions, among others. In short, just about every aspect related to the safe, secure and efficient management of EHC and ECCF was discovered to be lacking. CRIPA investigators recommended a lengthy list of remedial measures to bring Erie County’s jails into compliance with minimal constitutional standards.

Investigators found that many, if not most, of the problems at EHC and ECCF could be solved by the development, implementation and enforcement of appropriate policies and procedures. Sufficient staffing and proper training of security and medical staff also would have a positive impact on current jail operations. As to the problems with sanitation and environmental conditions, prompt and proper maintenance, including regular inspections and documentation of repairs, would resolve those issues. The spread of infectious diseases could be curtailed by adopting a more organized and controlled procedure for washing and delivering prisoners’ laundry and bedding.

Acting Assistant Attorney General Loretta King notified Erie County Executive Chris Collins of the deplorable conditions and civil rights violations found

by CRIPA investigators, and the recommendations for remedying those problems, in a 50-page letter dated July 15, 2009. The letter served not only as an offer of assistance and concern, but also as a last resort prior to a lawsuit being filed to protect the constitutional rights of prisoners in Erie County detention facilities.

King described many disturbing examples of civil rights violations at EHC and ECCF, including a number of cases where prisoners were abused by guards – such as an August 2007 incident in which deputies hit a pregnant prisoner in the face and kneed her in the side of her abdomen. The guards reportedly said they thought she was fat, not pregnant. The prisoner lost her two front teeth. In another incident, an ECCF detainee died due to a stroke in March 2007 after guards slammed his head against a wall and then denied his requests for medical attention. King stated that investigators had found a “pattern of serious harm to inmates, including death.”

Despite the litany of problems identified by CRIPA investigators, Erie County apparently didn’t get the message that King was trying to convey, and continued its practice of stonewalling and non-cooperation. County Attorney Cheryl A. Green, who had refused to let investigators into EHC and ECCF without county supervision, issued a 37-page reply that refuted many of the findings cited in King’s letter.

“The law is clear that prisoners cannot expect, and the county is not expected to provide the amenities, conveniences and services of a good hotel,” Green wrote, evidently not understanding that the provision of basic necessities and prevention of civil rights violations is far removed from supplying prisoners with a comfy hotel stay.

Unsatisfied with this response, the U.S. Dept. of Justice filed suit against Erie County officials on September 30, 2009. The lawsuit includes claims related to most of the deficiencies found by CRIPA investigators concerning excessive use of force by guards, poor medical care, insufficient suicide prevention procedures, failure to protect prisoners from harm and an inadequate classification system, among others. See: *United States v. Erie*

County, U.S.D.C. (W.D. NY), Case No. 09-cv-00849.

County Executive Chris Collins and Erie County Sheriff Timothy B. Howard called the lawsuit frivolous. Howard went even further, saying "These liberal bureaucrats have relied on dishonest means and unfounded allegations made by prisoners to advance their political agenda." Howard, a Republican, blamed Democrats who wanted to embarrass him; he was running for re-election and the CRIPA suit was filed just five weeks before voting day.

However, the Department of Justice isn't the only government agency suing Erie County over deficiencies in its detention centers. On September 22, 2009, the New York Commission of Correction filed suit against Sheriff Howard to require him to comply with state rules governing operations at ECHC and to "operate [the facility] in a safe, stable and humane manner, as required by law." Previously, the Commission had called medical care at ECHC "negligent and incompetent." See: *New York State Commission of Correction v. Howard*, New York Supreme Court, County of Erie, Case No. 2009-011216.

Although the Commission had issued variances to accommodate regulatory

lapses by Erie County, the county refused to fix the problems. "Despite our repeated efforts to assist, Erie County has persistently violated regulations and neglected or refused to take necessary remedial action," said Commission Chairman Thomas A. Beilein.

Further, a nonpartisan group, the League of Women Voters of Buffalo/Niagara, which had studied conditions at Erie County's detention facilities, agreed there were major deficiencies that made legal action "unfortunate but necessary." For the past five years the League has analyzed studies of Erie County jails and interviewed dozens of female prisoners after they were released. The League found significant problems in the areas of neglect and abuse, deficient prisoner release plans and sentencing alternatives, and medical and mental health treatment.

In 2008, the National Commission on Correctional Health Care criticized Erie County's practice of placing suicidal prisoners in unsafe cells that provided opportunities for self-harm, such as attachment points for hanging themselves. CRIPA investigators noted that since 2003, at least 23 prisoners at ECHC have attempted or committed suicide.

In spite of the problems identified by the U.S. Department of Justice, the New York Commission of Correction and independent agencies, Erie County apparently wants to take its chances in court rather than remedy inadequate and dangerous conditions at ECHC and ECCF. *PLN* will report the outcome of the federal and state lawsuits. ■■

Sources: *Letter from AAAG Loretta King to County Executive Chris Collins*, dated July 15, 2009; *Buffalo News*; www.scoc.state.ny.us

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Former PA Lawmaker Who Took Sex Offenders into His Home Files Suit Against Zoning Board

Thomas E. Armstrong, a former tough-on-crime Pennsylvania lawmaker who took three registered sex offenders into his home in Marietta Borough, filed a lawsuit last year challenging a decision by zoning officials to force the offenders to move out.

Citing his Christian faith and belief in forgiveness, Armstrong had previously provided housing for sex offenders in Conestoga Township. That decision didn't sit well with the local community, so Armstrong moved three sex offenders – a convicted rapist released from prison after serving a 20-year sentence in Illinois, a male offender who had fondled a 15-year-old girl, and a man caught with child porn on his computer at work – into his own home in Marietta.

Armstrong said he had been assured by prison counselors and defense attorneys that the offenders were not a threat to anyone. Nonetheless, before they moved into his house, Armstrong's wife and their 16-year-old daughter moved out, ostensibly to care for a sick relative. Whether that was a coincidence or because Armstrong was concerned for his family is unknown.

Skepticism aside, finding housing for sex offenders can be a serious problem, as residency options are often severely limited due to state and local laws that restrict where they can live. Compounding matters, personal information about registered sex offenders, including their address, is often posted online – leading to community opposition.

That was the case when Armstrong took sex offenders into his home, which resulted in local residents circulating flyers, picketing outside his house and demanding that the offenders leave. In August 2008, the zoning board ruled that he had violated a local ordinance by letting the offenders live with him. Armstrong appealed the board's decision to the Lancaster County Court of Common Pleas on September 11, 2008, but admitted he was "swimming upstream" against public opinion. All of the offenders have since moved out of Armstrong's Marietta residence.

A bill pending before the Pennsylvania state legislature (HB 755) would prohibit more than one registered sex offender from living in a single dwelling

unit. The bill was spurred by Armstrong's efforts to let sex offenders stay with him.

On January 31, 2009, Richard D. Owen, the convicted rapist who had lived at Armstrong's house, was charged with making lewd advances toward women at a local Wal-Mart. He was charged with disorderly conduct and harassment, jailed on a parole violation and later found guilty of harassment at trial.

Meanwhile, Armstrong had to fight a foreclosure proceeding against his home in Marietta. He moved two sex offenders into a private residence in Columbia, where he continued to face opposition from local residents.

According to Armstrong, released sex

offenders deserve a second chance. He has worked with Justice & Mercy, a non-profit criminal justice reform organization, and has admitted that being tough on crime while he was a state lawmaker was "not necessarily the brightest thing to do."

"Most of us think our judicial system is a good system, but it's got serious flaws and we end up destroying people," he observed. Which is unfortunately true – and the destructive nature of our criminal justice system is not limited to sex offenders or other ex-prisoners, but often extends to those who advocate for them, too. ■

Sources: *Lancaster New Era*, www.cfcoklahoma.org, *Associated Press*

\$250,000 Awarded to Former New York Prisoner Wrongly Convicted by Falsified Evidence

by David M. Reutter

A New York Court of Claims has awarded \$250,000 to a former prisoner based on her claims of malicious prosecution and negligent supervision, after finding a State Police investigator had fabricated fingerprint evidence in her case.

The claimant, Shirley Kinge, was convicted in November 1990 of first-degree burglary, third-degree arson, second-degree forgery, hindering prosecution in the first and second degree, and criminal possession of stolen property. She was sentenced on January 30, 1991 to serve 18 to 47 years in prison, which the Court of Claims found was equivalent to a life sentence since Kinge was 73 years old at the time of her damages award hearing in March 2009.

Kinge's convictions stemmed from four murders in which her son, Michael, was the prime suspect. The victims were found in their home; they were bound, had died of gunshot wounds to the head, and the house had been set on fire. One of the victims, a 15-year-old girl, had been sexually assaulted. A massive manhunt ensued. Police focused on Shirley and Michael Kinge after composite sketches were released of two people who had used credit cards belonging to the victims.

David L. Harding, an investigator with the State Police and a member of the

Bureau of Criminal Investigations Identification Unit, went undercover as a guest at the bed and breakfast where Shirley Kinge worked. A short time later, Harding said he had matched two of Shirley's latent fingerprints with those lifted from metal gas cans found at the crime scene.

When state police tried to apprehend Michael Kinge, he was killed in a shootout. Shirley was arrested, prosecuted and went to trial, where she was convicted – due largely to the fingerprint evidence that linked her to the murders.

In January 1991, Harding was interviewed for a position with the Central Intelligence Agency. He reportedly was asked whether he would break the law for his country. He responded that he would, and bragged that he had fabricated fingerprint evidence in criminal cases where he was certain of the suspects' guilt. The CIA contacted the FBI, which notified New York officials more than a year later. Following an investigation, it was determined that Harding had falsified evidence and committed perjury in Kinge's case.

Harding was prosecuted and sentenced to 4 to 12 years; another state trooper, Robert M. Lishansky, received 6 to 18 years for fabricating evidence in more than 20 cases. Police lieutenant Craig D. Harvey pleaded guilty to falsifying evidence and received a 22 to 72 year

sentence. The incident was known as the State Police Troop C scandal.

After serving 22 years in prison, Kinge was released in September 1992 following the reversal of her convictions. She later pleaded guilty to misdemeanor charges of using the victims' credit cards. On December 13, 2007, the Court of Claims found that the State of New York was liable for negligent supervision and malicious prosecution, as Harding's actions and an "unjustified and complete lack of supervision" by his superiors amounted to "actual malice." A damages trial ensued.

As Kinge did not come before the court with "clean hands" due to her admitted use of the victims' credit cards, the Court of Claims stated she must "bear full responsibility for any damage to her reputation which may have occurred" as a result of her conduct. However, the court held that Kinge was entitled to damages for mental anguish and emotional distress which resulted from having to listen at trial to "highly incriminating fingerprint evidence against her which she knew to be completely false," and for being convicted based on "tainted evidence and testimony."

She also endured hardship during her incarceration and suffered loss of privacy and liberty that entitled her to the \$250,000 award. The Court of Claims' damages award decision, released on June 23, 2009, also specified 9 percent interest from the date of the liability finding. See: *Kinge v. State of New York*, New York Court of Claims (Syracuse), Claim No. 88273, UID 2007-009-171. ■

Additional sources: www.syracuse.com, *New York Times*

\$170,000 in Settlements to Sacramento Jail Prisoner Sexually Abused by Guards

California's Sacramento County has paid \$160,000 to settle a claim that a guard raped a prisoner. The settlement is in addition to a \$10,000 payment out of personal funds paid by another guard for kissing the prisoner.

The suit claimed that lesbian guard Paula Sue Wood forced prisoner Annette Arellano to have sex with her more than 20 times between August 2006 and April 2007. Wood became so "obsessed" with Arellano that at one point she held up a sign that said, "You fascinate me."

In her suit, Arellano alleged that another prisoner reported Wood's involvement with Arellano in January 2007. The subsequent investigation cleared Wood and resulted in disciplinary action against the reporting prisoner.

Wood later resigned and pled no contest to a charge of having sex with a prison, which resulted in a sentence of 90 days in a work furlough program and three years probation. Jail officials

contend they could not uncover facts to support the allegations of sexual activity because Arellano refused to cooperate with them.

As for settling the lawsuit, "it's pretty clear why the matter was resolved," said the County's attorney, Nancy Sheehan. "Former Deputy Wood was charged with a violation of the penal conduct with an inmate and she pled no contest for that."

Arellano also sued guard Clement M. Tang, who she labeled "an opportunistic heterosexual." He kissed her in a holding cell while she was awaiting a court appearance. In addition to paying \$10,000 out of his pocket, Tang retired from the Sheriff's Department.

The April 23, 2009, settlement with the county resulted in dismissal of Arellano's lawsuit. She was represented by attorney Stewart Kate. See: *Arellano v. County of Sacramento*, USDC, E.D. California, Case No. 2:08-CV-01509. ■



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\$1 Million Settlement in Washington DOC Staff Sexual Abuse Suit of Women Prisoners

On June 12, 2009, the Washington State Department of Corrections (DOC) entered into a settlement agreement in a class-action lawsuit over staff sexual abuse of female prisoners which included \$22,500 in attorney fees for future enforcement of the agreement. Without admitting any wrongdoing, the DOC also agreed to pay five named plaintiffs \$1,000,000.

The class-action lawsuit was filed in Thurston County Superior Court. It alleged pervasive sexual abuse of female prisoners throughout the prison system. The central goal of the lawsuit was to force reforms on the prison system; however, five individual defendants also sought monetary damages for the sexual abuse they suffered. The lawsuit resulted in the resignation or firing of six prison guard defendants. Other prison staff were convicted of crimes related to the suit's accusations of "various acts of sexual misconduct against inmates, including voyeurism, exhibitionism, and rape."

Because of the lawsuit, the DOC made changes to the physical plants of its women's prisons to reduce the opportunities for staff sexual misconduct. This included the installation of surveillance cameras, restriction of staff access to some closets and rooms which had been previously used for sexual misconduct, installation of viewing windows on doors and installation of privacy curtains for strip-search areas. The DOC also improved staff training on the issue of sexual misconduct, initiated prisoner training on the reporting of sexual abuse, and developed procedures to make it easier to report such abuse and ensure that prisoners reporting sexual abuse would not suffer retaliation for doing so. There were also prison rule changes to prevent favoritism and familiarity and the creation of a staff position for the investigation of prisoners' allegations of sexual abuse.

The 44-page settlement order detailed aspects of training, complaint and reporting procedures and investigations of allegations of sexual abuse by prison staff. The order puts off further proceedings until January 31, 2010 to give the DOC an opportunity to comply with the order. Although the \$1 million settlement ends all claims for monetary damages, the lawsuit continues with respect to requested changes

in DOC policies and physical plants. It also prohibits the DOC from rehiring or allowing into the prisons as volunteers or contractors certain defendant guards who were fired or resigned. It requires the DOC to offer prisoners reporting sexual abuse involving body fluids an opportunity for a forensic medical examination and requires the DOC to make mental health services available to women prisoners who allege staff sexual abuse or misconduct.

The order limits the use of protective segregation for prisoners reporting staff sexual misconduct. It requires confidentiality by staff investigating such allegations and that alleged victims be given an oral update on the progress of the investigation every 30 days. Lie detectors are not allowed as an investigation tool.

Seattle attorneys Hank Balson and Nancy Chupp of the Public Interest Law Group and Beth Colgan of Columbia Legal Services won this decisive victory for women prisoners in Washington State. See: Stipulated Judgment and Settlement in *Doe v. Clarke*, Thurston Co. (WA) Sup. Court, No. 07-2-015130. Documents related to the case are posted on PLN's website. ■

Additional Sources: *Seattle Spokesman-Review*; KING5.com; Press Releases from Columbia Legal Services; Public Interest Law Group, PLLC; and Washington DOC

U.S. Senator John Ensign, Author of Ensign Amendment, Falls From Grace

by *Brandon Sample*

There is nothing like a good sex scandal to get things stirred up in Washington, and it's even better when the scandal involves the likes of U.S. Senator John Ensign, a conservative Republican and member of the Pentecostal Church who for years has railed against pornography, promiscuity and other forms of "immorality."

Ensign, in his second term as a Senator from Nevada, revealed on June 16, 2009 that he had had an 8-month extramarital affair with Cynthia Hampton, a female campaign staffer married to Ensign's former administrative assistant, Douglas Hampton.

Ensign claimed that his confession was prompted after Douglas Hampton tried to shake him down for hush money. However, it was later revealed that Ensign's parents gave \$96,000 to the Hamptons in April 2008, well before the scandal became known. It was further reported that Cynthia Hampton's salary had doubled during the time of the affair, and that Ensign had helped her husband find lucrative consulting and lobbying jobs.

Senator Ensign was once a rising star in the Republican Party. Former chairman of the Republican National Senatorial Committee, he was promoted to head the Republican Policy Committee (RPC) in 2008, making him the fourth most powerful Republican

in the Senate. Ensign was regarded as potential presidential material, at least until he admitted to having the affair. He resigned his leadership post with the RPC on June 17, 2009 but remains in office.

While scandal in Washington is nothing new, the Ensign affair highlights the hypocrisy of lawmakers who represent themselves as members of the so-called "moral majority." Once given a 100 percent rating by the Christian Coalition, Ensign strongly supported the Federal Marriage Amendment to ban same-sex marriages; he proclaimed on the Senate floor that "marriage is the cornerstone on which our society was founded." Strange, then, that he would break his own marriage vows by cheating on his wife.

Even after Ensign's affair became public, he was not without his supporters. Senator Tom Coburn, Ensign's roommate in Washington, pleaded for forgiveness. "If you look at it in the light of everybody makes errors, at least he fessed up and resolved the problem with his family," Coburn said. Calling Ensign a "bright young man," Coburn noted that "lots of people make mistakes." Coburn had reportedly known about Ensign's extramarital affair for over a year, but kept quiet about it.

Senator Coburn's defense of Ensign is not without its own irony. Coburn is considered by many to be one of the

most conservative members of the Senate, having warned against “rampant” lesbianism in Oklahoma public schools. He also opposed condom use, claiming that condoms do not prevent STDs, and has spoken out against “promiscuous sex without consequences.”

While Senator Coburn came to Ensign’s defense, he has not always been so kind to other politicians. For example, Coburn was a strong critic of President Clinton during the Monica Lewinsky scandal, and in 2007 he called for the resignation of fellow Senator Larry Craig. Craig had pleaded guilty to disorderly conduct for soliciting sex from an undercover police officer in a bathroom at a Minnesota airport (a plea he later tried to withdraw). Senator Ensign had been highly critical of Clinton’s affair with Lewinsky, too, calling for him to resign and saying Clinton had “no credibility left.”

In 1996, Ensign slipped an amendment into an appropriations bill that prohibited the Bureau of Prisons from using federal funds to distribute pornography to prisoners. This end-run around the First Amendment, dubbed the “Ensign Amendment” (28 U.S.C. § 530C(b)(6)), effectively barred all federal prisoners from receiving publications with sexually explicit content or nudity. [See: *PLN*, March 1997, p.11].

The Ensign Amendment, signed into law by President Clinton, was initially struck down by the U.S. District Court for the District of Columbia; however, it was upheld on appeal. [See: *PLN*, March 1998, p.10; Sept. 1999, p.17]. Other courts have questioned the soundness of the Ensign Amendment, but it remains in effect. See, e.g., *Ramirez v. Pugh*, 379 F.3d 122 (3d Cir. 2004), *summary judgment granted to defendants following remand*, *Ramirez v. Pugh*, 486 F.Supp.2d 421 (M.D. Pa. 2007)

[*PLN*, May 2006, p.30].

More recently, in November 2008, Senator Ensign introduced a bill that would require a 50-hour work week for federal prisoners, with wage deductions of 65-75% for victim restitution and reimbursement of incarceration costs (\$3695). Thus far the bill has no other sponsors; it was referred to the Senate Judiciary Committee, where it is going nowhere – much like Ensign’s political future.

Ensign is typical of many Christian conservatives. Unable to outlaw sexually explicit materials for all Americans they settle for banning it from prisoners and to

their discredit, the courts have largely gone along with the charade. Thus an adulterer like Ensign is happy to legislate his public moral beliefs onto prisoners.

With hypocritical lawmakers like Senator Ensign in office, it is not surprising that a majority of Americans remain disgusted and dismayed by Washington politics and politicians. Then again, it is the American voters who elect them and re-elect them. ■

Sources: www.thedailybeast.com, www.huffingtonpost.com, www.alternet.org, *Las Vegas Sun*, www.cnn.com, *Associated Press*

Former North Dakota State Psychologist Who Treated Sex Offenders Busted for Child Porn

Facing a sentence ranging from 5 to 30 years, Joseph Belanger, a North Dakota psychologist who treated sex offenders at the State Hospital in Jamestown, was sentenced on January 28, 2009 to 84 months in federal prison on child pornography charges, plus lifetime supervision following his release.

Belanger, 61, had worked at the State Hospital for more than two decades and claimed he became interested in child porn while treating sex offenders there. He had pleaded guilty last year to charges of receiving and possessing materials involving the sexual exploitation of minors. Investigators found he had downloaded thousands of pornographic pictures and more than 200 videos.

While his state job duties may well have proved to be his undoing, as Belanger claimed, no doubt his many years of public service also served him

well when he was sentenced. Not only did federal prosecutors recommend a relatively light sentence – and he received just 7 of the possible 30 years he faced – but the judge, who claimed to rarely depart from sentencing guidelines in sex offender cases, did so for Belanger because he saw “some room for optimism and hope.” Unlike other defendants convicted of child pornography charges who don’t have a background in government employment, apparently.

U.S. District Court Judge Ralph Erickson also noted that as a psychologist, Belanger “should have known there was help available” to deal with his child porn problem. See: *United States v. Belanger*, U.S.D.C. (D. ND), Case No. 3:08-cr-00076-RRE. ■

Source: *Associated Press*, *ABC News*

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\$73,000 Settlement for Denial of Pain Medication to Wisconsin Prisoner

by Matt Clarke

On January 6, 2009, Wisconsin settled a lawsuit brought by a state prisoner who complained of guards preventing him from receiving his pain medication when he was in intense pain, then retaliating against him when he complained about it and filed a state court investigatory action.

Kenneth Harris was a 53-year-old Wisconsin state prisoner at the Columbia Correctional Institution in Portage, Wisconsin when he began to vomit blood, bleed from the rectum and experience excruciating abdominal pain. He was sent to a hospital where the physicians were unable to initially diagnose the intestinal disorder, but scheduled tests for five days later and prescribed him Tylenol with codeine (Tylenol 3) and injections of Toradol each to be taken every six hours as needed. He was then returned to the prison.

Two days later, Harris was experiencing severe pain early in the morning. He asked guards Kally Ryan and Sgt. Linda Hinickle to contact the Health Services Unit (HSU) as he needed a Toradol injection. They allegedly refused to contact HSU, offered only to get him his Tylenol 3 and ordered him to his cell. Harris alleged that he could not take the Tylenol 3 because it had only been 4 hours since he last took one and was ineffective anyway.

Harris returned to the day room area later, again seeking help. Ryan pushed the alarm button to summon a response team. Ryan and Hinickle claim that Harris was aggressive and disruptive. However, when the response team arrived--fully prepared to take down a violent prisoner--one of the team members immediately ordered them to stand down, telling them that Harris was obviously sick, appeared to be in distress and needed to be taken to the HSU. The response team transported Harris to the HSU in a wheelchair. The HSU sent Harris to a hospital where he received an injection of Toradol.

When he returned to the prison, Harris was placed in segregation due to a disciplinary action written by Ryan charging him with disobeying a direct order (to return to his cell) and disruptive conduct. Harris filed grievances over the confrontation and disciplinary charges. He also filed a 'John Doe' proceeding in Columbia County Court alleging that

Ryan and Hinickle were criminal culpable for denying him medical treatment. The judge in the "John Doe" proceeding found that Ryan and Hinickle may have been guilty of criminal acts when they denied Harris medical treatment.

Nurse Sue Ward was subpoenaed to bring medical documents to the "John Doe" proceeding. The lawyer for the Department of Corrections wrote the judge a letter, telling him that Ward was under investigation for fraternization. Ward filed a "whistle blower" complaint for retaliation. The judge hearing that case found in Ward's favor, finding that the disciplinary action taken against her for fraternization and giving medical documents to a prisoner were unjustified and retaliatory and ordering the DOC to pay her costs and legal fees. She resigned citing workplace

discomfort and safety concerns.

Harris filed a civil rights suit in federal district court pursuant to 42 U.S.C. §1983 for violation of his First and Eighth Amendment rights. Harris hired California prison expert Jerry A. Schwartz, Ph.D. as an expert witness. He prepared a report condemning Ryan and Hinickle's actions, finding that they had a history of confrontations with prisoners and other staff, confirming retaliation against Harris and a cover up, but praising other aspects of the medical care given Harris. Following the DOC's deposition of Schwartz, the case was settled in mediation with no admission of wrongdoing. In addition to the \$73,000, the DOC agreed to pay Schwartz's fees. See: *Harris v. Grams*, U.S.D.C.-W.D. Wisc., Case No. 07-C-678. ■

Revised List of ICE Detainee Deaths Still Incomplete, Updated Again

by Mark Wilson

At least 92 detainees died in immigration detention facilities between October 2003 and February 2009, according to an updated list compiled by Immigration and Customs Enforcement (ICE). The list, which was obtained by the *New York Times* in March 2009 following a Freedom of Information Act request, revises a previous ICE report of 66 detainee deaths between January 1, 2004 and November 2007. [See: *PLN*, Sept. 2008, p.30]. There are glaring inconsistencies between the two reports.

The more recent ICE list "adds the September 9, 2005 death of Tanveer Ahmad, also known as Ahmad Tanveer, 43, of Pakistan," the *Times* reported. "Officials had maintained for months that no records of his death could be found, despite complaints that he had died after his severe and obvious symptoms of a heart attack went untreated for hours at the Monmouth County Correctional Institute in Freehold, New Jersey."

Interestingly, the updated ICE list omits at least one previously-reported death. On August 21, 2008, Ana Romero Rivera was found hanging in a cell at the Franklin County Jail in Frankfort, Kentucky. Newspaper reports indicated that

Rivera was being held for deportation, but "federal officials now disagree whether she was legally in immigration custody when she died."

Even more troubling is the May 30, 2007 death of Boubacar Bah, 44, at a Corrections Corporation of America (CCA) detention center in Elizabeth, New Jersey. Previously listed as "brain hemorrhage, fractured skull," Bah's cause of death was changed to "undetermined" in the revised list of ICE detainee deaths.

According to a May 5, 2008 article in the *Times*, Bah had collapsed and injured his head at the Elizabeth facility. CCA guards placed him in segregation, then later took him to a hospital where he underwent emergency surgery. He lapsed into a coma and died four months later.

Internal CCA documents, which were labeled "proprietary information – not for distribution," described how Bah was "shackled and pinned to the floor of the medical unit as he moaned and vomited, then left in a disciplinary cell for more than 13 hours, despite repeated notations that he was unresponsive and intermittently foaming at the mouth."

While there are over 500 detention centers in the United States, one private

contractor, CCA, has “had at least 18 deaths, including eight at its Eloy, Arizona center alone, three of those since July 2008. The 18 ... deaths include one in 2004 that the new [ICE] list mistakenly places at the ‘Jefferson County Jail,’” the *Times* reported.

In at least two cases, ICE officials found that deficient medical care at CCA’s Eloy Detention Center contributed to detainee deaths. Jose Lopez-Gregorio committed suicide at the Eloy facility on September 29, 2006, after a psychologist reduced his monitoring from suicide watch to cell checks every 15 minutes. ICE determined that Gregorio had filed a medical request that went unanswered, and was “not provided with proper care and treatment with regards to his physical examination or his request to be seen by medical staff while under their care and treatment.”

Another Eloy detainee, Mario Chavez-Torres, died on December 6, 2006 due to an “unwitnessed seizure”; he had filed a written request for medical treatment a week before his death, complaining of headaches, dizziness and vomiting. According to a special assessment report, ICE officials found “The facility has failed on multiple levels to perform basic supervision and provide for the safety and welfare of ICE detainees.”

In all, the *Times* reported that the updated list of ICE detainee deaths “counted 32 of the 92 deaths at jails run by private companies; 37 of them at county or regional jails; and 20 at federally run detention centers. The remaining 3 deaths

fall into other categories.” The death of another detainee was reported in March 2009 after the revised list was released.

On August 17, 2009, the Obama administration added 11 more names to the list of deaths in ICE custody, and acknowledged that more than 1 in 10 detainee deaths had not been included in the updated list provided by ICE in March. The number of known deaths was increased to 104.

“Today’s announcement is a tragic confirmation of our worst fears. Our nation’s immigration detention system has been plagued by a total lack of transparency and accountability, and even with today’s announcement there is no way

we can be fully confident that there are not still more deaths that somehow have gone unaccounted for,” said ACLU staff attorney David Shapiro.

This most recent discrepancy in reported detainee deaths came to light after the ACLU discovered one death that was not included in the earlier lists produced by ICE – the January 18, 2007 death of Felix Franklin Rodriguez-Torres, who died due to testicular cancer at CCA’s Eloy Detention Center. His cancer had reportedly gone undiagnosed and untreated at the facility for two months. ■

Sources: *New York Times*, *ICE List of Detainee Deaths Since Oct. 2003*




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California's Lethal Injection Protocol Invalidated for Failure to Comply with APA

by Michael Brodheim

Sustaining a legal challenge filed by prisoners Michael A. Morales and Mitchell Sims, both on death row, the California Court of Appeal has held that the state's lethal injection protocol, contained in San Quentin's Operational Procedure 770 (OP 770), is invalid because it was adopted without compliance with the public notice and comment requirements of the Administrative Procedures Act (APA). The invalidated protocol had been adopted after an earlier version was successfully challenged in federal court by Morales on Eighth Amendment grounds. See *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D. Cal. 2006).

The purpose of OP 770 was to establish "appropriate guidelines" for the execution of condemned prisoners. The trial court granted summary judgment in favor of Morales and Sims, and enjoined prison officials from applying OP 770 unless the protocol was properly adopted pursuant to the APA. On appeal, the issue was whether OP 770 was in fact a regulation subject to the requirements of the APA.

In order to be subject to the APA, a regulation must first be a rule of "general application"; second, it must implement the law administered by the agency that adopted it. Only the first of these requirements was disputed, with prison officials arguing that because OP 770 applied only to certain condemned prisoners at San Quentin (as well as execution team members trained and performing duties at that prison), it did not affect a sufficiently broad range of prisoners to be deemed a rule of general application.

In rejecting this argument, the Court of Appeal relied upon the reasoning of a Maryland case, *Evans v. State*, 396 Md. 256 (Md. 2006), which held that regulations that "comprehensively govern the manner in which every death sentence is implemented" have sufficient general application to fall under the requirements of the APA.

The appellate court rejected a second argument advanced by prison officials, that OP 770 was subject to an APA exception for rules that apply solely at a particular prison. This argument failed because, the court held, OP 770 "substantially governs behavior outside San Quentin." See:

Morales v. California Department of Corrections and Rehabilitation, 168 Cal. App. 4th 729 (Cal. App. 1st Dist. 2008).

On May 1, 2009, the California Dept. of Corrections and Rehabilitation (CDCR) published proposed regulations governing the state's lethal injection protocol, to comply with the APA. A public hearing was held on June 30, and hundreds of people testified for and against the regulations – including families of murder victims, legal experts, former prisoners who had been wrongly convicted, and members of religious groups. Speak-

ers included representatives from Amnesty International, California People of Faith Working Against the Death Penalty, the Progressive Jewish Alliance, and local chapters of the Coalition for Alternatives to the Death Penalty.

California's proposed lethal injection regulations have not yet been implemented. See: CDCR Notice of Change to Regulations, No. 09-09. ■

Additional sources: *ACLU of Northern California*, www.californiapueblooffaith.org, www.cdcr.ca.gov/regulations

Colorado Officials Increasingly Rely on Lockdowns to Manage Prison Violence

by Michael Brodheim

According to statistics released by Colorado Department of Corrections (CDOC) Director Ari Zavaras in a briefing to state lawmakers in February 2009, state prisons saw an increase in levels of violence among prisoners in fiscal year 2007-08 relative to the levels reported the previous year.

Although the rise in violent incidents was a relatively modest 11 to 20 percent, the number of prison lockdowns increased over the same period of time by a remarkable 80 percent. Prison officials attributed the growing level of violence to a steep increase in the number of incarcerated gang members.

CDOC spokeswoman Katherine Sanguinetti reported that while Colorado's prison population had increased by 42 percent over the past eight years, its gang population had grown at more than double that rate. According to Sanguinetti, over 9,300 prisoners, or approximately 40 percent of the state's total prison population of 23,000, are identified as gang members or affiliates.

In his briefing to state legislators, Zavaras indicated that the number of prison lockdowns had increased from 82 in fiscal year 2006-07 to 148 in FY 2007-08; the number of prisoner-on-prisoner assaults during that period had increased from 369 to 441; and the number of prisoner-on-staff assaults had increased from 265 to 294.

In one large-scale incident, around 30 prisoners at the Trinidad Correctional Facility fought in the yard on December 31, 2008. As a result, the prison was placed on lockdown for five days. Previously, in October 2008, dozens of Colorado prisoners engaged in a melee at the CCA-operated Huerfano County Correctional Center; that incident led to a lockdown, too.

Another contributing factor to the increased violence is a decrease in education and treatment programs. "One of the key principles of offender management is to keep them busy because they are less likely to be destructive," Sanguinetti explained. When the corrections budget was slashed between 2001 and 2003, she noted, 588 full-time employee positions were cut (many, presumably, from areas involving rehabilitative programs, since prison officials are loathe to reduce security staff). While most of those positions have been restored, "we still haven't recovered from that," Sanguinetti said.

However, the trend to cut back on programs may be reversing itself. According to Sanguinetti, a recent increase in funding for prison education programs had helped raise morale among prisoners, which had taken a dive when prisoner pay was cut from several dollars to just \$.60 a day.

CDOC Director Zavaras saw reason for hope in the fact that the number of prisoners entering the system had dra-

matically decreased from roughly 100 a month in previous years to just 32 a month in FY 2007-08. No doubt he was just as pleased with the fact that the increased levels of violence in Colorado's prisons, and the increase in gang members, would be addressed by a high-security prison being built in Canon City that is scheduled to open in FY 2010-11. The number of violent incidents systemwide is expected to drop after the new facility opens.

Meanwhile, fiscal constraints led Colorado Governor Bill Ritter to propose

closing several state prisons earlier this year, including the Women's Correctional Facility in Canon City and a minimum-security facility in Rifle. Sanguinetti said prisoners at the affected prisons would be moved to other facilities. [See: *PLN*, April 2009, p.1].

The Governor's prison closure plan had its critics. State Attorney General John Suthers, for one, said he was concerned the proposed closures were "short sighted." In what sounded like political posturing, Suthers stated, "I realize there

are a lot of competing interests, but public safety has got to be number one."

Not to worry. On February 21, 2009, Governor Ritter engaged in some political posturing of his own by announcing that the prison in Rifle would remain open, much to the relief of local residents who feared they might lose their jobs. The Colorado Women's Correctional Facility officially closed in June. ■

Sources: *Rocky Mountain News*, www.newsfirst5.com, www.certops.com

Medical Care Mismanaged at Orange County, California Jail

by Michael Brodheim

A \$36 million program designed to provide medical care to jail prisoners in Orange County, California is severely mismanaged, according to an internal performance audit. The audit found that the county Health Care Agency (HCA), which administers the jail's medical program, produces unreliable data and statistics; that contracts with medical care providers are poorly monitored; that doctors receive excessive payments; that transportation delays result in detainees routinely missing their medical appointments; that controlled substances are not adequately accounted for; and that conflicts of interest among staff have persisted for years – all to the detriment of the medical care that HCA is supposed to deliver.

The audit findings did not surprise at least one civil rights attorney who had previously sued the county, Richard Herman, who remarked, "You're better off in the prisons [for medical care] than you are in the Orange County Jail." If his assessment is accurate, it is very telling; healthcare in California's prison system is so grossly inadequate that it has been placed under federal receivership to ensure that prisoners receive constitutional medical treatment.

According to the audit, HCA's record keeping is so poor that the agency cannot account for nearly \$10 million in medical service billings – about a quarter of its outlays. The audit team made recommendations for improvements that could save more than \$3 million annually. While expressing appreciation for the audit's suggestions, HCA officials remained skeptical about the prospect of actually realizing those savings. They noted the many challenges in providing medical care

in a jail setting, as well as the difficulty of recruiting quality staff. No doubt those challenges are real. In 2008, while dispensing more than 4,000 doses of daily medication at the jail, HCA responded to over 175,000 sick-call requests.

Incredibly, despite uncovering "management, operational and administrative deficiencies," the audit concluded that jail detainees nonetheless received the medical treatment they needed. Attorney Richard Herman disagreed with that conclusion, saying, "It's simply not true. Sometimes, if they are lucky, [prisoners] get medical attention." Meanwhile, County Supervisor John Moorlach called the audit "troubling."

While HCA officials praised the work of their staff, Nick Bernardino, general manager for the Orange County Employees Association, criticized county executives and said, "They try to hide things as opposed to looking for solutions." This was echoed in the refrain "Nothing can be done. Nothing will change," which was repeatedly heard by the auditors during their investigation.

Yet change is needed. An Orange

County grand jury criticized the jail's medical program in a 2008 report chillingly titled, "Man down: Will he get up?" That report came one year after the *Orange County Register* reported understaffing and an alleged lack of training among jail nurses, following the death of prisoner Michael Patrick Lass in October 2007. Lass died after being Tasered by jail guards. ■

Source: *Orange County Register*



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Divided Ninth Circuit Holds Prison Officials Entitled to Qualified Immunity for Prolonged Deprivation of Outdoor Exercise

A divided Ninth Circuit Court of Appeals held that California prison officials were entitled to qualified immunity for denying outdoor exercise to prisoners during extended lockdowns, when the lockdowns were precipitated by assaults on staff and a series of brutal prisoner-on-prisoner attacks, including one homicide.

The appellate ruling reversed a jury determination that prison officials had violated the Eighth Amendment by denying outdoor exercise to Gregory Norwood, a prisoner at CSP-Sacramento – a maximum-security prison – during four separate extended lockdowns which lasted for periods totaling over 12 months.

Norwood had filed suit under 42 U.S.C. § 1983. Finding that his rights were violated but he had suffered no harm, the jury awarded him no compensatory damages and \$11 in nominal damages. The jury also provided \$39,000 in punitive damages; the court later awarded attorney's fees of almost \$24,000.

On appeal, the defendants argued that the district court had erred in refusing to instruct the jury to give deference to prison officials' security decisions. Noting that prison officials are indeed entitled to such deference, the Ninth Circuit held that the failure to give such an instruction was error as well as prejudicial. On that basis, the appellate court vacated the jury's verdict and damages award.

Instead of then simply remanding the case for a new trial, the Court proceeded to consider whether the defendants were entitled to qualified immunity. Finding that they were – because the “extraordinary violence gripping the prison threatened staff and inmates alike,” and because the “expert judgments” of prison officials should not be lightly second-guessed – the Court of Appeals remanded the case with instructions to reverse the judgment and vacate the award of attorney's fees.

In a well-reasoned dissent, Ninth Circuit Judge Sidney Thomas took issue with virtually every aspect of the majority's ruling. In particular, he argued that the district court had properly instructed the jury; that the instruction proposed by the defendants (and approved by the majority appellate ruling) was not faithful to the Supreme Court's deliberate indifference standard articulated in *Farmer v. Brennan*, 511 U.S. 825 (1994), and therefore was erroneous;

that the defendants did not preserve the issue of qualified immunity for resolution on appeal; that even if the issue had not been waived, the claim should be reviewed under a different legal standard; and that, in any event, because no reasonable prison official could have believed that long-term deprivation of outdoor exercise was lawful under the circumstances, the defendants were not entitled to qualified immunity.

The most compelling (and technically difficult) part of Judge Thomas' analysis was that the deliberate indifference stan-

dard articulated in *Farmer*, which had been adopted by the district court, already incorporates the principle of deference to prison officials that the defendants sought to emphasize in their proposed jury instruction. With considerable force, Thomas explained that a jury instruction incorporating further deference would amount to double-counting the deference due prison officials, which runs afoul of the Supreme Court's rejection of such an approach. See: *Norwood v. Vance*, 572 F.3d 626 (9th Cir. 2009). ■

1 in Every 31 Adults Under Some Form of Correctional Restraint

by David M. Reutter

A 2008 report by the Pew Center on the States reported that for the first time that 1 in every 100 adults in the United States was confined behind bars.

In a March 2009 report, the Pew Center found that when you combine those behind bars with those on parole or probation there are 7.3 million adults under some form of correctional control. This amounts to 1 in every 31 adults in the nation.

The latest report, which will be reviewed here, details the incarceration rate for each state, looks at how money has been used to grow the nation's prison system, the impact on public safety, and provides a strategy for safety and savings.

“The explosive prison growth of the past 30 years didn't happen by accident, and it wasn't driven primarily by crime rates or broad social and economic forces beyond the reach of state government,” states the report. “It was the direct result of sentencing, release, and other correctional policies that determine who goes to prison and how long they stay there.”

While the number of those in jail or prison grew by 274 percent over the last 25 years, the number of those under community supervision “grew by a staggering 3,535,660 to a total of 5.1 million.” Race and gender reveal stark differences in those under supervision.

The report found that 1 in 11 blacks are under some sort of correctional control while Hispanics represent 1 in 27 and whites 1 in 45. While 1 in 89 women are under restraint, 1 in 18 men are on a public restraint.

Southern states had higher rates, with Georgia being the worst, having 1 in every 13 people on some type of correctional control. The lowest rates were in rural and northeastern states. The overall rate may be even higher than the average of 1 in 31 due to “a hidden population supervised pre-trial, by drug courts or alternative sentencing units, and other specialized programs.” One estimate puts this at 1 million people, and another 100,000 offenders are in U.S. Territories, Immigration and Customs facilities, and juvenile facilities.

Nationwide, 20-year correctional spending has jumped 303% to an estimated \$52 billion yearly. Only Medicaid spending has outpaced prisons. Despite community corrections experiencing huge growth, 88% of corrections spending has been directed toward prisons.

The report finds this is a huge mistake that brings lower public safety returns. It finds that while increased imprisonment rates have lowered crime rates to a degree, we are now at a point of diminishing returns. Scholars find that imprisonment is useful to avert crime at rates between 111 and 207 per 100,000, but we are now at a rate of 506 per 100,000.

There are three forces why increased imprisonment decreases returns at certain limits: 1) the “replacement effect” draws more people into criminal lifestyles by creating jobs; 2) as offenders age they give up their criminal ways, making lengthy sentences costly while imprisoning those who are no longer a danger; and 3) the

deterrence effect of more severe sanctions does little to serve the greatest deterrent: certainty and swiftness of sanctions for criminals and supervision violators.

New York proved that “states can carefully reduce incarceration and still protect – and even improve – public safety.” Between 1997 and 2007, New York reduced its prison population 9.4% and saw its crime rate drop 40% over that period. This is in stark contrast to the national average of the prison population rising 28% while crime dropped 24% over the same period.

Finally, the report finds that community corrections can not only increase public safety, but save money by lowering the recidivism rates. This requires lawmakers to not only make a fiscal investment, but the implementation of a framework for less crime at a lower cost. The report examines six key components: sort offenders by risk to public safety, base intervention programs on science, harness technology, impose swift and certain sanctions, create incentives for success, and measure progress.

The report concludes that we are in a rare moment of time that finds budget crunches and a growing acknowledgement that there exists a “massive, expensive and underperforming correctional system in America.” It calls for states to reexamine their systems and to “learn from its failures and build upon its success.”

The March 2009 report, Pew Center on the States’ *One in 31: The Long Reach of American Corrections*, is available on PLN’s website. ■

California Death Row Court Monitoring Discontinued

by Michael Brodheim

Almost thirty years after it began, a federal court supervision over conditions at San Quentin’s death row – the nation’s largest, now housing 685 condemned prisoners – came to an end in April 2009.

A group of death-sentenced prisoners filed suit in 1979 complaining about filthy and decrepit conditions on death row, which at that time held only ten condemned men. They also challenged a classification system that deemed all death row prisoners to be such high security risks that they had to be confined in their cells nearly 24 hours a day.

The suit settled in 1980 when the state agreed to a consent decree that allowed the district court to oversee conditions on death row, which gave the court authority to order improvements in such areas as food, medical care, showers and law library access. The settlement also required prison officials to evaluate condemned prisoners on an individual basis for exercise and visitation privileges comparable to those afforded prisoners in general population.

Over the years, the state was required to address additional violations of the terms of the consent decree, including noise levels, filthy water, and the presence of birds and rodents on death row.

On January 23, 2009, a final inspection of East Block at San Quentin, which houses death row, gave prison staff “high marks” for “striking improvements” at the unit, and Magistrate Judge Nandor J. Vadas recommended that the consent decree be vacated. Steven Fama, the Prison Law Office attorney who represented the death row prisoners, did not oppose termination of the consent decree. Although less than enthusiastic about the progress that had been made, he conceded that conditions on death row were now at least “minimally adequate.”

The district court adopted the Magistrate’s recommendation and the consent decree was terminated on April 14, 2009. On May 1, the court ordered the state to make a final payment of attorney fees to the plaintiffs’ counsel, in the amount of \$3,841.04. See: *Thompson v. Cate*, U.S.D.C. (N.D. Cal.), Case No. 3:79-cv-01630-WHA. ■

Additional source: *San Francisco Chronicle*

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PLN Sues Virginia DOC Over Censorship, Due Process Violations

On October 8, 2009, *Prison Legal News* filed suit in U.S. District Court against Virginia Department of Corrections (VDOC) Director Gene M. Johnson and other prison officials, claiming that the VDOC had violated *PLN*'s rights under the First and Fourteenth Amendments to the U.S. Constitution by censoring publications sent to Virginia prisoners.

According to *PLN*'s complaint, the VDOC has repeatedly censored *PLN*'s monthly publication, claiming it is "detrimental to the security, good order, discipline of the facility, or offender rehabilitative efforts or the safety or health of offenders, staff or others," or because it "presents information geared toward a negative perception of law enforcement."

However, VDOC officials have provided no explanation as to why *PLN*'s coverage of criminal justice issues is considered detrimental to security or rehabilitation, or casts law enforcement in a negative light. "The news is what it is," said *PLN* editor Paul Wright. "We don't make it up. We're not an inflammatory publication."

The VDOC's censorship policy does not provide for timely and adequate notice that allows publishers, including *PLN*, to challenge such censorship. Further, the VDOC does not permit prisoners' families or friends to purchase books or magazine subscriptions for prisoners. *PLN*'s lawsuit notes that Virginia prisoners, "many of whom are indigent, may not receive purchases on their behalf by family members, friends, or charitable organizations." *PLN* has successfully challenged such gift-ban subscriptions in four other states.

Further, VDOC prisoners must obtain permission from prison officials before ordering, subscribing to or receiving publications. However, the VDOC has prohibited prisoners from receiving correspondence from *PLN* that contains information about subscriptions, renewals and book sales. *PLN* contends that these policies "serve no neutral, legitimate, penological purpose," and therefore infringe upon its rights.

"Prisoners are adults and should not be treated as children by the VDOC by requiring approval by prison officials before prisoners can order legal and self-help materials," stated Human Rights Defense Center General Counsel Dan Manville.

"Although prisoners lose many of their constitutional rights when they are incarcerated, the First Amendment does not end at the prison door," noted Jeffrey Fogel, one of the attorneys who represents *PLN*. "The Virginia Department of Corrections has censored numerous issues of *Prison Legal News* on the flimsiest of grounds. Moreover, the Department's procedures do not comply with the law, which requires a meaningful opportunity for a publisher to challenge censorship decisions."

"We have made good faith efforts to communicate with the VDOC to resolve these problems," added Paul Wright, "but those efforts have been unsuccessful. *PLN*

has a well-established right under the First Amendment to send our magazine and books to prisoners, and we have filed suit to enforce that right."

PLN's lawsuit against the VDOC was reported by the *Associated Press*, *Richmond Times-Dispatch* and various other publications. Virginia's Office of the Attorney General declined to comment.

PLN is seeking declaratory and injunctive relief as well as monetary damages, and is represented by attorneys Jeffrey E. Fogel and Steven D. Rosenfield of Charlottesville, and by HRDC General Counsel Dan E. Manville. See: *Prison Legal News v. Johnson*, U.S.D.C. (W.D. Vir.), Case No. 3:09-cv-00068. ■

Human Rights Study Shows That Decades Later Blacks Still Incarcerated More

by Gary Hunter

In March 2009 a report by the Human Rights Watch (HRW) organization indicated that blacks continue to be arrested at disproportionately high rates in this country's war on drugs.

The study spanned almost three decades and showed that from 1980 to 2007 blacks in the U.S. were arrested from 2.8 to 5.5 times more than whites. It also showed that, in a state-to-state breakdown, the disparity was even greater.

Data gathered for the study came from the Federal Bureau of Investigation (FBI) Uniform Crime Reporting (UCR) Program. Human Rights Watch obtained UCR data detailing drug arrests by race and type of offense from 1980 thru 2006. Population data was obtained from the U.S. Census Bureau.

Between 1980 and 2007 the U.S. has incarcerated over 25.4 million adults on drug charges. Every year the number of arrests increased for both blacks and whites. But the increase for blacks increased by 4.8 times compared to only a 3.2 fold increase for whites.

HRW Research indicates that blacks and whites use drugs at roughly the same rate. Yet 33 percent of all drug arrestees in this country are black even though blacks only make up 13 percent of the population. In 1980 drug arrests for blacks was 544 per 100,000 compared to only 190 for whites. In 2007 that number had increased to 1,721 per 100,000 for

blacks and 476 for whites.

The figures become more alarming when broken down by state. Illinois arrests blacks at a rate of 4,210 per 100,000 compared to 857 whites. For Nebraska the ratio is 4,043 for blacks and 558 for whites. The numbers for California are 3,150 to 1,029 respectively. Vermont 2,681-to-310; Oregon 3,626-to-607; West Virginia 2,599-to-376. Iowa by far has the most alarming numbers at 3,287-to-291. That reflects an arrest rate of 11.3 times higher for blacks than whites. (See also *PLN* Nov. 2008, page 29) Hawaii has the most equitable ratio at 428-to-214. Not one single state in the U.S. arrests whites at a higher rate than blacks when it comes to drugs.

Ironically, the lowest disparity in arrests occurred in 1981 when black drug arrests were only 2.8 times that of whites. The highest rate of discrimination occurred between 1988 and 1993 when black drug offenders were consistently arrested over five times more than their white counterparts.

The net result of this discriminatory practice is the over-incarceration of blacks since "at least two-thirds of drug arrests result in a criminal conviction." Blacks account for almost half (46%) of all drug convictions in state courts. The rate of incarceration for those convicted is 71 percent for blacks as opposed to 63 percent for white drug offenders.

An analysis of the data for 2003 led

researchers to conclude that “relative to population, blacks are 10.1 times more likely than whites to be sent to prison for drug offenses.” The Human Rights Watch study described the toll taken on the black community as “incalculable” and described the overall practice as “unjust.”

The report also emphasized that the solution does not lie in attempting to incarcerate whites at a higher rates. Researchers recommended five areas in which the solution to drug abuse in this country would be more effective: 1) restructured funding with an emphasis on treatment and prevention; 2) An emphasis on community-based sanctions and the elimination of mandatory minimums; 3) comprehensive analyses of current policies that unfairly target blacks; 4) rethink the manner in which local police are deployed to unfairly targets black neighborhoods; and 5) study patterns in police stops to determine the extent to which racial profiling influences arrests.

In its own words, “A fresh and evidence-based rethinking of the drug war paradigm is needed.” Source: *Decades of Disparity: Drug Arrests and Race in the United States*. The report is on PLN’s website. 📖

Problems Persist at Lucas County, Ohio Jail

Last month, *PLN* reported that four officials with the Sheriff’s Office in Lucas County, Ohio, including Sheriff James Telb, had been indicted on federal charges related to the June 1, 2004 death of jail prisoner Carlton Benton. [See: *PLN*, Oct. 2009, p.48]. Apparently that is not the only problem involving the Lucas County jail.

On October 14, 2008, following a five-day trial and 2½ hours of deliberations, a federal jury found Lucas County jail guard Seth Bunke guilty of three civil rights violations. He was found not guilty of two other charges related to beating prisoners.

One of Bunke’s convictions was for stopping and detaining a suspected drunken driver on March 13, 2007 and portraying himself as a police officer, when he was only a jail guard. The two other convictions were for assaulting prisoners on May 6, 2007 and July 11, 2007. Federal prosecutors proved that Bunke repeatedly kicked prisoner Jeffrey Jones in the head and side after a verbal altercation during a strip search. Jones had to be hospitalized for several days

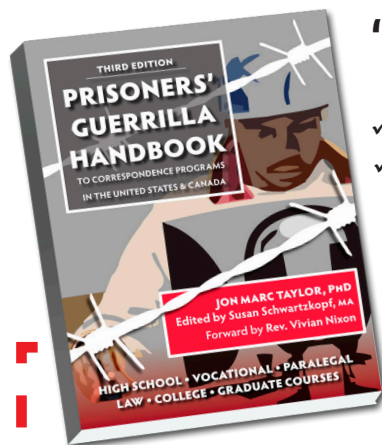
with a collapsed lung.

Bunke was taken into custody after the verdicts were read. He was sentenced on March 9, 2009 to 48 months in federal prison and three years supervised release; the court also recommended that he obtain mental health counseling. See: *United States v. Bunke*, U.S.D.C. (N.D. Ohio), Case No. 3:08-cr-00065-JZ.

On June 1, 2009, the Lucas County Sheriff’s Office revised its use-of-force policy. “We’ve improved it over the years, but usually an incident will happen and we take a look at how it could happen and make changes,” said Sheriff Telb, who remains under indictment for lying to federal officials during the investigation into Carlton Benton’s death. The updated policy specifies what types of force jail guards should use in “situations when nonlethal force is authorized.”

Presumably, the new policy will result in fewer incidents in which prisoners are abused – or killed – by jail employees. 📖

Sources: www.toledoblade.com, www.newsnet5.com



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North Carolina Courts, Legislature Take Steps to Resume Executions

by Michael Brodheim

The North Carolina judiciary and legislature have both taken steps to clear the way to resume executions, which have remained dormant in the state for the past three years.

On May 1, 2009, a split North Carolina Supreme Court held that the N.C. Medical Board had overstepped its authority by issuing a position statement which threatened to discipline doctors who participated in executions (beyond merely being present and pronouncing death). The Court held that the Medical Board's position statement "directly contravenes the specific requirement of physician presence [at executions]" under state law. See: *North Carolina Department of Correction v. North Carolina Medical Board*, 675 S.E.2d 641, 363 N.C. 189 (N.C. 2009).

Following the Supreme Court's ruling, state lawmakers attempted to statutorily undercut the basis for the Medical Board's action, by amending a pending bill to prohibit professional discipline against medical personnel who participate in executions. The bill, dubbed the Racial Justice Act, also contained controversial provisions that would permit condemned prisoners to argue, based on statistics from prior cases, that imposition of the death penalty was racially motivated; a successful showing of racial bias would allow a judge to invalidate a death sentence.

The Racial Justice Act (H472/S461) was signed into law by Governor Beverly Perdue on August 11, 2009, but the final version did not include the amendment related to participation of physicians or other medical staff in executions. Only one other state, Kentucky, has a similar statute that allows prisoners to challenge death sentences due to statistical evidence of racial bias (no state has a law that allows condemned prisoners to challenge their sentence based on socio-economic disparity, which is even more prevalent than race in death penalty prosecutions).

Further, on May 13, 2009, a North Carolina Superior Court judge ruled against death row prisoners who had challenged the manner in which the Council of State, consisting of the Governor and nine other statewide elected officials, had approved the state's lethal injection protocol. The prisoners had argued that the Council did not comply with the Adminis-

trative Procedures Act when approving the execution protocol. See: *Connor v. North Carolina Council of State*, Superior Court Division, Wake County (NC), Case No. 07 CVS 19577.

The de facto moratorium on executions in North Carolina originally stemmed from a federal lawsuit that challenged the constitutionality of lethal injection as a means of execution. Death row prisoners and death penalty opponents had argued that the state's execution protocol did not ensure that prisoners wouldn't feel pain, and lethal injection therefore constituted cruel and unusual punishment.

The district court declined to issue a preliminary injunction in that case, but ordered "personnel with sufficient medical training" to be present at executions.

See: *Brown v. Beck*, U.S.D.C. (E.D. NC), Case No. 5:06-CT-3018-H; 2006 U.S. Dist. LEXIS 60084 (E.D.N.C., Apr. 7, 2006), *aff'd*, 445 F.3d 752 (4th Cir. 2006), *cert. denied*. The constitutionality of lethal injections was largely resolved by the U.S. Supreme Court in *Baze v. Rees*, 128 S.Ct. 1520 (2008). [*PLN*, Dec. 2008, p.37].

There are presently 161 condemned prisoners on North Carolina's death row; the state's last execution was in August 2006. Since that time, three wrongfully convicted North Carolina death row prisoners have been released: Glen Edward Chapman, Jonathan Hoffman and Levon Jones. ■

Sources: www.deathpenaltyinfo.org, www.ncmoratorium.org, *Journal Reporter*, www.doc.state.nc.us/DOP/deathpenalty

Questionable Kentucky Courthouse Construction Practices Lead to Court Official's Resignation, Audit, Settlement

by Michael Brodheim

On February 25, 2009, after questions were raised about the failure of his office to fully insure courthouse construction projects, Garlan VanHook resigned from his position as executive director of the Dept. of Facilities for Kentucky's court system. Adding intrigue to the mix, VanHook confirmed that his brother, Willie, was employed by a company involved in 24 of the state's 35 pending courthouse building projects, which are part of an \$880 million construction initiative.

According to the company, Codell Construction, Willie VanHook was not working on any courthouse projects; not surprisingly, Garlan VanHook denied any conflict of interest as a result of his brother's employment. Garlan, a residential architect, had been hired to run the Dept. of Facilities by former Kentucky Supreme Court Chief Justice Joseph E. Lambert after he designed Lambert's personal residence.

In his role as facilities director for the Administrative Office of the Courts (AOC), Garlan VanHook had overseen the construction of dozens of new court-

houses. While state law requires general contractors to insure 100 percent of each project they are hired to complete, the AOC's practice was to allow construction firms to bond only 5-6 percent of the project costs. In practical terms, this would leave taxpayers holding the proverbial bag should the company go bankrupt or fail to complete the project.

For example, if a construction firm defaulted on its contractual obligations, the owners of the insurance bond – taxpayers, through government contracts – would not be able to recover a substantial part of their investment. The "questionable" nature of this practice was brought to the attention of 35 county judge-executives in a February 25, 2009 letter from two national surety bond organizations, which noted that the 5 percent bonding practice apparently provided protection solely for the amount of the fee paid to the construction company. "That's not normal at all," said Edward Gallagher, general counsel for the Surety & Fidelity Association of America.

On February 26, Kentucky Supreme Court Chief Justice John D. Minton, Jr.

authorized the AOC to conduct an audit of the state's courthouse construction initiative. "I am committed to ensuring that all aspects of this program are in complete compliance with state statutes and our own Administrative Procedures," he said.

Construction attorney William Geisen was hired to conduct the audit, which was released on March 25, 2009. Geisen found that state law, AOC regulations and contracts between the counties and construction companies required the companies to post 100 percent payment and performance bonds. Minton informed county judge-executives overseeing courthouse building projects that the construction firms must insure 100 percent of their work or risk being held in default.

Codell Construction, the company that employed Garlan VanHook's brother, took issue with the audit findings but said it would comply. Construction companies involved in courthouse projects had convinced AOC representatives in December 2007 that providing bonds only to cover their fees and subcontractors would be acceptable, but Geisen found this practice "legally insufficient."

Codell had threatened to sue the two national bond organizations that blew the whistle on the 100 percent bonding issue, demanding that they "cease and desist from making similar spurious accusations." However, following months of negotiations, on August 12, 2009, Codell entered into a settlement with the AOC over when and how the

company must insure courthouse building projects.

"Codell Construction and the AOC had some legitimate business disputes with each other," said Chief Justice Minton. "As a result of this settlement agreement, we can put those issues in the past and work together going forward." Codell agreed to deposit \$150,000 in an escrow account to reimburse counties in the event the company fails to meet its obligations for courthouse construction projects.

In September 2009, it was reported that Kentucky lawmakers weren't happy with the AOC and Minton over whether they had followed state contracting rules when hiring Geisen to conduct the AOC audit. Several legislators wanted to know why the contract to hire Geisen, who is paid \$250 per hour, was not put out for bid and why the contract was not submitted to the Government Contracts Review Committee until well after it had been formalized in July.

AOC director Laurie Dudgeon acknowledged that the contract should have been competitively bid pursuant to state procurement rules, and submitted for legislative approval before it went into effect; however, the AOC said the contract would not be canceled. "When we first retained Geisen, we had no idea how big this was going to be," Dudgeon explained. ■

Sources: *Lexington Herald-Leader*, letter from the *Surety & Fidelity Association of America* and *National Association of Surety Bond Producers*, <http://courts.ky.gov>

California Budget Cuts Lead to Closure of Two Parolee Residential Centers

In a questionable effort to save money, the State of California has closed two parolee residential centers in Los Angeles and returned the 74 non-violent offenders housed at those facilities back to prison. Scott Kernan, undersecretary of the California Dept. of Corrections and Rehabilitation (CDCR), justified the closures by noting that the centers, operated by Volunteers of America (VOA), had three dozen empty beds. He explained that the CDCR, ordered to cut \$800 million from its budget, could no longer afford to fund a program that was not operating at full capacity. Kernan did not say why, if the prison system is at almost 200% of

its population capacity the work release centers were empty.

While it is true that closing the centers will save the state \$500,000 in contractual payments this year, the long-term wisdom of the decision is less certain. For example, it costs the state nearly twice as much (\$97 per day) to house an offender in prison as it does to place the same prisoner in a VOA residential center (\$50 per day). Further, VOA residents are employed, and one-third of their income is used to reimburse the state for housing and related costs. Another third of the offenders' earnings is used to pay victim restitution. ■

Source: *Los Angeles Times*

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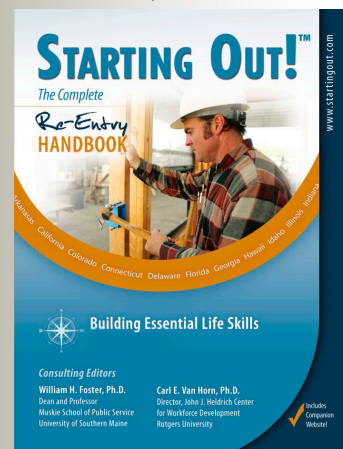
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Florida to Allow Exportation of Prisoners to Other States

by David M. Reutter

Florida lawmakers have handed a victory to the private prison industry by passing a bill (SB 1722) that allows Florida prisoners to be exported to out-of-state facilities, which are mostly privately-operated. When Governor Charlie Crist signed the bill into law in June 2009, Florida joined 15 other states that permit their prisoners to be housed far from home en masse.

"It's a safety valve," said the bill's sponsor, Republican State Senator Victor Crist (no relationship to the governor). "This is not a mandate. It's a passive safety net." That safety valve, said Governor Crist, is available in case the state needs to avoid releasing prisoners early due to overcrowding.

Whether and when Florida begins shipping prisoners out-of-state will depend on how long the economic downturn continues. In late 2008, Florida became the third state to reach a prison population in excess of 100,000 prisoners. Currently there are 106,000 available beds in the state prison system, with over 5,000 unused. A 3,300-bed facility in Suwannee County was built but has not been opened due to budgetary constraints.

Budget problems caused the Florida legislature to end planned prison construction to meet an expected need for 124,000 beds by 2014. The prisoner export law was passed as a result of lobbying by Corrections Corporation of America (CCA), which refers to itself as "the leader in out-of-state housing" on its website.

CCA urged the legislature, without success, to pass the prisoner export law last year. "This is not a new issue," said Matt Bryan, CCA's Tallahassee lobbyist. "This gives the state another option to deal with a potential rapid influx of inmates."

It also gives CCA an opportunity to fill thousands of empty beds in the company's more than 60 prisons spread throughout the nation. *PLN* readers will recall our previous coverage of riots, abuse and deplorable conditions at CCA facilities. [See, e.g., *PLN*, Oct. 2009, p.40; April 2009, p.34; June 2008, p.10; May 2008, p.28].

There is a simple reason for such conditions and abuses. "They're for profit. Their staff is not the most well trained. They cut corners in the programs they say they will offer," said Matt Puckett of the Florida Police Benevolent Association, a

union that represents state prison guards.

The new prisoner export law is not popular with prison administrators, either, including Florida Dept. of Corrections (FDOC) Secretary Walter A. McNeil. "Secretary McNeil has concerns about placing prisoners out of state. He believes removing inmates further from their communities and families undermines the goal of reducing recidivism," said FDOC

spokeswoman Jo Ellyn Rackleff.

The bottom line, however, will likely prevail. Rather than building more state prisons at a cost of \$100 million each, Florida can simply ship its prisoners to privately-operated facilities in other states under the philosophy of out of sight, out of mind. ■

Sources: *WCTV*, *Associated Press*, *St. Petersburg Times*

Georgia Attorneys Abandoning Indigent Defendants

by David M. Reutter

For almost 50 years, following the Supreme Court's 1963 decision in *Gideon v. Wainwright*, criminal defendants have had a constitutional right to legal representation. However, Georgia lawmakers have decided that as a result of the state's budget shortfall and cuts to public defender services, the right to counsel is discretionary. Consequently, lawyers who are not being paid for their services are abandoning indigent clients.

The Georgia Public Defender Standards Council (GPDSC) is overwhelmed with a backlog of unpaid attorney bills. The main problem involves lawyers who are appointed in "conflict" cases, which typically involve multi-defendant prosecutions in which a public defender can represent only one of the defendants due to conflict-of-interest rules. Private attorneys are then assigned to represent co-defendants.

Lawyers used to gladly accept such cases. "But they haven't been paid in years," said GPDSC member David Dunn. "They won't take the cases anymore. No one wants to take them anymore." Also exasperating is that judges are letting the attorneys withdraw, allowing defendants to remain without counsel.

In addition to the unpaid attorney fees in regular criminal cases, the bills for death penalty prosecutions are stacking up. There are at least 10 such cases proceeding to trial, with an estimated \$1.1 million in defense counsel fees.

The Georgia legislature's response to the lack of payment for indigent defense representation was an attempt to pass a bill to strip GPDSC's board of its author-

ity, replacing it with new board members who only serve in advisory roles. The bill died in the House on the last legislative day in session. The legislature did include \$1.6 million in GPDSC's 2010 budget to pay outstanding bills in conflict cases, but the matter of unpaid fees in current cases, including death penalty prosecutions, remains unresolved.

On March 9, 2009, the Georgia Supreme Court affirmed a lower court's order holding the GPDSC in contempt for refusing to pay almost \$69,000 to two defense attorneys in a death penalty case. The Supreme Court held that the state, through the GPDSC, was required to pay the cost of indigent defense counsel in death penalty prosecutions. [See: *PLN*, July 2009, p.46].

In June 2008, the Southern Center for Human Rights (SCHR) filed suit against the GPDSC in Superior Court over the imminent closure of the Metro Atlanta Conflict Defender Office, which would leave up to 1,800 defendants without representation. "Many of the people accused have been in jail since their arrests and now will remain there even longer," said SCHR president and senior counsel Stephen Bright. "Removal of their counsel is unfair and prejudicial to their cases. It is unconscionable."

Bright warned that closing the Conflict Defender Office would result in "justice on the cheap," with defendants remaining in jail until overworked and underpaid (or unpaid) attorneys could be found to represent them. GPDSC director Mack Crawford countered that the public defender office had to "live within

[its] means,” but said replacement counsel would be arranged for defendants affected by the closure of the conflict office.

“The lack of conflict counsel in the Northern Circuit reduces the fundamental right to counsel to a crapshoot,” said SCHR director Lisa Kung. “If two people are accused of a crime, one person gets a lawyer and the other doesn’t. This has to change.”

In a September 3, 2009 hearing, SCHR attorney Gerry Weber informed the Superior Court that while the origi-

nal five plaintiffs in the suit were now represented by counsel, dozens of other indigent defendants still did not have attorneys. “This is a fix, but it’s not completely fixed,” he said.

The SCHR lawsuit is still pending with a class certification hearing scheduled for November 2009. See: *Cantwell v. Crawford*, Superior Court of Elbert County (GA), Case No. 09-EV-275. ■

Sources: *Atlanta Journal-Constitution*, *Associated Press*, www.schr.org

Massachusetts Prison Officials Assault Prisoner With Feces, Settle Lawsuit for \$5,000

In January 2009, Eric Bargoot, a Massachusetts prisoner who suffers from post-traumatic stress disorder and panic disorder, as well as a heart condition, settled his § 1983 lawsuit for damages arising from events in September 2004, during which time the defendant prison officials locked him in a shower stall overnight, assaulted him with feces and urine, destroyed his personal property, refused to release him from the feces- and urine-covered stall, and denied him access to medical care. Bargoot received \$5,000 in the settlement, as well as a zeroing-out of his remaining restitution balance accounts. In agreeing to settle, the defendants – Christopher Braddix and other prison guards, two sergeants, a lieutenant, a captain, and the former Superintendent of the Souza Baranowski Correctional center (SBCC) -- denied any wrongdoing or liability. Disciplinary sanctions sustained by Bargoot as a result of events which gave rise to the lawsuit remained undisturbed. All the parties agreed to nondisclosure of the fact or the terms of the settlement; responding to unsolicited inquiries, on the other hand, was not prohibited.

On the evening of September 17, 2004, about ten days after he had engaged in the misconduct of throwing food through the slot in the door of his SBCC Special Management Unit cell, two guards escorted Bargoot to a shower cubicle where, according to the complaint for damages he filed in 2008, he remained for

approximately ten hours and endured the hellish, overnight events described above. Guard Braddix in particular was alleged to have assaulted Bargoot by shoveling human waste into the shower stall and onto Bargoot’s body and clothing.

This was not the first time that Massachusetts prison officials were accused of using human waste as an instrument of (unauthorized) punishment. In 2000, prisoners at the Massachusetts Correctional Institution – Cedar Junction filed a § 1983 lawsuit alleging that MCI-CJ officials had forced them, during events in 1999, to wallow in human excrement and several inches of toilet water for a period of several weeks. The outcome of that lawsuit, filed by Boston attorney Phillip Kassel, is not known.

Bargoot was represented in the SBCC litigation by Massachusetts Correctional Legal Services attorney Bonnie Tenneriello. See: Settlement Agreement, *Bargoot v. Russo*, USDC Civil Action 07-10505, 1/30/09; *Ashman v. Marshall* Complaint for Damages, 12/19/00. The documents are on PLN’s website. ■

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Outgoing Mail Censorship Assessed Under *Procunier*, not *Turner*; Oregon Court Applies Wrong Standard

The Ninth Circuit Court of Appeals has reversed a district court's dismissal of an Oregon prisoner's outgoing mail censorship suit, finding that the "dismissal relied on an incorrect legal standard."

Oregon State Penitentiary (OSP) prisoner Jacob Barrett attempted to mail a series of letters to his mother and grandmother. Guards read and confiscated the letters because Barrett described prison officials in "vulgar and offensive racist language." He was disciplined for the content of his letters and sanctioned to "a loss of good time, revocation of certain privileges, and other punitive measures."

Barrett sued in federal court, alleging that the censorship violated his rights under the First Amendment. "Acting without the benefit of any substantive briefing from the parties, the district court reasoned that the prison had a 'legitimate penological

interest...' in preventing Barrett from using 'crude and racist language' that outweighed any countervailing First Amendment interest," the Court of Appeals noted.

The district court then dismissed, *sua sponte*, with prejudice, for failure to state a claim. Barrett sought reconsideration under *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800 (1974) and its progeny, but the court denied his motion without comment.

The Ninth Circuit reversed, reminding the lower court that *Procunier* established the standard for evaluating censorship claims involving outgoing prisoner mail. Under *Procunier*, such censorship must: (1) further an important or substantial governmental interest unrelated to the suppression of expression, and (2) be no greater than necessary or essential to the protection of the stated governmental interest. "*Procunier* is controlling law in the

Ninth Circuit and elsewhere as applied to claims involving outgoing prisoner mail," the Court of Appeals explained.

The district court had erroneously failed to apply this standard, relying instead "on case law addressing prison regulations that concern communications between prisoners," including *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532 (1977) and *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987). The appellate court found that "those authorities are not controlling here," and under the proper standard, Barrett's complaint "states a claim that is clearly cognizable under *Procunier*." See: *Barrett v. Belleque*, 544 F.3d 1060 (9th Cir. 2008).

Following remand, on August 10, 2009, the district court appointed counsel to represent Barrett for the limited purpose of handling summary judgment motions. This case is still pending. 📖

Orange County Sheriff Sentenced to 5½ Years in Prison

by Gary Hunter

"I need a sheriff I can trust. Lying will not be tolerated in this courtroom, especially by the county's highest-ranking law enforcement officer."

That was what U.S. District Court Judge Andrew J. Guilford told former Orange County, California Sheriff Mike S. Carona just before sentencing him to 5½ years in prison, two years supervised release and a \$125,000 fine.

Carona was indicted on multiple corruption charges in October 2007. Almost a year and a half passed before he finally went to trial. In late 2008, jurors began hearing testimony from 60 witnesses in court proceedings that lasted two months. [See: *PLN*, Feb. 2009, p.1].

Carona first came to prominence in 2002 when a search for the killer of 5-year-old Samantha Runnion attracted national media attention. Photogenic and charismatic, he quickly cemented his place as the top lawman for the nation's fifth largest sheriff's department by promising voters that criminals would not be coddled.

But it wasn't long before Carona himself was under investigation. He was forced to resign in January 2008 amid an array of federal charges that included conspiracy, mail fraud, money laundering and witness tampering. [See:

PLN, July 2008, p.30].

One of the witnesses who testified against the ex-sheriff was multimillionaire Don Haidl. Carona had appointed Haidl to the post of assistant sheriff and director of a deputy reserve program, in exchange for Haidl's contribution of \$30,000 to Carona's election campaign. Haidl used his position with the Sheriff's Department as an opportunity to pass out quasi-official badges to friends, relatives and associates.

Haidl was eventually indicted, but reached a plea agreement with federal prosecutors and became a government informant. Prosecutors told the jury that Haidl's "gifts" to Carona were actually in excess of \$430,000.

Haidl met with Carona three times in 2007 while wearing a wiretap; during those meetings the two spoke of untraceable money and secret bank accounts. Carona bragged about his extramarital affair and a Las Vegas love nest, and described himself as the "most lethal" politician in Orange County.

The wiretaps revealed a dark side of Carona, whose profuse use of profanity and racist and sexist language stood in stark contrast to his public persona as a law enforcement professional who spoke at

church meetings and prayer breakfasts.

Another former Orange County Sheriff's official, George Jaramillo, also agreed to help prosecutors, though he didn't testify at Carona's trial. Jaramillo, a former police sergeant and assistant sheriff, was Carona's campaign consultant during the sheriff's first run for office, and, like Carona, received bribes from Haidl. Carona had fired Jaramillo in 2004 after it became known that he had interfered with a sexual assault investigation involving Haidl's son, Greg.

Jaramillo pleaded guilty to charges of tax evasion and money laundering, and was sentenced on September 14, 2009 to 27 months in prison, three years supervised release and a \$50,000 fine. He also will have to forfeit any money he receives in his wrongful termination lawsuit against the Sheriff's Department. Haidl pleaded guilty to filing a false income tax return, but has not yet been sentenced.

Other prosecution witnesses at Carona's trial testified about influence peddling, envelopes stuffed with cash, secret bank accounts and hidden cameras. Carona was accused of taking bribes and using his office to enrich himself. Thus, it was a surprise to everyone when, in January 2009, the federal jury acquitted

Carona of all charges except for one count of witness tampering.

Immediately following the verdict, Carona joined his attorneys in a jubilant celebration outside the Santa Ana courthouse. A week later he and his supporters held a victory celebration at an Orange County restaurant, compliments of the Jones Day law firm which had represented him free of charge. Carona called the verdict "an absolute miracle" and evidence of God's forgiveness.

But on April 27, 2009, when it came time for sentencing, Judge Guilford was not as forgiving. Expressing disdain for Carona's post-verdict festivities, Guilford remarked, "I cannot understand the unrestrained celebration and proclamations of innocence and complete vindication," considering that Carona had been found guilty of witness tampering.

The judge made it clear that he believed Haidl's testimony was completely credible. Even the jurors admitted that they had found the former sheriff not guilty of corruption charges only because the statute of limitations had expired.

Carona's attorneys requested probation, saying that any greater punishment would "just not be right." However, Judge Guilford made his position clear. "What goes around, comes around," he said. "There will be no coddling here."

Carona appealed his conviction to the Ninth Circuit on May 6, 2009, and remains free pending a ruling by the appellate court. If his conviction and federal prison sentence stand he can expect to serve at least 4 years and 8 months behind

bars – which is a long fall for a lawman once known as "America's Sheriff." ■

Sources: *Associated Press, Los Angeles Times*

Ohio Prison Guards Party, Federal Stimulus Funds Save Their Jobs

by David M. Reutter

Only weeks before ordering \$640 million in spending cuts, Ohio Governor Ted Strickland paid more than 800 employees of the Ohio Department of Rehabilitation and Correction (DORC) to attend a "Year End Review" celebration at the state fairgrounds. A few months later, the federal stimulus package saved the jobs of more than 400 prison employees that were going to be cut due to budget shortfalls.

The three-hour Year End Review celebration on December 5, 2008 featured holiday decorations, hors d'oeuvres, awards and appearances by state big wigs, including Governor Strickland. State prisoners were used to cater the event. Not only were DORC employees paid their regular wages for attending, costing Ohio taxpayers approximately \$60,000, they also were reimbursed for travel time and expenses if they drove from outlying parts of the state.

Strickland was unapologetic. "It was more than a party; it was an employee-recognition event," he said. "I think it's quite appropriate for morale to have people come together for morale and recognition purposes."

Perhaps Strickland's true intent was a going-away party for prison employees

who would soon face the loss of their jobs. Just two weeks after the party, on December 19, Strickland announced \$640 million in additional statewide spending cuts. He had previously pronounced \$1.27 billion in budget cuts, which included closing up to six prisons and laying off hundreds of ODRC workers.

The federal stimulus package pushed by President Obama, however, saved those prison jobs. Becky Williams, president of Service Employees International Union District 1199, said 37 parole officers, 16 chaplains and 15 case managers, along with 360 other prison employees, avoided layoffs due to \$59 million in stimulus funds.

ODRC Director Terry J. Collins sent letters to all state prison workers on April 3, 2009, reassuring them that there would be no "massive job abolishments or reductions." Within days of taking office President Obama had fulfilled his campaign promises to police and guard unions by rushing billions of dollars in federal funds to local police departments and prisons. It explicitly recognizes the use of prisons as economic development tools. ■

Sources: *www.dispatchpolitics.com, Columbus Dispatch, Associated Press*



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\$21 Million Jury Award for Illinois Wrongful Conviction

by David M. Reutter

In June 2009, an Illinois federal jury awarded \$21 million to a former prisoner who served 11-1/2 years for a murder he didn't commit. The basis of the claim was that Chicago police detective Reynaldo Guevara, a gang crimes specialist, had framed Juan Johnson for a 1989 homicide.

The September 9, 1989 murder occurred outside a Chicago nightclub after a fight between rival gangs spilled from inside the club to the streets. The melee included several brawls with over 100 people involved or spectating. Witnesses testified that the victim, Ricardo Fernandez, was so bloody and disfigured after being beaten that they couldn't recognize him.

The next day Guevara arrested Juan Johnson, a member of the Spanish Cobras gang, and placed him in a line-up. Several other gang members identified him as the killer. Johnson was convicted and sentenced to 30 years for murdering Fernandez; however, a successful post-conviction petition resulted in a new trial.

At the re-trial, it was revealed that Guevara "had a reputation for hooking people up" with crimes they did not commit. That reputation led gang members Salvador Ortiz and Samuel Perez to follow Guevara's instruction to identify Johnson as the person who beat Fernandez to death with a board.

The board used in the murder was identified by another gang member, Juan Michael. Following the first trial, the board was tested; it did not reveal any trace of blood or hair. It was also learned that at least 12 Police Department of Professional Standards complaints had been filed against Guevara, resulting in several suspensions. There were repeated specific complaints in other cases that Guevara had fabricated identifications and concealed tainted identification procedures.

After a jury acquitted Johnson at his second trial in 2004, he filed suit in U.S. District Court. On June 19, 2009, a federal jury ruled in Johnson's favor on his claims of due process violations, malicious prosecution and intentional infliction of emotional distress, and awarded him \$21 million. He was represented by Chicago attorneys Thomas C. Gardiner, Amanda C. Antholt and Daniel J. Stohr, and the

law firm of Loevy & Loevy.

"The evidence is there that [Guevara] framed me," Johnson said. "It's time the city starts taking responsibility for its actions." Apparently that isn't going to happen, though, as the defendants, including the City of Chicago, have since appealed the case to the Seventh Circuit. See: *Johnson v. Guevara*, U.S.D.C. (N.D. Ill.), Case No. 1:05-cv-01042.

Interestingly, Johnson was arrested in a federal drug investigation in October 2008 and charged with crack cocaine-related offenses. At the time he had been working as a volunteer for CeaseFire, a non-profit agency, as a "violence interrupter" to defuse gang disputes. As part of an agreement with the Attorney Gen-

eral's office, he pleaded guilty to a lesser charge and federal prosecutors agreed to delay the criminal case until after Johnson's civil suit went to trial.

Johnson's attorneys filed a motion stating he had "no intention of playing games with this Court. To the contrary, he is putting his cards on the table about his intention, which is to avoid having any conviction for the present charges for the purpose of the upcoming civil trial." The district court rescheduled the trial date on the drug charges and Johnson pleaded guilty in August 2009, after the verdict in his civil case. He has not yet been sentenced. See: *United States v. Johnson*, U.S.D.C. (N.D. Ill.), Case No. 1:08-cr-00828-1. ■

Oklahoma Legislators Not Considering Closing State Prisons, Unless They Are

by Matt Clarke

On April 7, 2009, Oklahoma State Senate President Pro Tem Glenn Coffee was accused of asking the Oklahoma Department of Corrections (DOC) to conduct a study analyzing the cost of closing certain state prisons and using private, for-profit facilities to house prisoners formerly held in those DOC prisons. Senator Coffee is a known advocate of prison privatization.

The study, issued by DOC Director Justin Jones, concluded that it would cost the state over \$23 million to close the Oklahoma State Reformatory (OSR) at Granite, the James Crabtree Correctional Center (JCCC) at Helena, and the Mack Alford Correctional Center (MACC) at Stringtown.

A breakdown of the costs for closing OSR included \$1.5 million for private prison beds, \$2.5 million for DOC employee severance pay, \$1.4 million in annual "mothball" maintenance and \$3 million due to the loss of the prison farm. Further, the economic loss for the Granite area would be about \$12.2 million in payroll, \$72,000 in prison canteen sales tax and \$120,000 in payments to the Quartz Mountain Regional Water Authority.

The cost for closing JCCC was \$9.5 million. Additionally, Helena would lose \$10.7 million in payroll plus \$59,960 in

prison canteen sales tax and \$146,390 in sewage and water district payments.

For MACC, the cost was \$4.7 million. Stringtown would also suffer economic losses of \$10.9 million in payroll, \$42,000 in prison canteen sales tax, \$704,089 from the loss of prison work crews for public projects, \$12,000 in water donated to the wildlife department and \$627,220 in utility payments.

When confronted by Democratic legislators who represent the districts where OSR, JCCC and MACC are located, Coffee denied that he had asked the DOC for a cost analysis of prison closures, even though the DOC said the study was provided to him "per your request." He then claimed there were no plans to close the facilities, stating it would be "virtually impossible" to do so this year "even if there was a plan."

"The priority, from our standpoint, was always to try to save money without any preconceived notion from where," Coffee explained, weakly.

He also defended a December 2008 vacation to Mexico that his top aide, Fred Morgan, had taken with Brett Robinson, a lobbyist for GEO Group, the nation's second-largest private prison company. "They had a prior relationship before they were a lobbyist and a government official," said Coffee.

However, if Senator Coffee is mainly concerned about saving money for the state and there is no prison closure plan, then why are legislators being so secretive about it? "Any talk of prison closing is based on speculation and on rumor and not based on any kind of fact," said state Senator Anthony Sykes, who chairs the Public Safety and Judiciary Committee. "There have been no discussions, in public or private, targeting any facilities for closure."

Yet the study reportedly requested by Senator Coffee did exactly that – it assessed the cost of closing three specific state prisons. "No decisions have been made whatsoever," Coffee asserted. "We're simply trying to gather all the facts." And if those facts lead Coffee and other state lawmakers to sell out state prisons to the private prison industry, what then?

"I'm not saying we should go to all private prison beds," said Coffee. "But I do think, in tough economic times when the capital outlay of building new prisons may be a bridge too far right now, and those [private] beds are available, we need to make use of them."

Some state lawmakers aren't convinced. "You get what you pay for,"

said Senator Connie Johnson, who has introduced legislation that would restrict private prisons in the state. There are already six for-profit facilities located in Oklahoma, which house about 20 percent of the state's prisoners.

Corrections Corp. of America (CCA) and CCA officials have made \$24,200 in contributions to Oklahoma lawmakers and political committees from 2006 to 2008, including a \$5,000 donation to Governor Brad Henry. GEO Group has donated \$4,000 over the same period of time.

A study conducted for the Oklahoma legislature by the Durrant Group, at a cost of \$415,000, may lend support to lawmakers who want to turn to the private sector. The study, publicly released in July 2009, found that most of the state's prisons were in deteriorated condition and required extensive maintenance and repairs. The Durrant Group recommended that the DOC demolish three prisons and spend approximately \$220 million to renovate existing facilities, plus \$292 million to build an additional 2,600 prison beds.

Legislators in the cash-strapped state are more likely to consider contracting with private prison firms. "We're keeping an open mind and examining all of our

options," said State Rep. Randy Terrill, chairman of the House Public Safety and Judiciary Committee. Reducing the prison population is not, apparently, one of those options.

Senator Coffee wasn't pleased with the study. In a letter that he and House Speaker Chris Benge sent to the Durrant Group on June 25, 2009, they complained that "It was not apparent from the report that the possibility of acquiring existing facilities from private prison companies, public private partnerships, or contracts with private prison operators to meet anticipated capacity requirements was ever considered."

Perhaps, if Oklahoma lawmakers want to avoid stress and acrimonious debate over the state's prison system, they should try less Coffee. ■

Sources: *Associated Press, McAlester News, Tulsa World*

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Terms of Parole Injunction Supersede Conflicting Provisions of California Voter Initiative

by Michael Brodheim

In the latest chapter of a 15-year-old class-action lawsuit, a U.S. District Court held that the passage of Proposition 9 by California voters on November 4, 2008 could not override a stipulated permanent injunction entered four years earlier for the purpose of reforming the state's parole revocation procedures. The court had previously found, in *Valdivia v. Davis*, 206 F.Supp.2d 1068 (E.D. Cal. 2002) [*PLN*, Jan. 2003, p.16], that the revocation procedures violated parolees' due process rights under the Fourteenth Amendment.

After Proposition 9 passed last year, the plaintiff class in *Valdivia* moved to enforce the terms of the permanent injunction ("P.I.") against conflicting provisions of newly-enacted section 3044 of the California Penal Code. The state, in turn, cross-moved to have the terms of the P.I. modified so that, to the extent there was any conflict with section 3044, the will of California voters would take precedence.

In a relatively straightforward opinion, the district court found there were several areas in which section 3044 and the P.I. plainly conflicted. First, section 3044 provides fewer procedural protections to parolees in the revocation process than does the P.I. For example, it fails to provide for prompt notice, accommodation of a parolee's disabilities, the ability of parolees to provide evidence at probable cause hearings, expedited probable cause hearings under certain circumstances, and provision of the state's evidence to the parolee's counsel.

Second, whereas the P.I. provides counsel to all parolees, section 3044 limits the circumstances under which attorneys may be appointed.

Third, section 3044 extends the deadline for conducting a parole revocation hearing to 45 days – about ten days longer than permitted under the P.I.

Fourth, the P.I. provides for the use of remedial sanctions programs, where appropriate, in lieu of the parole revocation process (with the goal of reducing the number of returns-to-prison for parole violations). Section 3044, however, requires that parole revocation decisions

be made without regard to cost – inferentially, at least, conflicting with the goals of the P.I.

The district court noted that two additional provisions of section 3044, one regarding the use of hearsay evidence and the other ostensibly limiting a parolee's confrontation rights, could be construed as being contrary to the P.I.

The court had little difficulty in concluding that to the extent section 3044 conflicted with the P.I., the former could not be enforced. As the court succinctly stated, "The Supremacy Clause commands this result." The fact that the passage of Proposition 9 reflected

the will of California's electorate, as opposed to its legislature, did not change this analysis.

The district court also observed that Proposition 9 could be alternatively interpreted as an articulation of state law which was not intended to set forth or alter parolees' federal constitutional rights.

Accordingly, the court denied the state's motion to modify the P.I., noting that there had been no change either in federal law or in factual circumstances to warrant such a modification. See: *Valdivia v. Schwarzenegger*, 603 F.Supp.2d 1275 (E.D. Cal. 2009). ■

Pennsylvania Private Juvenile Prison Scandal Results in Guilty Pleas

by Matt Clarke

On June 9, 2009, attorney Robert J. Powell of Hazeltown, Pennsylvania pleaded guilty to charges related to an illegal scheme involving two for-profit juvenile facilities – PA Child Care in Luzerne County and Western PA Child Care in Butler County.

Powell was charged with one count of withholding information about a crime and two counts of being an accessory after the fact. He has not yet been sentenced, but according to his plea agreement will receive 5½ years in prison. He also will be fined \$500,000 and must forfeit his corporate jet and an ocean-going yacht christened "Reel Justice." See: *United States v. Powell*, U.S.D.C. (M.D. Penn.), Case No. 3:09-cr-00189-EMK.

Federal prosecutors say Powell helped two former Luzerne County juvenile court judges, Mark A. Ciavarella, Jr. and Michael T. Conahan, send juvenile offenders to the private facilities for minor crimes that did not warrant imprisonment, often when the juveniles were not represented by attorneys. The county paid millions to the private facilities to incarcerate juvenile offenders, and the judges reportedly received about \$2.6 million in bribes and "finder's fees" – first for their help in getting the facilities built and then to keep them filled.

The contractor who built the two pri-

vate juvenile prisons, Robert K. Mericle, was accused of bribing the judges; Powell was the bagman who helped deliver and disguise the illicit payments, claiming they were for renting a Florida condo owned by the judges' wives. Mericle pleaded guilty on Sept. 2, 2009 to withholding information about a crime. He has not yet been sentenced. See: *United States v. Mericle*, U.S.D.C. (M.D. Penn.), Case No. 3:09-cr-00247-EMK.

Ciavarella and Conahan had entered pre-indictment guilty pleas to wire fraud and tax evasion last February, and were to receive seven years in federal prison as part of plea agreements. [See: *PLN*, May 2009, p.20].

However, the U.S. District Court rejected the agreements on July 31, 2009, citing a failure of the former judges to take responsibility for their actions. District Court Judge Edwin M. Kosik noted that Conahan had "refused to discuss the motivation behind his conduct, attempted to obstruct and impede justice, and failed to clearly demonstrate affirmative acceptance of responsibility with his denials and contradiction of evidence."

Further, Ciavarella's denials that he had taken bribes or "traded kids for cash" were criticized by the court, which found that "Such denials are self serv-

ing and abundantly contradicted by the evidence.”

“In this case, the fountain from which the public drinks is confidence in the judicial system – a fountain which may be corrupted for a time well after this case,” Judge Kosik stated.

On Sept. 9, 2009, a federal grand jury returned a 48-count indictment against Ciavarella and Conahan that included charges of fraud, bribery, extortion, racketeering, money laundering and tax-related offenses. The disgraced judges now face significantly more prison time than they would have received under their plea bargains. See: *United States v. Conahan*, U.S.D.C. (M.D. Penn.), Case No. 3:09-cr-00272-EMK.

Powell, whom prosecutors said falsified records and helped the former judges launder their illegal income, co-owned the juvenile facilities along with Greg Zappala, brother of Allegheny County District Attorney Stephen A. Zappala, Jr. and son of former state Supreme Court Justice Stephen A. Zappala, Sr. Greg Zappala has not been charged with any wrongdoing but is being sued – along with Powell, Ciavarella and Conahan – by hundreds of former juvenile offenders and their parents for civil rights and RICO violations. See: *Wallace v. Powell*, U.S.D.C. (M.D. Penn.), Case No. 3:09-cv-00286-ARC.

Ciavarella and Conahan have moved to dismiss the civil lawsuits based on the doctrine of judicial immunity, which immunizes judges “for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been

done maliciously or corruptly.” Judicial immunity is, of course, a judicially-created doctrine, not a constitutional or statutory protection. For more on judicial misconduct, see *PLN*’s August

2009 cover story. 📰

Sources: *Pittsburgh Post-Gazette*, www.timesleader.com, www.standardsspeaker.com

Florida Jail Death Ruled a Homicide; Investigations Pending

The Florida Medical Examiner’s Office called the March 31, 2009 in-custody death of 62-year-old Nicholas Christie at the Lee County Jail a homicide, finding that restraint methods and pepper spray were contributing factors in his death.

“You could tell immediately there was something wrong with the guy,” said jail prisoner Ken Cutler, who was housed in a cell close to Christie. “He didn’t know where he was.” Guards repeatedly pepper sprayed Christie, then restrained him in a chair and put a spit mask on him.

“While he was sitting in the chair, they sprayed him two more times,” recalled Cutler. “This guy sat in the restraint chair, which seemed like over an hour, and his whole head was turning purple and almost blue.... He was gasping.” Christie, who complained of chest pains, was taken to a hospital where he died two days later.

His death certificate listed brain damage caused by lack of oxygen after a cardiac arrest, low blood pressure due to heart failure, and stress from the restraint and pepper spray as causes of death. A Deputy Chief Medical Examiner reported Christie’s death as a homicide but noted

that was a medical, not legal, term.

Lee County Sheriff’s Office spokesman Larry King pledged the jail would conduct a thorough investigation. “Deaths at our jail are very rare,” he said. “Certainly it’s uncommon.”

Yet while deaths may be uncommon, the use of force by guards is not. Jail logs revealed an 85 percent increase in use-of-force incidents over the past three years, up from 596 in 2005 to 1,104 in 2008. “We’re going to pursue this all the way,” said Nick DiCello, a lawyer who represents Christie’s widow, Joyce. “She wants justice for her husband.”

The U.S. Dept. of Justice, which announced an investigation into Christie’s death in August 2009, will be pursuing it, too. The federal inquiry will be conducted separately from a concurrent investigation by the Sheriff’s Office, which failed to notify the State Attorney of Christie’s death for over a month.

Christie had been arrested for trespassing at a hotel after he stopped taking anti-anxiety medication and began behaving erratically. 📰

Sources: *news-press.com*, www.m.naplesnews.com



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Wisconsin Courts Sealing Cases

by David M. Reutter

A basic principle of the American court system is that the public has a right to know what happens in the nation's courtrooms. In Wisconsin, however, that principle has been compromised to protect certain parties in court proceedings, including at least one prison guard.

In 2006, the Wisconsin Circuit Court Access (WCCA) advisory committee found that circuit judges have the authority to seal a case or its documents. To do so, the judge must first determine that the reasons for sealing court records outweigh the public's right to access those records. "Given the strong state policy favoring openness," the committee stated, "documents or cases are only rarely sealed."

Yet one court considered it necessary to seal a case involving a prison guard to protect his reputation and career. The guard and a prisoner were involved in a fight, and both were criminally charged. While the dismissal of the charges against the guard was sealed, the prisoner's dismissal was not.

The guard's attorney said the sealing was necessary because prison employees are "vulnerable to specious accusations [by prisoners] under current law." Yet the *Wisconsin State Journal*, which reported the disparate treatment of the two cases in October 2008, found nothing specious about the prisoner's accusations.

Sealing court records often entails

more than sealing just one document; it may result in the entire case disappearing from the WCCA. Thus, members of the public will not only never know the case exists, they will not know the reasoning for why the case was sealed. As a result, the public cannot seek judicial review of whether it was proper for the court to seal the case in the first place.

PLN has previously reported on the questionable practice of sealing state and federal court records in Florida, which has since been discontinued. [See: *PLN*, June 2009, p.24; Oct. 2007, p.13].

Sources: *Wisconsin State Journal*, www.wisopinion.com

Indiana Sex Offender Residency Restriction Violates Ex Post Facto Clause

Indiana's "residency restriction statute," which prohibits sex offenders from living within 1,000 feet of a school, youth center or public park, violates the ex post facto clause of the state constitution as applied to sex offenders convicted before the law's enactment, the Indiana Supreme Court held on June 30, 2009.

Anthony W. Pollard was convicted of a sex offense in 1997. On July 1, 2006, Indiana's residency restriction statute took effect. Pollard, who already owned and lived in a home located within 1,000 feet of a school, was charged with violating the statute.

The charges against Pollard were dismissed on ex post facto grounds by the trial court, and the Court of Appeals affirmed. The Indiana Supreme Court agreed to review the case given its public importance.

In a unanimous decision, the Supreme Court affirmed the lower courts. In assessing whether the residency restriction statute was punitive, the Court considered seven factors. The first factor, whether the law imposed an affirmative disability or restraint, indicated the statute had a punitive effect, the Court concluded.

"Although the statute does not affect ownership of property, it does affect one's freedom to live on one's own property. A sex offender is subject to constant eviction because there is no way for him or her to find a permanent home in that there are no guarantees a school or youth program center will not open within 1,000 feet of any given location," the

Supreme Court wrote.

Furthermore, the Court found the statute had "traditional aims of punishment," applied only to criminal behavior, and was excessive in relation to the state's professed purpose for the law: to protect children from sex offenders.

Accordingly, the Indiana Supreme

Court held that the statute, as applied to Pollard and other sex offenders convicted before its enactment, violated the ex post facto clause of the state constitution. See: *State of Indiana v. Pollard*, 908 N.E.2d 1145 (Ind. 2009).

Additional source: *Associated Press*

Former Mississippi DOC Chief Medical Officer Charged with Embezzlement

Dr. Kentrell Liddell, 35, was arrested on May 21, 2009 and charged with 13 counts of embezzlement. She was taken into custody at her current job at the Madison County Medical Center in Canton, Mississippi, and booked into the Hinds County Jail.

Officials would not divulge the details that led to Liddell's arrest or the amount of money she is accused of stealing. She had been employed as the Chief Medical Officer for the Mississippi Dept. of Corrections (MDOC) since September 2004.

In May 2008, her last month with the MDOC, Liddell presented the Hinds County Board of Supervisors with a detailed account of the medical budget for county prisoners.

"She presented herself as a true professional," said Supervisor Peggy Calhoun. "You could tell she's very intelligent and she knows her field. All the board members were impressed."

But Liddell's good impression on the board members wasn't enough to deter the State Attorney General's office from investigating her activities while she was employed at the MDOC – an investigation that led to her subsequent arrest. Attorney General Jim Hood said his office's investigation came at the request of prison officials.

"You're always disappointed when a person in a position of trust abuses that trust," said MDOC Commissioner Chris Epps. "We will continue to police ourselves and evaluate our policies and procedures in the Mississippi Department of Corrections."

If convicted, Liddell faces up to 20 years in prison and a \$5,000 fine on each of the 13 counts of embezzlement. She was released on \$13,000 bond.

Sources: *Associated Press*, www.clarionledger.com, www.hattiesburgamerican.com

Illinois Governor's Failure to Act on Clemency Petitions Not Actionable

by *Brandon Sample*

In March 2008, U.S. District Judge Joan B. Gottschal held that persons seeking executive clemency in Illinois have a protected liberty interest in having their petitions decided within a reasonable time by the governor. However, that ruling was reversed by the Seventh Circuit Court of Appeals just over a year later, in April 2009.

Stephanie Bowens and other individuals sought executive clemency under the Illinois Constitution, Illinois Compiled Statutes (Ill.Comp.Stat.) and Illinois Administrative Code from then-Governor Rod Blagojevich. After Blagojevich failed to take action on their clemency petitions following recommendations from the Illinois Prisoner Review Board, Bowens and eight other clemency applicants filed suit under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, seeking an injunction requiring the governor to make a decision on their petitions, for good or bad, within a reasonable period of time.

Bowens and the other plaintiffs alleged a protected liberty interest under the due process clause in receiving such a decision, based on the mandatory language of 730 Ill.Comp.Stat. § 5/3-3-13(d) – which provides that “[t]he Governor shall decide each application” for clemency. Blagojevich moved to dismiss the suit for failure to state a claim.

Before a state-created liberty interest may be recognized under a theory of procedural due process, two prerequisites must be met: (1) the statute or regulation at issue must employ “language of an unmistakably mandatory character, requiring that certain procedures ‘shall’, ‘will’ or ‘must’ be employed,” and (2) the

statute must “contain substantive standards or criteria for decision-making as opposed to vague standards that leave the decision-maker with unfettered discretion.”

Applying these standards to the plaintiffs’ claim, the district court found that § 5/3-3-13 created a liberty interest protected by the due process clause based on the statute’s unambiguous requirement that “some decision shall be made.” And while § 5/3-3-13 does not specify a time period in which the governor must make a decision, the necessary implication of the statute’s imperative language, the court held, “is that the decision be made within a reasonable period of time.”

Accordingly, the district court denied Blagojevich’s motion to dismiss. See: *Bowens v. Blagojevich*, 2008 U.S. Dist. LEXIS 21383 (N.D. Ill. 2008).

The state filed an interlocutory appeal, and the Seventh Circuit reversed on April 2, 2009. The appellate court noted that during the pendency of the case, Blagojevich had granted one of the plaintiff’s requests for clemency and had denied the petitions of the other eight. The plaintiffs had filed an amended complaint to add three more individuals whose petitions for clemency had not yet been decided by the governor. The Court of Appeals found the case was not moot as to the original plaintiffs whose petitions were denied, as their claim was “capable of repetition ... yet evading review.”

The appellate court then held that “[t]here is no Fourteenth Amendment property or liberty interest in obtaining a pardon in Illinois – no substantive entitlement, in other words – and so no ground

for a claim of denial of due process.”

The Court further stated that it did “not even think that the Illinois statute creates a requirement of prompt, or indeed of any, action by the governor on a clemency petition. The statute merely describes steps in the sequence of procedures in clemency matters.” As for determining a “reasonable” time for deciding clemency petitions, the Seventh Circuit stated it had “no idea what a ‘reasonable’ time for deciding a clemency petition would be,” noting that it would depend on the number of petitions filed, which would “vary from year to year.” The appellate court also questioned what sanctions could be imposed on the governor for failing to decide petitions in a timely manner.

The Court of Appeals concluded that executive clemency “is a classic example of unreviewable executive discretion,” and reversed the district court with instructions to dismiss the case with prejudice. See: *Bowens v. Quinn*, 561 F.3d 671 (7th Cir. 2009).

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\$5.9 Million Settlement in Philadelphia Jail Strip Search Class Action

Philadelphia's prison system has agreed to pay \$5.9 million to settle the claims of class members in a class action lawsuit alleging their rights were violated as the result of a strip search policy. The settlement does not include attorney fees, which are to be determined later, and are expected to reach \$2 million.

The lawsuit includes persons who were strip searched at one of Philadelphia's jails between April 23, 2003, and October 9, 2007. The class is expected to contain around 38,000 people, divided into two subclasses.

The subclasses distinguish between

people who were not "charged with certain violence, drug, and/or weapons (VDW) related misdemeanor charges ... (2) were charged with bench warrants and/or probation violations where the underlying charge was a VDW misdemeanor charge, or (3) had convictions for felonies and/or VDW misdemeanor charges predating the date of their admission," and those who had VDW related charges.

Both subclasses will receive a payment if they file a claims form. For those not charged with VDW offenses, they will receive a "pro rata share" of \$5,170,000 which cannot exceed \$3,000 per class mem-

ber. Those charged with VDW offenses receive a "pro rata share" of \$400,000, not to exceed \$100 per class member. If a person falls into both subclasses, payment is "based on the subclass status during his first admission to the Philadelphia Prison System during the class period."

Incentive awards for the lead plaintiffs were provided. Class Representatives Nakhisha Boone and George Byrd will each receive \$15,000 under the settlement.

The settlement was reached by the parties on February 19, 2009. See: *Boone v. The City of Philadelphia*, USDC, E.D. Pennsylvania, Case No: 05-CV-1851. ■

Ninth Circuit: "Three Strike" Conviction Does Not Allow Use of Old Offenses for Impeachment Purposes in § 1983 Suit; Heck Does Not Bar Admission of Evidence

by John E. Dannenberg

In a case of first impression, the Ninth Circuit U.S. Court of Appeals held that when defending against a prisoner's excessive force civil rights lawsuit, prison officials could not impeach the prisoner with evidence of his three prior convictions (which were more than 10 years old) by arguing that his current prison sentence, enhanced under California's Three Strikes law, extinguished the 10-year exclusion provided by Federal Rules of Evidence § 609(b).

The Court of Appeals further held that the district court could not bar the prisoner's use of evidence that was contrary to his underlying disciplinary conviction, because *Heck v. Humphrey*, 512 U.S. 477 (1994) did not create a rule of evidence exclusion.

Gary Simpson was serving a five-year term for robbery, enhanced by the Three Strikes law with an additional 13 years for having three prior felonies. Two years into his sentence, he had an altercation with prison guards after they ordered him to remove a covering from his cell window. As often occurs in such cases, Simpson's version of the events differed substantially from that of the guards, and he filed a civil rights suit that alleged excessive force.

At trial (where he lost), the defendants impeached Simpson by introducing evidence of his three prior felonies. Over his objections, the district court permitted the impeachment as an exception to the 10-year exclusion of Rule 609(b) on the

grounds that "those prior strikes were not and do not wash out under state law." Additionally, the court barred Simpson from introducing evidence that he had acted in self defense after a guard punched him first, because under *Heck* that would necessarily imply the invalidity of his disciplinary conviction (and 150-day loss of good time credit). Simpson appealed.

The Ninth Circuit rejected the bootstrapping of the Three Strikes law so as to expose Simpson to the use of his 10-year-old prior convictions as impeachment evidence. The Court relied upon the express language of § 609's 10-year safe harbor provision "for confinement 'imposed for that conviction.'" This, the appellate court reasoned, could not be held to refer to a new crime whose punishment was merely increased by the history of the priors. The plain meaning of "that conviction" was the prior itself, and nothing that subsequently resulted due to that conviction could be imputed under § 609.

As to Simpson's unsuccessful attempt to argue the facts of the case as evidence in support of his § 1983 claims, the Ninth Circuit concluded that *Heck* was never intended to create an evidence-exclusion rule. Rather, *Heck* merely held that a plaintiff could not make out a suit for damages if the necessary conclusion of an award of damages imputed the invalidity of a prior disciplinary conviction resulting in loss of good time.

Heck held that to raise such an ar-

gument, a plaintiff was constrained to first obtain a reversal of the underlying disciplinary conviction via a direct appeal or writ of habeas corpus. Failure to do so would allow a prisoner to circumvent restrictive appellate and habeas procedures to make an "end run" on such claims through § 1983.

Here, the Ninth Circuit concluded that under relevant U.S. Supreme Court case law, *Heck* addressed nothing more than whether a claim itself was viable, not whether evidence was admissible. Or, restating the principle another way, "evidence is not barred merely because a claim may be."

Because the district court had improperly admitted impeachment evidence and improperly barred potentially exculpatory evidence, the Court of Appeals reversed and remanded for a new trial. See: *Simpson v. Thomas*, 528 F.3d 685 (9th Cir. 2008).

Following remand, on December 19, 2008 the district court taxed the costs of the appeal, in the amount of \$1,386, against the defendants. The court also held that if the \$455 appellate filing fee was deducted from Simpson's prison trust account, "those costs are to be taxed against Defendant as well." See: *Simpson v. Thomas*, 2008 U.S. Dist. LEXIS 105633.

On May 11 2009, the district court denied the defendant's motion for summary judgment, which argued that Simpson's

claim should have been barred in its entirety under *Heck*. The court found that “[e]ven if Defendant acted unlawfully by using excessive force, Plaintiff could still have been guilty of [his disciplinary conviction for] battery if Plaintiff also

used excessive force.” In other words, if Simpson prevailed on his excessive force claim, that finding would not necessarily invalidate his prior disciplinary conviction, thereby avoiding the limitations imposed by *Heck*. See: *Simpson v. Thomas*, 2009

U.S. Dist. LEXIS 39945.

The retrial in this case has not yet been held. Simpson is ably represented by attorney Carter White of the University of California, Davis School of Law Civil Rights Clinic. ■

Texas Supreme Court: Prisoner May Appeal Despite Incomplete Indigence Affidavit

by Matt Clarke

On May 16, 2008, the Supreme Court of Texas held that an indigent prisoner whose indigence was uncontested may proceed with an appeal despite deficiencies in his affidavit of indigence.

Lawrence Higgins, a Texas state prisoner, filed suit in state district court alleging that county jail officials were negligent in failing to protect him from an attack by another prisoner. The court dismissed his suit for lack of prosecution. Higgins appealed, but failed to pay the filing fee or file a timely affidavit of indigence. He filed an untimely affidavit that did not comply with Texas Rule of Appellate Procedure (TRAP) 20.1(b), after the Court of Appeals requested the filing fee. The appellate court dismissed his appeal because the affidavit was untimely and insufficient. Higgins filed a petition for review with the Texas Supreme Court.

The Supreme Court reversed the dismissal, holding that an appeal may not be dismissed for a formal procedural defect without giving the party an opportunity to correct the defect. The case was returned to the appellate court. See: *Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006).

The Court of Appeals then sent Higgins a letter instructing him to file a written justification for the late affidavit and an amended affidavit that complied with Rule 20.1 within ten days. There were only three days left by the time Higgins received the letter, and he was unable to access the prison law library to look up Rule 20.1 within that time period.

Instead, he filed a written justification and an affidavit explaining that he was incarcerated, did not have any money, did not receive any money, did not expect to receive any money in the near future and could not afford to pay the filing fee. He also enclosed a copy of his Inmate Trust Fund statement showing a \$.03 balance. His affidavit of indigence was not con-

tested. Nonetheless, the Court of Appeals dismissed his appeal for failure to comply with Rule 20.1(b). Higgins again petitioned the Texas Supreme Court for review.

The Supreme Court held that although Rule 20.1(b) requires that 11 specific items of financial information be included in an affidavit of indigence, the test for determining indigence is straightforward: Does the record as a whole show by a preponderance of the evidence an inability to pay the costs, pay partial costs or post security, given a good-faith effort to do so? In Higgins' case, “common sense” supports the notion that an incarcerated individual is highly unlikely to qualify for loans” to pay the filing fee.

Thus, with an uncontested claim of indigence at the trial and appellate court levels, Higgins' affidavit was sufficient to prove his indigence and fulfill the fundamental purpose of Rule 20.1. Further, Rule 20.1 states that a “party will be allowed to proceed without advance payment of costs” if the affidavit of indigence is uncontested. Therefore, the Court of Appeals erred in dismissing Higgins' appeal, and the dismissal was reversed and the case returned to the appellate court for further proceedings. See: *Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684 (Tex. 2008).

Unfortunately, there was no happy ending for Higgins' case following remand. On March 16, 2009, the Court of Appeals ruled on the merits of his appellate issues regarding the dismissal of his suit by the trial court. Higgins argued that “the trial court erred in dismissing his lawsuit for his failure to appear

at a dismissal docket when he was incarcerated,” and had “failed to rule on his motion for the issuance of a bench warrant to secure his presence at trial.”

The appellate court found that Higgins “did not supply any information with respect to the factors the court must consider in granting his request [for a bench warrant]. Nor did he request or propose any alternative means of attendance at the hearing such as by telephone or deposition.”

That, coupled with the fact that Higgins had failed to effect service on the county for two-and-a-half years after filing his lawsuit, led the Court of Appeals to affirm the trial court's dismissal of his case for lack of prosecution. See: *Higgins v. Randall County Sheriff's Office*, 2009 Tex. App. LEXIS 1821 (Tex. App. Amarillo 2009), *petition for review denied*. ■

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Black Drug Incarceration Drops 21.6%, White Rate Up 42.6%; Shift Driven by Decreasing Crack Cocaine Use, Increasing Meth Use

by Mark Wilson

The number of people incarcerated in state prisons for drug offenses has increased an astronomical 1,150 percent since 1980, increasing from 40,000 to 500,000 prisoners, according to Bureau of Justice Statistics cited in a research paper by The Sentencing Project (TSP). The number of people now incarcerated for drug offenses exceeds the 1980 prison population for all offenses.

Interestingly, between 1999 and 2005 – the most recent data available – state drug offense incarcerations remained virtually unchanged, rising less than 1 percent from 251,200 to 253,300, TSP reported. Yet, the racial composition of state drug offenders shifted dramatically.

Today, two-thirds of drug offenders in state prisons are African American or Latino. Even so, between 1999 and 2005, the number of African American drug offenders dropped 21.6 percent from 144,700 in 1999, to 113,500 in 2005, the study found. In 2005, African Americans represented 12 percent of all drug users, but 34 percent of those arrested, and 45 percent of those incarcerated for a drug offense, down from 57.6 percent incarcerated in 1999.

During the same period, Latino state drug confinements remained steady, dropping only 1.9 percent from 52,100 in 1999 to 51,100 in 2005, reports TSP. Meanwhile, white state drug offenders increased 42.6 percent from 50,700 in 1999 to 72,300 in 2005.

The study questions numerous possibilities for such a dramatic racial shift. After examining and disregarding factors including increased federal prosecutions, declining drug use, and declining drug arrest rates, the report suggested that the decline in African American drug incarcerations is likely attributed to the substantial decline in crack cocaine addiction since its peak in the late 1980s. Similarly, the sharp increase in white drug incarcerations appears to be due primarily to the increase in methamphetamine use – a drug used much more by whites and Latinos than by African Americans. Minnesota, for example, saw a substantial meth increase between 2001 and 2005, rising from 230 to 1,127. It is believed that meth incarcerations accounted for

nearly 90 percent of the state's prison growth during this time. Similar trends can be found across the nation, lending "support to the idea that increased imprisonment for methamphetamine offenses is likely to have been responsible for some portion of the overall white increase in incarceration," TSP found. Still, "as with the examination of African Americans in prison for a drug offense, assessing the rise in the number of whites in prison is a complex undertaking and one that reflects criminal justice processing in all 50 states."

"While the racial dynamics of

incarceration for drug offenses have shifted, there remains the question of whether massive imprisonment for drug problems is either an effective or compassionate strategy," the report concluded. "If we are to see any sustained reduction in incarceration there will need to be a broad scale reexamination of these policies."

See: *The Changing Racial Dynamics of the War on Drugs*, The Sentencing Project (April 2009), available at The Sentencing Project, 514 Tenth St. NW, Suite 1000, Washington, DC 20004, (202) 628-0871, www.sentencingproject.org. ■

Refusal to Mail Nebraska Prisoner's Artwork Violates First Amendment

Nebraska district court has held that prison officials violated a prisoner's First Amendment right to send and receive mail when they refused to let him mail his drawings. The court's ruling came on a motion for judgment as a matter of law following a three-day jury trial. The jury, however, rejected other claims related to retaliation and denial of a sketchbook with erotic content.

While housed at Nebraska's Lincoln Correctional Center, prisoner Tyler J. Keup created two pieces of artwork. When he tried to mail the artwork out to his parents and the Maoist Society, prison officials refused because his drawings contained "uncovered female breasts" and depicted "illegal drugs."

Keup pursued the grievance process, arguing that Operational Memorandum 207.1.1, which was the prison's basis for refusing to mail his artwork, violated his First Amendment rights and served no legitimate penological purpose. His grievances were denied by prison officials Dennis Blakewell and F.X. Hopkins.

Having exhausted his administrative remedies, Keup filed a civil rights lawsuit seeking an injunction, declaratory judgment and nominal damages. Several weeks after filing his complaint, prison officials refused to let him to send the artwork in question to the court as an exhibit.

Once again, Keup unsuccessfully pursued the grievance process. In an

amended complaint, he also claimed that prison officials retaliated against him by confiscating a greeting card enclosed with a book and damaging the book. Further, he alleged a separate First Amendment violation when the prison refused to let him receive a sketchbook that contained pictures of bondage.

Finding that Blakewell and Hopkins had infringed on Keup's First Amendment rights by refusing to accept his artwork for mailing and by failing to deliver the greeting card, the district court granted declaratory and injunctive relief, and awarded Keup \$1.00 in nominal damages. The jury found for the defendants on the retaliation and sketchbook claims.

On December 15, 2008, the Court awarded a total of \$24,598.74 in attorney fees and costs. Attorney Dana C. Bradford received \$8,730 in fees and \$225.42 in costs, while attorney Kellie P. Asaka, who represented Keup at trial, was awarded \$15,225 in fees and \$418.32 in costs. Note that Keup was entitled to attorney fees because he secured equitable relief. See: *Keup v. Hopkins*, U.S.D.C. (D. Neb.), Case No: 4:05-cv-03208; the fee award is available at 2008 U.S. Dist. LEXIS 101982 (D. Neb., Dec. 15, 2008). ■

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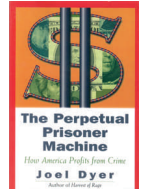
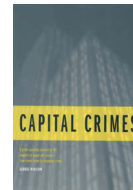
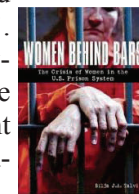
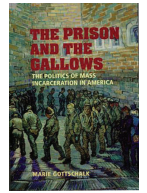
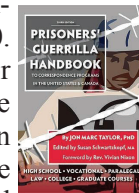
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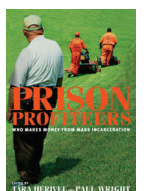
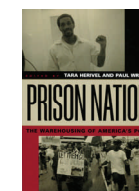
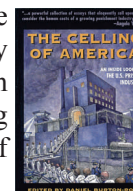
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News in Brief:

Alabama: In September 2009, criminal defense attorneys in Birmingham donated 2,700 rolls of toilet paper, soap and other supplies to the Jefferson County Jail when they learned officials were severely rationing those items. The jail was reportedly allowing prisoners no more than three strips of toilet paper per day. Officials said the county's financial crisis required the jail to make significant spending cuts, including prisoners' basic hygiene items.

Arizona: On September 25, 2009, defense attorney David DeCosta, 42, was charged with various crimes for trying to smuggle heroin and methamphetamine into the Maricopa County Jail. DeCosta attempted to pass the drugs to his client, Jesse Alejandro, during a court appearance on September 18. Alejandro's girlfriend, 19-year-old Emilee Keen, also was charged. DeCosta admitted that Keen had performed sexual favors for him prior to his attempt to smuggle the drugs. Jason Keller, Alejandro's former attorney, pleaded guilty to promoting prison contraband and faces 3 to 12 ½ years in prison; he admitted to smuggling cell phones and drugs to Mexican Mafia prisoners in 2008.

California: On September 10, 2009, the Sacramento County Sheriff's Department arrested three prisoners for an attempted escape from the downtown jail. Items found in the jail and tips from informants helped identify Andre Pulido, Adam Ramsey and Alex Brown as the would-be escapees. The escape attempt occurred on the evening of August 16 when a car drove by the jail and a passenger fired shots at the fifth and sixth floor windows. Investigators believe the shooter was hoping to break a window so the prisoners could jump to freedom. Jackie Phoulivanh and Rosetta Rogers were later identified and arrested as the accomplices in the car.

Florida: On September 22, 2009, 41-year-old prisoner Christopher Lunz died in his cell at the Florida State Prison from an apparent suicide. Lunz had been transferred to the facility the day before from the Franklin Correctional Institute after guards discovered that he had stabbed his cellmate, 46-year-old Nathaniel Taylor, to death. Lunz was serving a life sentence for the 2003 robbery and murder of his father; Taylor was in prison for multiple sex offenses against children.

Florida: On September 8, 2009, Sgt. Ronnie Brown died at Winter Haven Hospital of complications during surgery for broken vertebrae. Brown was injured when he tried to remove prisoner Terrence Barnett from his cell at the South County Jail in Frostproof, south of Orlando. Barnett, who is 6'10" tall and weighs 225 pounds, shoved Brown into a concrete wall, breaking his back. Barnett stabbed another guard with a broken sprinkler pipe, but that guard's injuries were minor and didn't require hospitalization. On September 22, Barnett was charged with first degree murder for causing Brown's death.

France: Jean-Pierre Treiber, 45, escaped from a high security prison in Auxerre, Burgundy on September 8, 2009 by concealing himself inside a cardboard box when he was left alone in the prison's workshop. The box was placed on a truck with other packages and driven out of the facility. Treiber leapt from the truck sometime later; authorities did not discover the escape for at least seven hours. Treiber had been in prison since 2004 awaiting trial for the notorious murders of Geraldine Giraud, daughter of French actor Roland Giraud, and her friend Katia Lherbier. Authorities searched the woods about 20 miles north of the prison, but were not confident they would locate Treiber because he had worked in that area for years as a forest ranger and was a skilled outdoorsman.

Georgia: On September 22, 2009, former Fulton County Jail guard Derontay Anton Langford pleaded guilty in an Atlanta federal court to obstructing justice by lying to a grand jury investigating the May 18, 2008 death of a prisoner. Langford admitted that he falsified, omitted and concealed information about an altercation he had with Richard Glasco shortly before Glasco was discovered dead on the floor of his cell. According to eyewitnesses, Langford and two other jail guards, Curtis Jerome Brown, Jr. and Mitnee Markette Jones, entered Glasco's cell, beat him and left him to die. Brown and Jones are scheduled to go to trial on October 13, 2009 on charges of making false statements and filing false reports. Two jail lieutenants, Robert W. Hill, Jr. and Earl Glenn, also were charged in connection with Glasco's death; Glenn pleaded guilty on August 25 to using excessive force and lying to an FBI agent.

Guatemala: On September 7, 2009,

a prison assistant director, a warden and two prison guards were killed by gunmen. The first attack, which killed the guards, occurred around 7:00 a.m. when gunmen with AK-47s opened fire on a transport van in Guatemala City. The warden and assistant director were killed 10 minutes later in a separate attack in front of the Hospital General San Juan de Dios. Officials believe the fatal attacks were in retaliation for efforts to crack down on cell phones and other contraband inside the nation's prisons.

Illinois: On October 2, 2009, Jose C. Nava, Jr., a former Cook County Jail guard, was sentenced to three years probation for smuggling marijuana and other contraband into the facility. Nava was arrested in April when officials discovered drugs and alcohol as he passed through a security checkpoint on his way to work. Apparently, Nava knew one of the prisoners at the jail and agreed to meet the prisoner's girlfriend to obtain the contraband. He was suspended from his job without pay following the arrest, and resigned in August.

Indiana: On July 8, 2009, Karen Gibson, 27, a guard at the Westville Correctional Facility, was arrested on a felony charge of smuggling contraband when she reported for work. Officials did not say what she tried to bring into the prison. Gibson was booked into the LaPorte County Jail on \$1,500 bond.

Indiana: On September 14, 2009, 67-year-old John M. Kelly, a former civilian transport officer for the Bartholomew County Jail, was sentenced to three years for having sex with a female prisoner he was transporting to the Brown County Jail. Judge Judith Stewart suspended two years of the sentence, finding that Kelly's conduct indicated he had a failure of character rather than an overall bad character. Kelly may be able to serve the remaining one year of his sentence in Brown County's work release program.

Kansas: On September 22, 2009, prisoner Joseph Bellamy was acquitted of aggravated battery charges related to an incident at the CCA-run Leavenworth Detention Center on October 22, 2008. Bellamy was accused of stabbing guards Kenneth Lajiness and Cory O'Neill, who both survived the incident and testified during the trial. Bellamy won't be released, however, as he is still serving a life sentence plus 48 years for an unrelated

conviction.

Kentucky: On September 13, 2009, Mark Hourigan, 41, was ordained as a minister at the City of Refuge Worship Center, a Pentecostal church in Louisville. Hourigan had been convicted of sex crimes involving an 11-year-old boy in 1998. He completed his prison sentence and was discharged from parole in 2008. Religious experts believe this could be the first time a known sex offender has been ordained as a minister in a Christian church. Victims' rights groups opposed the decision to ordain Hourigan, but church leaders fully support him as they believe he is reformed.

Mississippi: In September 2009, Joseph Leon Jackson and Courtney Logan were indicted for shooting Nashville police Sgt. Mark Chesnut. Jackson, who was being held at the CCA-run Delta Correctional Facility, escaped from three CCA guards on June 25, 2009 during a visit to an eye doctor. Logan entered the doctor's office, fired shots into the ceiling and freed Jackson. The pair was later stopped by Sgt. Chesnut for not wearing seatbelts in their getaway car. Chesnut was sitting in his police cruiser running a license check when Jackson walked up and shot him five times using a .38 taken from one of the prison guards. Chesnut managed to call for help, and Jackson and Logan were quickly apprehended. Logan attempted to hang himself shortly after his arrest and was placed on suicide watch at a Nashville jail. Jackson was serving a life sentence. Both have been charged with attempted murder, as Sgt. Chesnut survived the shooting.

New Jersey: On September 25, 2009, former Morris County Jail guard Lee C. Maimone was sentenced to five years in prison for theft by extortion. Maimone gave special treatment to an unnamed prisoner, such as agreeing to back him up in disciplinary cases, in exchange for a promise that he would be paid \$60,000 upon the prisoner's release. Maimone eventually negotiated a meeting with a person he thought was the prisoner's girlfriend to receive a partial payment of \$2,000. The woman was an undercover detective and Maimone was immediately arrested. He will be eligible for parole after serving 20 months of his sentence.

New York: On August 12, 2009, 42-year-old Hope Spinato, a former guard at FCI Otisville, was sentenced to 8 months in prison for aiding and abetting in an escape. On July 15, 2007, Spinato drove

an unnamed prisoner who was serving a 203-month sentence on drug convictions from the FCI to her home, had sex with him, and then returned him to the prison. She later admitted to bringing the prisoner home with her on numerous occasions so they could have sex.

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New York: On September 4, 2009, prisoner Kevin Schmitt leapt from the second tier of the Ulster County Jail and died of a severe head injury. Schmitt had been arrested the day before following a 10-hour standoff with Sheriff's deputies on charges that he struck his ex-wife

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In Brief (cont.)

with a rifle butt.

Ohio: On September 9, 2009, Franklin County Jail guard Joseph M. Cantwell pleaded guilty to two health code violations. He was fined \$500 and received five years probation and a 90-day suspended sentence. The guilty plea stemmed from Cantwell feeding prisoner Joseph Copeland, Jr. a bologna sandwich that, unbeknownst to Copeland, had been rubbed against another prisoner's penis. Cantwell and a second guard who participated in the incident, Phillip Barnett, were fired. Copeland has since filed a lawsuit, as has Todd Triplett, the prisoner who rubbed his penis on the sandwich, claiming he was forced by the guards to do so.

South Carolina: On September 26, 2009, the Lee Correctional Institute was locked down after a fight broke out among 60 prisoners in a common area. Guards dropped tear gas canisters through the ceiling and stormed the room. The prisoners put up no resistance and only minor injuries were reported; the cause of the fight is under investigation.

Texas: On July 31, 2009, Moises B. Martinez, Jr., a former case manager at the GEO Group-run Reeves County Detention Center, was sentenced to 2 ½ years in prison and three years probation for attempting to smuggle tobacco and other contraband into the privately-run facility. On September 2, 2009, former Reeves County life skills instructor Velma Jean Payan was sentenced to 24 months on charges of smuggling contraband. The next day, former Reeves County guards

Jerri Ornelas, Silvia Chairez and Jacob C. Guzman were sentenced on similar charges. Ornelas and Chariez both received 24 months in prison, while Guzman was sentenced to 46 months; all will also have to serve three years on supervised release.

Texas: On August 23, 2009, Chastity Withers, formerly a guard employed by Community Education Centers, which operates the Falls County Jail, married prisoner Timothy Hargrove by proxy. Officials discovered the marriage in September following tips from confidential sources, and Withers was fired. Hargrove has since been sentenced to 30 years for drug manufacturing and transferred to prison. Withers was later arrested and charged with introducing prohibited items into a correctional facility. She was released after posting \$1,000 bail. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

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Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi; Seal Press, 295 pages. \$15.95. Best book available explaining and covering the issues of imprisoned women. Detailed account of a crisis hiding in plain sight. 1066

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$19.00. Documented first hand reporting on law enforcement's war on the poor. Covers paramilitary policing, the INS and prisons. 1002

Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Ceiling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

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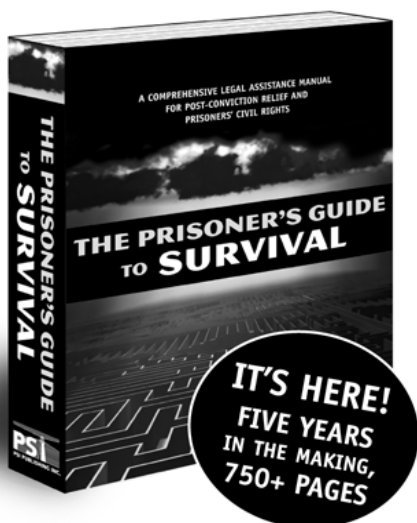
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Dedicated to Protecting Human Rights

December 2009

Improbable Private Prison Scam Plays Out in Hardin, Montana

by Alex Friedmann

"Trouble, oh we got trouble, right here in River City! With a capital 'T' that rhymes with 'P,' and that stands for pool."
– Professor Hill

The above quote is from *The Music Man*, a 1957 Broadway musical in which "Professor Hill," an opportunistic con artist, convinces the gullible residents of a small rural town to buy instruments and uniforms to form a marching band. Replace "River City" with "Hardin" and "pool" with "prison," and you have a modern-day adaptation of this classic performance – complete with a shady conman, unsuspecting townfolk and entertaining hijinks. The

only thing missing is a musical score. And a happy ending.

A Prison Without Prisoners

PLN recently reported on the plight of Hardin, Montana, a middle-of-nowhere town with a population of 3,500 located in Big Horn County about an hour's drive east of Billings. Hardin made national headlines last April when the city, desperate to find prisoners to fill its vacant 464-bed correctional facility, offered to take maximum-security terrorist detainees housed at the U.S. military prison in Guantanamo Bay, Cuba. [See: PLN, October 2009, p.28].

Hardin's Two Rivers Detention Center was completed in September 2007 with the goal of spurring economic development and creating jobs, but has sat empty for the past two years. The city, which owns the prison through the tax-supported Two Rivers Trade Port Authority (TRA), has been unable to locate any prisoners. The Montana Department of Corrections wasn't interested in using the prison, nor were neighboring counties. Hardin's attempt to house sex offenders at the facility also fell flat.

Initially, Montana's Attorney General declared the Two Rivers Detention Center could not hold out-of-state prisoners; although the city won a lawsuit in 2008 overturning the Attorney General's opinion, Hardin has been unsuccessful in enticing other states to send their prisoners to the facility. One major problem is the physical layout of the prison, which includes open-dorm housing units and relies on indirect supervision.

Thus, after the \$27 million in revenue

bonds used to finance the Hardin facility went into default in May 2008, TRA officials, lacking other options, said they were willing to take the Guantanamo detainees. That was more of a public relations ploy than a serious offer, though, since the medium-security Two Rivers Detention Center was ill-equipped to handle maximum-security prisoners without extensive – and expensive – upgrades. Regardless, Hardin's proposal generated widespread media attention, which attracted a company that made city officials an offer they simply couldn't refuse.

On Sept. 10, 2009, Hardin announced a 10-year contract with the American Private Police Force Organization (APPF) to house prisoners at the Two Rivers facility. A complete unknown in the private prison industry, APPF had been in discussions with the TRA for months prior to the announcement of the contract. The deal was negotiated by TRA executive director Greg Smith, other TRA officials and former Hardin city attorney Rebecca Convery.

According to APPF's website (www.americanpolicegroup.com), the company was in the business of providing paramilitary and security services as well as investigative work such as polygraph testing, finding missing persons, checking up on cheating spouses, and "kidnaping prevention & ransom recovery." The firm said that it had offices in Santa Ana, California and Washington, D.C., and played "a critical role in helping the U.S. government meet vital homeland security and national defense needs." For example, APPF stated it could activate a battalion of special forces soldiers within 72 hours.

The same day that the APPF contract

Inside

Private Prison Financing Exposed	9
From the Editor	10
Miami Sex Offenders Under Bridge	14
Habeas Hints	18
Florida's Brutal Law Enforcement	22
Prisoners Have E Mail	24
\$100 Million Michigan Rape Settlement	30
\$750,000 Chicago Brutality Settlement	32
PLN Goes to ACA Conference	36
\$14 Million Massachusetts Settlement	42
Alabama Judge Acquitted of Rape	44
4,000 Kenyan Death Sentences Commuted	48
News in Brief	50

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Prison Scam in Montana (cont.)

was announced, *PLN* began preliminary background research into the company. Within a matter of hours it was learned that APPF had been incorporated in California in March 2009 and its website went up two months later; the firm's Washington, D.C. address was at a location that provides "virtual office" services, but APPF didn't have an account there; the company was not registered to do business in D.C. or Montana; and APPF was not listed in a database of federal contractors.

These inconsistencies led *PLN* to note in our October article, "In their desperation ... Hardin officials may have signed up with a shady company that has an even less realistic chance of success than housing prisoners from [Guantanamo]."

Too Good to be True

The public face of APPF was "Captain" Michael Hilton, who initially said he did not want his last name mentioned because he was involved in security work. Hilton, a slightly-built man in his 50s with a pronounced Serbian accent, had a penchant for sharp business suits when he wasn't wearing a security uniform complete with an APPF badge and shoulder patches. He described himself as a naturalized U.S. citizen from Montenegro – a small European nation near Serbia – with extensive military and law enforcement experience.

According to APPF's contract, the company would make annual \$2.6 million bond payments for the Hardin prison and pay the city \$5.00 per diem for each prisoner housed at the facility. Hilton also had grand plans of investing at least \$17 million to build a military and law enforcement training center for U.S. and international forces. APPF wanted to expand the prison to 2,000 beds, and under the company's management the Two Rivers complex would include a homeless shelter, animal shelter and forensics lab.

Eighty percent of the jobs at the facility would go to local residents, plus free health care would be provided. APPF would further take care of citizens without enough to eat. "So if anybody is hungry in the city of Hardin if they cannot drive, we will send police officers with food," said Hilton, who added that he wanted to put Hardin "onto the world map."

If APPF's promises sounded too good to be true or perhaps a touch improbable,

that didn't faze TRA officials who were overjoyed to finally find a contractor for the city's empty detention center. "I am just thrilled for the city of Hardin and I can't wait to see it all just come together," said TRA director Greg Smith.

Others were not as enthused. "It doesn't make any sense at all. They [APPF] come on like Mother Teresa in camo," observed Frank Smith, field organizer for the Private Corrections Institute (PCI), a non-profit watchdog group that opposes prison privatization. PCI worked in cooperation with *PLN* to conduct background research into APPF. Hardin officials apparently were only interested in the bottom line. Even if the Two Rivers facility was operating at half capacity, it was estimated the city would receive over \$365,000 per year under APPF's contract, with the first payment due on February 1, 2010. This potential windfall led TRA vice president Al Peterson to remark, "Holy crap. Right now we're on a shoe string."

However, troubling inconsistencies continued to stack up. The TRA refused to release a copy of the contract, saying it was undergoing revisions and had not been signed by U.S. Bank, the bond trustee. Although APPF claimed it was a recently-formed spin-off of a major security firm, it declined to provide the name of its parent company. "We have enemies, worldwide – not in the U.S., but you never know – so it's for security purposes," Hilton said of APPF's lack of transparency.

Nor was it certain where APPF planned to find prisoners to fill the Two Rivers facility. The Montana DOC stated it was not involved in the deal. While there was speculation that the prison would house federal detainees, U.S. Marshal Dwight MacKay, in the agency's Billings office, said "I don't know where in the heck they're getting them from." Others suggested the prisoners might come from California's overcrowded prison system, which is under court order to reduce its population and already houses about 8,000 prisoners in out-of-state facilities.

"It will gradually be more clear as things go along," said APPF's newly-hired attorney, Maziar Mafi. As for the company's apparent dearth of experience in managing prisons or jails, Hilton claimed APPF was primarily interested in building and operating the proposed training center. "We don't really want to get into the prison business," he explained.

Despite these assurances, future prob-

Prison Scam in Montana (cont.)

lems were foreshadowed by the abrupt suspension of TRA director Greg Smith, who was placed on administrative leave just days after the contract with APPF was announced. No reason was given for his suspension.

Foreign Mercs and Martial Law?

Hardin officials fiercely defended APPF, evidently considering the company's offer to operate the Two Rivers facility to be the town's financial salvation. "I've seen their documents. I've seen their credentials," Peterson insisted. "They are who they say they are, and they are going to do what they say they are going to do."

However, APPF's extreme secrecy led some skeptics – including *PLN* – to question the legitimacy of the firm's proposal to run the Hardin prison. This cautious approach was not shared by the local news media. "As far as I'm concerned, if a little secrecy means good, high-paying jobs and an economic boost to the city, then I say go for it," said Jim Eshleman, who writes for the *Big Horn County News*.

Others, primarily with right-wing anti-government viewpoints, saw a more sinister plot. They alleged that APPF was President Obama's private paramilitary police force; that the company was planning to confiscate guns from Hardin residents; and that the H1N1 (swine flu) vaccine would be forced on the town's population, with those who refused being quarantined in the Two Rivers facility.

As bizarre as these beliefs were, conspiracy theorists went into overdrive when Hilton and other APPF officials arrived in Hardin on Sept. 24, 2009 in three black Mercedes SUVs with "City of Hardin Police Department" decals. Which presented

a problem, because Hardin doesn't have a police force.

Local law enforcement is provided by the Big Horn County Sheriff's Department under the direction of Sheriff Lawrence "Pete" Big Hair – though the city was in the process of deconsolidation, which would let Hardin create its own public police agency. The sight of private security personnel on city streets under the guise of a police force confirmed the worst fears of anti-government activists and self-styled patriots.

For its part, APPF explained the police decals were a symbol of good faith that the company was committed to helping Hardin form its own police force, and that the SUVs would be donated to the city as patrol vehicles. Upon request by Hardin officials, the decals were quickly removed.

Regardless, unfounded rumors continued to run rampant – including that APPF was installing a security gate at the entrance of the city. Businesses in Hardin reportedly received dozens of phone calls from concerned out-of-towners wanting to know if martial law had been imposed. Conservative talk-radio host Alex Jones jumped on the story, traveling to Hardin and instigating reports that APPF might be a subsidiary of military contractor Blackwater (now known as Xe), or possibly part of a United Nations civilian police force.

The fact that APPF's corporate logo included a Serbian coat-of-arms with a double-headed eagle didn't help matters, as some paranoid fearmongers insisted that meant the firm was composed of foreign mercenaries. Hilton said the use of the Serbian crest was intended to honor his family's heritage; the company's emblem was subsequently changed.

The APPF controversy became so heated that TRA officials had to place a notice on their website stating, "We welcome anyone to visit our town! There are no commandos in the streets. There is no fence or gate being built around Hardin. People are free to come and go as they please." Interestingly, those who voiced objections to a private police force did not seem to have a problem with privately-operated prisons, which have become business-as-usual in the U.S. criminal justice system.

APPF received a boost in credibility on September 25, when *Billings Gazette* reporter Becky Shay unexpectedly resigned from the newspaper to become the firm's spokesperson. She was promised a \$60,000

annual salary, signing bonus, company vehicle (she received one of the Mercedes SUVs), and assistance with buying a home. Shay, who had previously reported on the Hardin prison, expressed complete trust in APPF. "I know enough about where the money is coming from to be confident signing on with them," she said.

The Scam Hits the Fan

Meanwhile, *PLN* continued to re-search APPF and, more specifically, company front man Michael Hilton. *PLN* discovered that a defendant named Michael Hilton had been sued in a fraud and conspiracy lawsuit in California involving an assisted living center, which resulted in a \$1.4 million judgment. An appellate ruling in that case described Hilton as a convicted felon and "the main perpetrator of the fraud." See: *Bentley v. Carella*, 2003 Cal.App.Unpub. LEXIS 8418 (Cal. App. 2d Dist., Sept. 4, 2003).

PLN tracked down two of the plaintiffs and one of the co-defendants in *Bentley*, who all confirmed that the Michael Hilton named as a defendant in the case spoke with a Serbian accent. Additionally, plaintiff Richard Earnhart and co-defendant Dr. Joseph A. Carella verified that the Michael Hilton in the *Bentley* suit was the same person employed by APPF, after viewing news photos of Hilton at the Two Rivers prison in Hardin. Earnhart also mentioned that Hilton went by the alias of "Miodrag Dokovich."

A search of federal court cases found two bankruptcy filings under the name of Michael Hilton, with Miodrag Dokovich listed as an alias. The filings included Hilton's Social Security Number. Armed with this information, a check of California criminal records revealed that Hilton had arrests dating back to 1990 in Los Angeles for grand theft; in Santa Ana for grand theft and writing bad checks; and in Orange County for 13 counts of grand theft, diversion of construction funds and attempted grand theft. Hilton had pleaded guilty to the Orange County charges and was sentenced in March 1993 to more than three years in prison.

State court documents and a Lexis search uncovered Hilton's use of at least a dozen other aliases, including Midrag Dokovitch, Michael Djokic, Anthony Michael Hilton, Miodrag Djokich, Miodrag Djokovich, Michael Hamilton, Chedomire Djokich and Hristian Djokich, plus related variants.

PLN was the first news publication to conclusively tie APPF's Michael Hil-

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ton to the *Bentley* fraud case, which led to the discovery of his criminal record. *PLN* provided its research findings to the *Associated Press* in Montana, which was simultaneously conducting its own investigation. The *AP* broke the story on September 30, 2009, concurrent with a *Billings Gazette* investigative report on Hilton published the same day.

The *AP* and *Gazette* articles included additional details about Hilton's dubious past, including a 2003 DUI conviction in Orange County, California that resulted in a 45-day jail sentence plus three years probation. Further, Hilton had been accused of fraud, larceny, false pretenses and breach of contract in numerous lawsuits, which resulted in over \$1 million in civil judgments against him.

In one of those cases, Hilton was accused of scamming money from investors to create commemorative Super Bowl coins, though no license was obtained from the NFL and no coins were ever produced. In another scheme, Hilton reportedly posed as an art dealer to steal a silver statue worth \$100,000.

"That prison [in Hardin] – he should be in it," said Richard Earnhart, who had obtained a judgment against Hilton in the assisted living center scam and referred to him as a thief and a conman. Dr. Carella, one of Hilton's co-defendants in the *Bentley* suit, was apparently himself victimized by Hilton and used as a "pawn," according to court documents. Carella said he lost his medical practice and had to file bankruptcy due to Hilton, who misappropriated investors' money "like a Ponzi scheme."

Hilton had used appearances of affluence in his prior fraudulent ventures. For example, as part of the assisted living center scam, Hilton gave Earnhart a new Mercedes – which was repossessed three weeks later. When he stole the silver statue, Hilton had arrived at the victim's house in another Mercedes driven by a chauffeur. This fit in with his arrival in Hardin with a trio of Mercedes SUVs.

When asked about Hilton's criminal record, APPF spokesperson Becky Shay responded, "The documents speak for themselves ... the documents are what they are." She referred to Hilton's previous business dealings as his "private business," and stated, "My job is not to give you the answers you want, my job is to give the information I've been employed to release or not release." Shay continued to insist she had made "a great career choice" by

joining APPF, but broke down in tears during an emotional press conference.

Prison Contract Unravels

Following the news reports about Hilton's criminal past and history of civil fraud cases, APPF's plan to operate the Two Rivers prison began to fall apart. Montana's Attorney General stepped in the day after the *AP* and *Gazette* articles ran, launching an investigation into APPF and requesting documentation from both the company and Hardin officials. The Attorney General expressed concern that APPF may be violating the Montana Unfair Trade Practices and Consumer Protection Act by making false statements.

On October 1, 2009, former Hardin city attorney Rebecca Convery resigned from her contract position with the TRA, where she had helped negotiate the deal with APPF, citing a conflict of interest. When Convery worked for the TRA she had shared an office at the Two Rivers facility with Hardin's animal control officer, along with several cats, a pygmy goat, hamsters, a gerbil and a field mouse named "Mr. Jingles," which was the prison's unofficial mascot.

"Those of us who spent months of our time trying to secure inmates for the facility often joked that those furry critters were the only inmates the facility was ever going to house," said Convery. She also criticized the TRA, noting "There's been no acknowledgement on the board's behalf that this whole thing has been a fiasco."

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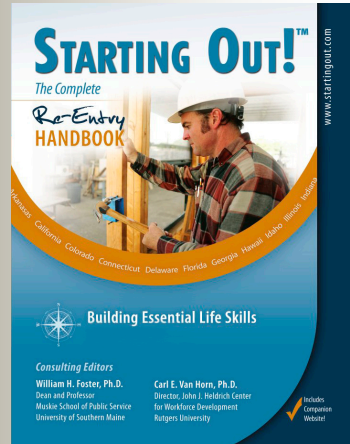
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APPF attorney Maziar Mafi contacted *PLN* on October 2 and said he no longer represented the company. In a letter to TRA officials, Mafi wrote that he had "decided to discontinue my work with American Police Force at this time." It was later learned that he had guaranteed lease payments for two of the Mercedes SUVs used by Hilton.

Amazingly, despite the discovery of Hilton's criminal record and history of fraudulent business deals, plus significant doubts about the legitimacy of APPF, Hardin officials refused to give up hope. "I don't know that his background has

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Prison Scam in Montana (cont.)

affected his position or his ability to do his work,” remarked City Council member Carla Colstad.

TRA vice president Al Peterson agreed. “I believe that the TRA has a better chance of getting the detention facility open with [APPF] than with any Montana officials,” he stated. “What do we have to lose if it doesn’t work out?”

Indeed, other than the city’s reputation and the dignity of its elected leaders, there was little risk. Hardin wouldn’t lose any money as a result of the deal with APPF because the prison’s bondholders were on the hook for the vacant facility. Rather, the main costs to Hardin officials were in terms of embarrassment, lost opportunities and increased difficulty in attracting future economic development or bond investors. But as Peterson put it, APPF was “a better shot than nothing.”

Another major discrepancy involving APPF was revealed during a TRA meeting on October 5. Hilton had told TRA officials that the Two Rivers facility would be run by Michael S. Cohen, a former U.S. Secret Service agent who is currently the vice president of Ohio-based International Security Associates. When contacted, however, Cohen denied that he had agreed to manage the prison, saying he only sent a résumé to Hilton and had cursory talks with him. “I feel sorry for everyone up there in Montana,” said Cohen. “He’s [Hilton] scamming everyone up there.” Ironically, it was subsequently discovered that Cohen had a criminal record, too. He was convicted of stealing \$2,800 during Secret Service investigations and served about 14 months in federal prison. See: *United States v. Cohen*, 301 F.3d 152 (3rd Cir. 2002).

Due to growing uncertainty and opposition by worried city residents, the TRA decided to place APPF’s contract on hold. “We won’t move forward. I don’t think any of us want to be on the chopping block,” said TRA president Gary Arneson. Greg Smith, the TRA’s former director who had been suspended about a month earlier, submitted his official resignation during the October 5 meeting.

One of the Hardin officials who had initially traveled to California to meet with Hilton was Smith’s wife, Kerri. At the time that the APPF contract was announced, Kerri, a mayoral candidate, told city residents to “just go with the

flow and everything will be fine.” Hilton had offered Kerri a job with APPF if she was not elected mayor. While Greg Smith was reportedly informed about Hilton’s criminal record before the contract with APPF was signed, he said it wouldn’t be a problem. In hindsight that may not have been the best approach.

On October 9, 2009 the contract between APPF and the TRA was formally dropped, just days before the deadline to produce documents demanded by the Attorney General’s office. The contract had never been finalized because it was not signed by the bond trustee. Becky Shay acknowledged that the deal had “gone sour” due to extensive media coverage of Hilton’s shady background, but claimed “there was never any fraudulent intention.”

Al Peterson was unapologetic about the implosion of APPF’s proposal to operate the Two Rivers prison and Hilton being unmasked as a conman. “I can’t say it was a mistake,” Peterson remarked. “We make the best decision we can based on the information we have on hand. I don’t think we did anything we couldn’t or wouldn’t do in the future.”

When Montana Governor Brian Schweitzer commented on the situation involving APPF, he referred to Hilton as “a low-level card shark.” Schweitzer noted that “the people of Hardin are good people”; however, he also said “the people that they have elected to serve them have been duped by con artists over and over and over and over again.”

The Attorney General’s office discontinued its investigation on October 13, as APPF was no longer doing business in the state and the Attorney General was “unaware of any Montanans who have been harmed financially by this company.” It was later reported that Hilton had written a bad check for “about \$1,000” to cover his stay at the Kendrick House Inn in Hardin, and that a retainer check he gave to an attorney in Billings likewise had bounced.

Former *Gazette* reporter Becky Shay, who had quit her job to sign on with APPF, never received a paycheck; the Mercedes SUV she was driving courtesy of Hilton was reclaimed in mid-October by ex-APPF attorney Maziar Mafi. According to an *Associated Press* report, Shay was back in her 1999 Dodge Intrepid.

Michael Hilton made his last stand in a California courtroom on October 30, one day after an arrest warrant was issued for him to appear at a judgment debtor’s hearing in the *Bentley* case. He

testified under oath that APPF did not have a parent company and that he had no law enforcement or corrections experience. Hilton said he had raised about \$100,000 for the Hardin venture from his father and four other investors, including his girlfriend. He stated he was broke and unable to pay his rent, and that all of APPF’s money was gone and the company’s account was overdrawn. “I’m out of the game. I’m done,” he said.

Hilton alleged his only remaining assets were four paintings, which he was ordered to turn over so they could be sold. He said he had created two of the paintings himself – apparently putting the “artist” in con artist. Hilton delivered the paintings on November 5, 2009, but it was unknown whether they were worth anything. His creditors might recover a small amount of money, though, as the TRA decided to reimburse Hilton for \$1,504 in travel expenses from when TRA officials visited him in California during contract negotiations with APPF.

The refund was to avoid potential conflicts of interest.

A Cautionary Tale

When Governor Schweitzer said Hardin officials had been repeatedly tricked by conmen, he was referring to how the city ended up with an empty prison in the first place. “I believe the people of Hardin were duped by these construction people out of Texas to build the facility, then the bond people to build this they were duped, now we have these card sharks out of California who are there to dupe them,” Schweitzer stated.

Hardin was approached in 2004 by a consortium of prison developers headed by Corplan Corrections, a Texas-based company that, according to its website, “has developed prisons, jails, correction centers and detention centers” nationwide, and provides “full service, from conception, to ‘selling’ the concept ..., interface with government officials, design, build, manage and financing.” Corplan offered the city a “turn-key” package in which the Two Rivers facility would be financed with revenue bonds and operated by Emerald Corrections – later changed to CiviGenics, which has since been acquired by Community Education Centers.

Other rural towns, primarily in Texas, also were approached to build publicly-owned and privately-managed prisons using revenue bonds, including the GEO Group-run Reeves County Detention Center in

Pecos and the LaSalle County Regional Detention Center in Encinal, which is operated by Emerald Corrections.

The backstory as to how Hardin fell victim to greedy prison entrepreneurs, and was left with a vacant facility and bonds in default as a result, is told in an accompanying article in this issue of *PLN*, "Behind Montana Jail Fiasco: How Private Prison Developers Prey on Desperate Towns." Nor is building speculative prisons a thing of the past, as small communities continue to be targeted for such questionable projects.

Most recently, some of the same prison developers that graced the city of Hardin with its mothballed Two Rivers facility – including Corplan, Municipal Capital Markets Group and Innovative Government Strategies – are trying to build a prison in the Tohono O'odham Nation, a tribal community in Arizona. In an unrelated venture, Corrections Corporation of America is negotiating with Wickenburg, Arizona to put a 3,000-bed facility in the town. Such speculative prison building persists despite research studies that have found little if any positive economic impact when detention centers are sited in rural areas.

"I believe it is the wrong direction

to base economic development on corrections," said Montana state Senator Steve Gallus. "The idea that it is sound economic policy to create profit from incarcerating people just simply does not make sense to me."

Unlike in *The Music Man*, there was no happy ending to Hilton's ill-fated attempt to con Hardin officials. The Two Rivers Detention Center still sits empty. Former TRA director Greg Smith is out of a job and former *Gazette* reporter Becky Shay is looking for work (she has applied for Smith's old position). TRA president Gary Arneson announced on November 2 that he will not seek another term, while there have been calls for TRA vice president Al Peterson to resign. The residents of Hardin, which has an unemployment rate of more than 10 percent, remain without the much-needed jobs the prison was supposed to provide. The city now hopes to attract a Chinese-backed horse slaughterhouse.

Seeking a silver lining to the storm clouds that overshadowed the failed APPF contract, Peterson said the widespread media attention had led several other private prison companies to express interest in the Two Rivers facility. Ever the optimist, Peterson noted there was

"no such thing as bad publicity." Except, perhaps, when your city has become a national laughingstock due to poor decisions by its inept leaders. At least Hilton was right about one thing: He put Hardin, Montana on the world map.

If nothing else, the APPF meltdown should serve as a warning for small impoverished towns to avoid speculative private prisons that promise riches but deliver only problems. So long as modern-day snake-oil salesmen stand to profit from building and financing such facilities, however, there are sure to be more Hardins, other scams like APPF, and continued reliance on the misplaced notion of using prisons as a form of economic development.

That's prisons with a "P," which rhymes with "T," and that stands for trouble. ▀

Sources: *Newsweek*, www.tpmuckraker.com, *Billings Gazette*, www.kulr8.com, *Boston Review*, www.kxnet.com, *Associated Press*, *Big Horn County News*, www.tworiversauthority.org, www.texasprison-bidness.org, www.americanpolicegroup.com, www.cryptogon.com, <http://data.opi.mt.gov>, *Wickenburg Sun*, *The Missoulian*, *PLN investigative research*



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Behind Montana Jail Fiasco: How Private Prison Developers Prey on Desperate Towns

by Justin Elliott

With the unraveling of the deal for the shadowy American Private Police Force to take over and populate an empty jail in Hardin, Montana, it's pretty clear that the small city got played by an ex-con and his (supposed) private security firm.

But an investigation by *TPMmuckraker* into how Hardin ended up with the 92,000 square foot facility in the first place suggests that, long before "low-level card shark" Michael Hilton ever came to town, Hardin officials had already been taken for a ride by a far more powerful set of players: a well-organized consortium of private companies headquartered around the country, which specializes in pitching speculative and risky prison projects to local governments desperate for jobs.

The projects have generated multi-million dollar profits for the companies involved, but often haven't created the anticipated payoff for the communities, and have left a string of failed or failing prisons in their wake.

"They look for an impoverished town that's desperate," says Frank Smith of the Private Corrections Institute, a Florida-based group that opposes prison privatization. "They come in looking very impressive, saying, 'We'll make money rain from the skies.' In fact, they don't care whether it works or not."

The Pitch

In June 2004, James Parkey, a Texas-based prison developer and architect, met at the Las Vegas airport with Judy Martz, who at the time was the Republican

governor of Montana. Described by the *Texas Observer* as a "polished salesman" for the booming private prison industry, Parkey presents himself on his websites as a beneficent savior for local communities hit hard by the decline of the manufacturing sector.

Parkey, who runs a company called Corplan Corrections, was seeking to sell Martz on a prison project for her state. His method is to promise a full-service team to handle the entire project from soup to nuts – what one source described as a "turn-key system."

That team includes a construction firm to build the prison, a prison operator to work with local officials to find prisoners, then run the facility, underwriters to sell the bonds, and even a consultant to do an economic feasibility study. "They walk into a municipality and say, you don't have to do a thing, we'll take care of everything," Christopher "Kit" Taylor, a municipal bond expert who has followed Parkey's operation, told *TPMmuckraker*.

State officials eventually referred Parkey to the city of Billings. From there, he was directed 50 miles east, to rural Hardin – where he found a receptive audience. Parkey promised the town's brass that his team would take care of everything. The project would generate 150 solid jobs. The prison operator in Parkey's team pledged to pay the town a business license fee and at least \$100,000 in annual per-prisoner fees.

To officials in a county whose poverty rate is double the national average, that seemed like too good an opportunity to turn down.

Big Pay Day

For Parkey and his crew, the deal soon paid off. The prison's designer and builder, Hale-Mills Construction of Houston, was guaranteed a maximum price of \$19.88 million, according to the official bond statement obtained by *TPMmuckraker*. The exact amount the firm ultimately received isn't known.

And Hardin's \$27 million municipal bond sale, conducted in 2006, netted the underwriters – a pair of companies called Herbert J. Sims, of Connecticut, and Mu-

nicipal Capital Markets Group (MCM), of Dallas – a total of \$1.62 million. Other players recruited by Parkey – lawyers, surveyors, and the North Carolina-based consultant who conducted the feasibility study – reaped \$169,750. It's not known how big a cut Parkey took, and he didn't respond to calls for comment.

Hardin itself didn't make out nearly so well. Not a single prisoner has ever slept in the jail, and the town hasn't seen a cent of revenue from the project.

The bonds, which were to be paid back through the anticipated – but non-existent – revenue, have gone into default, and the bond investors have lost money. The prison "was built on spec," says Taylor, the muni bond expert, who has looked at the Hardin deal. "[The consortium's] whole premise was hell, we don't care what happens to the bonds."

That's left Hardin with an empty jail that it so desperately wanted to fill that it begged first for sex offenders from the state, then for Guantanamo prisoners from the Feds, and, finally, for some kind of salvation from the American Private Police Force.

A Compromised Consultant?

Central to Hardin officials' expectations for the deal was the feasibility study that Parkey's team conducted, which concluded that the project was all but certain to pay off. But that study appears to have been not only deeply flawed, but essentially rigged from the start.

A Montana state auditor found in a 2007 memo that the study – carried out by Howard Geisler, a North Carolina feasibility consultant specializing in prisons – was racked with problems. It provides "little methodology" regarding its estimates of potential prisoners for the jail. It lacks "historical data to support anticipated prisoner counts." And it makes "a number of assumptions made related to financial viability that appear to be unfounded," including "potential improvements to local aviation facilities."

In addition, Geisler's study failed to mention that bringing in out-of-state prisoners is potentially illegal under Montana law – even though that idea was held up as a key method for recruiting prisoners. The

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state's attorney general challenged Hardin over the provision, and though a judge ultimately sided with the town, it was only after a year of legal wrangling.

Perhaps those flaws aren't surprising. The study was paid for by one of the underwriters, MCM, which had worked frequently with Geisler in the past. A truly independent feasibility study, says Taylor, the muni bond expert, would involve multiple firms making bids to do the job for the city.

Geisler was clearly aware while writing the study of the conflict of interest inherent in the set-up. On one page, he notes in bolded text that, "to assure independence," his fee "is not contingent upon the sale of the Bonds." But Taylor calls that "a smokescreen." "[The passage] is trying to give a sense of legitimacy to the deal, when that's not the case at all," he told *TPMmuckraker*.

Indeed, the study was in fact the third such report produced on the subject – and the second by Geisler – over a two-year period, according to a Montana source close to the process. The first two studies – the other of which was done internally by Hardin – came to ambiguous conclusions as to whether the project would succeed.

After the first two reports, says the source, "the MCM people had [Geisler] come back and do another. That's when they decided it made sense to go forward."

To this day, some local officials defend the study, arguing that it's easy to criticize with the benefit of hindsight. Dan Kern, Hardin's economic development director in late 2005 and early 2006, told *TPMmuckraker* he's not sure why support for the project evaporated after the jail was built. "Everybody told me that this was a great project and there was a need for it," he said.

But Taylor says if the official bond statement, which includes the feasibility study, was false or misleading, the bond players have legal liability.

Beyond Hardin

It looks like Hardin isn't the only place where the lavish promises of Parkey's consortium failed to pan out.

The Montana state auditor's memo notes that, in three separate jail deals with Texas counties, pushed through by Parkey's team, "current revenues are insufficient to cover operating and debt expenses."

And in 2005, three Texas county commissioners were convicted on bribery

charges in connection to one of those Parkey-led projects. As in Hardin, MCM acted as the underwriter, and Hale-Mills handled construction.

All of the companies in the consortium either declined to comment for this story or did not return calls and e-mails.

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From the Editor

by Paul Wright

With the end of the year we can look back at our accomplishments in the past year as well as our goals for the coming year. In 2009 *PLN* accomplished quite a bit. We published our first book, the *Prisoners Guerrilla Handbook Guide to Correspondence Courses in the US and Canada*; we added a staff attorney position; we ended the ban on publications by the Fulton County jail in Atlanta, Georgia; we ended the Massachusetts DOC policy of requiring books to be sent from "approved vendors"; we successfully expanded the size of the magazine from 48 to 56 pages; we unsealed a confidential settlement between Corrections Corporation of America and its prison employees it had bilked out of overtime pay; we changed the name of our parent non-profit from Prison Legal News to the Human Rights Defense Center and much more.

By now all readers should have received *PLN*'s annual fundraising appeal. We desperately need your support, above and beyond the cost of an annual subscription to continue doing the work we do on behalf of the human rights of the imprisoned in the US besides publishing the magazine *Prison Legal News*. This includes our cutting edge anti-censorship and government transparency litigation; book publishing and advocacy and media work. *PLN* is firmly established as the go-to source for media doing research or background stories on the prison industry. When Michael Moore was researching his latest movie *Capitalism: A Love Story*, he turned to *PLN* for information about the private prison industry. Alex Friedmann, *PLN* and I are duly thanked in the closing credits of the film. Any donations you can make will go a long way

towards supporting our work. We don't have a bloated staff, high-paid consultants or expensive office space. Your money goes towards the work we do.

The saddest duties I have as editor of *PLN* is noting the passing of our friends and allies. In October two very different champions for the rights of prisoners died. In Florida Bobby Posey, a prisoner and the editor and founder of *Florida Prison Legal Perspectives*, died on October 22 after being diagnosed with lung cancer in June of this year after unsuccessfully seeking medical treatment for the prior two years. I never met Bobby in person. We corresponded on a regular basis since at least 1993 or 1994. I always looked forward to each issue of *FPLP* because of its extensive coverage of the Florida DOC. Bobby's tireless advocacy on behalf of prisoners was an inspiration. Showing the quality of mercy in this country, Bobby was denied a medical parole even after being diagnosed with terminal cancer and being given less than six months to live (he actually lived for four). Florida governor Charlie Crist is running for the office of US senator on the blood of men like Bobby. Everyone at *PLN* wishes Bobby's wife of many years Teresa our best and I would like to dedicate this issue of *PLN* to the memory of Bobby Posey.

Florida Prison Legal Perspectives will no longer be publishing with Bobby's death. Which is a serious loss to Florida prisoners in particular. We will increase our coverage of Florida litigation as a result of this. We are also seeking a complete set of the copies of *FPLP* to scan and post on our website. If anyone has a complete, CLEAN (as in not marked up,

damaged or otherwise unreadable) set of *FPLP*s please contact me so we can make arrangements to receive them and put them into electronic format. Otherwise there is a real possibility that there will be no centralized repository of *FPLP*s. Alas, no electronic copies of *FPLP* exist and the set that I have is incomplete.

Judge William Wayne Justice, a federal district court judge in Texas, died on October 13th. His passing received much more attention than did Bobby's. Judge Justice is best known among prisoners as the judge who brought the Texas prison system into the 19th century by holding vast sections of the Texas prison system to be unconstitutional in the case of *Ruiz v. Estelle*. He also desegregated the Texas school system among many other accomplishments in his 41 years on the federal bench. I had the privilege of meeting Judge Justice at a conference in Austin in 2006. I am always interested in why people do the things we do. I asked Judge Justice why he had ruled in favor of prisoners in *Ruiz*. His simple answer was "Since I was a little boy my daddy told me to always do the right thing and that's what I've tried to do my whole life. It was just the right thing to do." He also mentioned he had attended the funeral of David Ruiz, the plaintiff in *Ruiz v. Estelle*. At one point Judge Justice was the most reviled judge in Texas if not the South and took his constitutional duties as a judge seriously. He was not an outcome-oriented jurist. The American judiciary is a poorer place with his passing.

On those happy notes, we would like to wish everyone a happy holiday season and best wishes for a new year of greater struggle. 🏠

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Private Prisons Don't Make Better Prisoners

by Prof. Andrew L. Spivak

The incarceration rate, which from the 1920s to the early 1970s hovered between about 100 to 120 state and federal prisoners per 100,000 Americans, has risen nearly fourfold. While the rate of increase has slowed substantially in recent years, the raw numbers continue to climb and many prisons are operating at or above capacity. Along with increasing correctional populations, per capita state prison expenditures have likewise expanded, but spending for building new prisons or renovating existing facilities has not been commensurate with the overall level of growth.

Under these pressures, the country increasingly turned to the private sector to deal with burgeoning prison populations. Americans' affinity for market economy solutions and a corresponding distrust of government in general led to a belief that the private sector might outperform government agencies in providing incarceration services. Although the proportion of state correctional budgets spent on private prisons is relatively low, about six percent nationally, some states spend a much higher proportion than others.

As of the last available data (about 3 years ago), Oklahoma ranked fourth in the nation with 30% of its funds allocated for private prison expenditures, and was sixth in the percentage of total prisoner population housed in private prisons. Thus, several years ago, the Sooner state seemed like a good place in which to conduct an evaluation of the effectiveness of private prisons, with prisoner recidivism as the comparison measure.

Until last year the only academic studies of private and public prisons using recidivism as a benchmark had taken place in Florida. I had worked for the Oklahoma Department of Corrections since 1997 and regularly dealt with reception and release data, which I had used previously to study recidivism in general. Since inter-facility movement data also was available, I realized that it would be possible to replicate an analysis originally designed by William Bales, a criminal justice professor at Florida State University. Bales had been the research bureau chief at the Florida Department of Corrections (FDOC) in the 1990's and I met him at a Justice Research and Statistics Association (JRSA) meeting in 2005, where he was presenting a paper

that he'd recently published in the journal *Criminology & Public Policy*.

Bales and his colleagues had used a quasi-experimental design to determine whether spending more time in private prisons affected prisoners' post-release performance. It didn't, and the results were exciting because 1) they contradicted some previous findings which suggested that private prisons had a positive effect on prisoners' post-release performance, and 2) his work was of much higher quality than what had been done in the past. He accounted for more controls (things like age, gender, offense type and prior criminal record), and matched comparison groups more precisely than any of the previous studies. When he explained his methodology to me in greater detail after the presentation, I knew that I had access to roughly the same type of data in Oklahoma, and was determined to find out if that state would show similar results.

To provide some background, privatization of correctional services began to increase during the War on Drugs in the 1980's and the resultant rapid expansion of prison populations around the country, which led to a search for more economical and effective ways to house prisoners. This movement towards privatization also created concerns about the quality of services provided by private prison companies. The compatibility of incarceration's goal of societal responsibility with the private prison industry's inherent profit-seeking motive incited fears that profit-conscious budgets would cut corners more than would allocated public budgets, and these kinds of concerns led to calls for judicial review and an ongoing ethical debate.

Amid this debate, two important topics arose over the past two decades regarding the effectiveness of private prisons in meeting the needs of the government and the prisoner: cost and prisoner post-release performance. Private prison companies purported several ways to reduce the

costs of incarceration. One set of researchers, in a 2003 report funded by Corrections Corporation of America (CCA), proposed that private prison contracting leads to cost savings in the public sector due to increased accountability that is fostered by competition. In other words, private prisons supposedly save money because "their existence helps control the cost of public prisons." Other researchers claimed that private companies can build prisons more quickly and cheaply, although subsequent research at the Bureau of Prisons contradicted that assertion. The debate over whether private prisons are cheaper, the same or more expensive than public prisons is far from resolved, and like many privatization issues, a great deal of additional research effort and subsequent ink will be spilt over it.

The other evaluative aspect of an emergent private prison industry, prisoner post-release performance, is a matter of the degree to which the private industry's

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Private Prisons (cont.)

services compare in quality to those of the public sector. The idea is that better services will lead to prisoners who are better prepared to succeed after release. As early as 1992, an article in *The Journal of Criminal Law and Criminology*, a relatively high-ranking and prestigious academic publication, claimed that the quality of confinement, using an index with measures of security, safety, order, care, activity, justice, conditions and management, were all better in private prisons than in either state or federal prisons. Interestingly, however, this finding of superior performance held true only when examining staff opinions. From prisoners' perspectives, the public prisons were actually preferable. Other research claimed that public prisons were better run, and additional comparative studies raised issues involving many different measures, including institutional operations, safety, staff turnover, gang activity, drug use and programming.

All of these performance standards were really peripheral, however, to the key indicator of correctional performance – the proverbial holy grail of prison research – which is recidivism. Saying that a prison, or system of prisons, is more beneficial than another for prisoners due to the quality of its services is a directly testable claim; you just have to determine whether prisoners do better after they are released. It sounds simple, but the methodological issues can be daunting. First, recidivism can be defined in a number of ways, including re-arrest, re-conviction, re-incarceration and even absconding from parole, and the timing of events between release and the recidivistic event can confuse the interpretation of data.

Then consider the fact that prisoners spend varying amounts of time in different types of facilities; they are not randomly assigned as in an experiment and their outcomes are subject to a host of possible confounding factors such as age, race, gender, time served, offense history and level of post-release supervision. Not surprisingly, only four studies prior to mine had attempted to assess the recidivism of prisoners according to their having been incarcerated in public versus private prisons. All four of those studies had been conducted in Florida and used data from the FDOC. The first three, conducted in the late 1990's and early 2000's, found some degree of support for a

lower rate of recidivism among prisoners released from private facilities, but then along came William Bales and his colleagues, claiming that this was not really the case at all. Who was right?

The first study compared 12-month recidivism rates for 396 male prisoners released from public and private prisons. Prisoners from each group were matched for age, race and number of prior incarcerations, and were tracked for one year after release. Although private prison releases tended to result in better post-release performance (lower recidivism rates), the FDOC rightly expressed concern with the authors' methodology, citing the small sample size and limited criteria for matching prisoners. An additional study then conducted further analyses on a subset of the original data, using more precise control-group matching and a longer follow-up period of four years. The authors confirmed the previous finding of a lower rate of re-imprisonment among prisoners released from private prison; however, the Florida Ethics Commission raised the issue of a conflict of interest due to the receipt of private corrections industry consulting fees by the group that undertook the project.

In 2002, a new team of researchers in Florida improved on the previous studies' methods by using a significantly larger sample of prisoners and matching the groups across more criteria (adding offense type, custody level, education and time served). Most importantly, though, they expanded the categorical definition of private and public prisoner groups. Instead of release facility, they used the facility in which the prisoners spent the final six months of incarceration – a huge improvement, since the prior studies would count prisoners as "private" or "public" simply on the basis of the facility from which they were released.

Consequently, if a prisoner was transferred to a private or public facility mere days before his release, after spending years in the other type of prison, a gross misidentification would be represented in the data. In the new study, a regression model indicated there was no difference in recidivism among male prisoners from private and public prison groups, but did find a difference for female prisoners. Women in the private prison group were 25% less likely to re-offend and 34% less likely to be re-incarcerated than those in the public prison group.

Thus was the state of scientific

research on private/public prisons and recidivism when William Bales and his colleagues entered the scene in 2005. What they did was both original and far more sophisticated than any of the previous work. They designed new measures that would capture the degree of prisoners' exposure to private and public prisons, using categories defined by the amount of time prisoners spent in each type of facility. This quasi-experimental design included multiple treatment and control groups coded by type of release facility, whether the prisoner had spent any time in public and/or private prisons, and the amount and proportion of time spent in each.

Therefore, prisoners who had served a certain amount of time in one type of prison, but no more than a certain amount in the other, would be compared only with those who had symmetrically opposing characteristics. Additionally, the study controlled for a variety of possible confounding variables. For Florida prisoners released over a six-year period and tracked for up to 60 months, the researchers found no significant difference between any of the treatment and control groups for adult male, adult female or juvenile male offenders. Spending more time in private facilities, as opposed to public prisons, didn't seem to improve or worsen prisoners' likelihood of returning to prison following their release.

But would these results hold up in other states? One thing about Oklahoma that made it such a good place to replicate the Florida studies is that all of the private prisons in Oklahoma (aside from a few halfway houses) were medium security. There were six privately-operated facilities that housed about one quarter of the state's 24,000 prisoners. They could be directly compared with public medium-security prisons, most of which were about the same size, so the study wouldn't have to account for differences in security-level.

I decided to create roughly the same types of quasi-experimental categories and control groups as did the Bales team, with most of the same controls (age, race, education, prior incarceration, offense history, post-release supervision, sentence length, time served and proportion of sentence served). However, in addition to the matched groups, I also decided to analyze a regression model with proportion of time spent in private and public facilities as predictor variables, and used all adult prison releases between 1997 and 2001, tracked through 2004.

In both the matched categories and the

time-proportion model, spending more time in private prisons was linked with slightly *worse* post-release performance. In other words, the likelihood of recidivating (returning to prison) increased the more time prisoners had spent in private as compared to public facilities. As stated in the study's published findings, "the analyses indicate a significantly greater hazard of recidivism among private prison inmates in six of the eight models tested (four of the six exposure and comparison group models and both of the continuous models). In every categorical model (including the two that were nonsignificant), private prison inmate groups had a greater hazard of recidivism than did public inmate groups."

The effect was modest, only just enough to achieve statistical significance, but it was a complete surprise. I thought I was going to be writing about how my study either confirmed the findings of Bales et al., or supported the older research. However, now I had to explain why spending more time in private prisons led to higher recidivism rates. As a statistician, I prefer crunching numbers to writing (it took me more than a month to write this article for *Prison Legal News*). So I found a colleague to be my co-author. Susan Sharp is a professor at the University of Oklahoma who writes extensively about prisons and had already authored two books on capital punishment. We set out to package my analysis into a report that a scholarly journal would accept for publication.

Some of my colleagues encouraged me to suggest, in the discussion of my findings, that public prisons were better-run than their private counterparts, a conclusion that would certainly be good news to those who were already skeptical of prison privatization and would deeply annoy private prison advocates. However, I didn't have any particular axe to grind with the private prison industry. Before leaving to accept a position as a university professor last year, I had worked almost a decade in corrections, starting in the 1990's as a security officer and later serving as a case manager, but only in state-run facilities. Therefore, other than what I had found in the academic literature and heard anecdotally from fellow correctional employees, I didn't know much about how private prisons were run compared to public facilities, and nothing that I had discovered from previous research pointed toward definitive quality differences.

So when my co-author and I submitted the findings of the Oklahoma data

to the journal *Crime & Delinquency*, I insisted on playing it safe and making the most intellectually honest conclusion possible. Most likely, we wrote, there is no private/public prison influence on recidivism. Spending more time in private or public facilities probably doesn't cause significant differences in prisoners' post-release performance. More likely, the surprising results of my research were due to an administrative caveat.

When I was a case manager at a medium-security prison in around 1998, we used to get a lot of requests from prisoners for transfer packets (applications) to go to private prisons. They wanted to transfer to the private facilities because the housing units there, unlike those in the state prisons, were relatively new and featured air-conditioning – a big deal when sweltering Oklahoma summers can heat the cells into the 90's, even at night. Since the state correctional budget was so constrained, case loads were horrendous (I had a protracted double roster of 180 prisoners for several months), and I believe that we unconsciously favored our most difficult prisoners for transfers in order to get them out of our housing units. Those prisoners with time-consuming disciplinary issues, excessive complaints and grievances and so forth were the ones we especially couldn't wait to transfer ... and they may be exactly the kind of prisoners who would have a harder time staying out of prison after release.

This was my own pet interpretation, and there was no way to verify or disconfirm it, but it got me out of having to conclude that one type of prison was better than the other. Perhaps the next social scientist who compares private and public correctional facilities will figure out a clever way to determine whether I'm right or not. In the meantime, I tend to agree with William Bales that the private prison controversy will probably focus more on cost issues over the next decade rather than alleged differences in quality of service. ■

**Andrew L. Spivak is an Assistant Professor in the Department of Sociology at the University of Nevada, Las Vegas, and wrote this article exclusively for PLN based on his research study titled "Prisoner Recidivism as a Measure of Private Prison Performance," co-authored with Professor Susan F. Sharp (University of Oklahoma) and originally published in Crime & Delinquency (Vol. 54, No. 3, pp.482-508).*



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Miami Sex Offenders Still Living Under Bridge; Lawsuits Fail to Solve Problem

by David M. Reutter

PLN has reported several times on the plight of Florida sex offenders forced to live under the Julia Tuttle Causeway in Miami due to restrictive sex offender residency laws. [See: *PLN*, July 2009, p.36; June 2008, p.1]. Despite local and national media attention, as well as two lawsuits, there has been no resolution to this problem.

Living in Miami's sex offender "colony" under the causeway bridge is an onerous task even for healthy people; it is much more difficult for those with health concerns. One sex offender was returned to prison due to complications involving his medical needs and the deficient living conditions under the bridge.

After five years in jail, Eduardo Galego took a plea bargain for time served and probation. Galego's conviction for sexually assaulting a 17-year-old while using a knife required him to register as a sex offender, which in turn required him to live under the Julia Tuttle Causeway since he could find no other suitable housing.

Miami city and county ordinances restrict sex offenders from residing within 2,500 feet of a school, day care center, park, playground or public school bus stop (City of Miami Ord. 37-7). The city ordinance is more restrictive than state law, which requires that sex offenders live at least 1,000 feet from such locations, with certain exceptions (Fla. Stat.

§ 794.065). According to an August 2009 report prepared for the ACLU of Florida that evaluated available housing for sex offenders under current residency restrictions, only 43 rental units were suitable for sex offenders in the Miami-Dade County area with monthly rental costs of \$1,250 or less.

The sex offender encampment under the Julia Tuttle Causeway is equivalent to a modern-day leper colony, created by laws purportedly intended to "protect the public." Bridge residents live in squalid conditions; they lack running water, use makeshift toilets, and have a small generator for electricity which is used to charge their ankle monitors. If they miss a 10:00 p.m. curfew check, it's a violation of their probation.

On January 24, 2008, Galego missed his curfew. A diabetic, he claimed that while on his way back to the bridge he became ill, suffering slurred speech, impaired vision and vomiting, and then fell asleep on a bus. As a result, he missed his bus stop and evening curfew.

The next morning he made it to a hospital where he was treated for a serious diabetic breakdown. His probation officer assumed he was drunk; the court revoked his probation and sent him to prison to serve out the remainder of his 25-year sentence.

"Living under the causeway is delete-

rious to diabetics' health – insulin must be refrigerated, but there is no electricity under the causeway. Without electricity, it is difficult to adhere to the prescribed regimen of small, frequent meals, and humidity depletes volume, throwing off glucose, which raises the blood sugar level. The wrong amount of insulin or food ... can cause kidney failure, amputation of the extremities, or blindness," states an appellate brief filed on Galego's behalf by the Miami-Dade Public Defender's Office. "Substantial uncontroverted lay, medical, and documentary evidence established that he missed curfew because he had become sick that day with acute complications of diabetes mellitus, leading to emergency intervention at the hospital." Despite this argument, Galego remains in prison.

Notwithstanding Galego's medical condition, the state's primary concern was that he return to the sex offender colony after curfew. If that posed a danger to his health or life, apparently that's a risk the public – and public officials – were willing to take.

Ironically, restricting where sex offenders can reside, which drives them to homelessness or to improvised housing like the bridge colony, may actually endanger public safety. With a lack of stability and sense of desperation due to their precarious living situation, some



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offenders may be more likely to reoffend. According to state records, 235 registered sex offenders in Miami have absconded while on probation, including some who had lived in the bridge encampment.

"It's not a good situation for the offenders under the bridge, but it's also not a good situation for public safety in Miami-Dade," admitted Florida Dept. of Corrections spokeswoman Gretl Plessinger. "Our concern is for public safety," she said. "If they are homeless there is more of a chance they will abscond." The ACLU of Florida and Florida Institutional Legal Services filed a lawsuit against Miami-Dade County in July 2009, challenging the city's sex offender residency ordinance. Their suit argued that the state law imposing a 1,000-foot restriction on where sex offenders could live preempted the city's 2,500-foot restriction. A circuit court disagreed, however, and dismissed the suit on September 23, 2009, finding there was no implied preemption of the city's ordinance by state law. The ACLU has appealed the court's decision. See: *Exile v. Miami-Dade County*, Circuit Court of the 11th Judicial Circuit (FL), Case No. 09-51205 CA 13.

The City of Miami, in turn, has filed suit against the State of Florida, claiming that the state created a public health nuisance by allowing or facilitating the sex offender bridge colony, in violation of city codes and the Florida Constitution. The city further claims that the state's failure to remedy the situation involving sex offenders living under the bridge violates Miami's residency restriction ordinance, as the colony is within 2,500 feet of a

"park" – a small off-shore island. The city is seeking an injunction requiring the state to relocate the sex offenders.

On Sept. 23, 2009, the Court of Appeal for the Third District held that the trial court had improperly denied the state's motion for a change of venue, and that the suit should be heard in Tallahassee. The case was therefore remanded for further proceedings, including a change of venue to the Second Judicial Circuit in Tallahassee. See: *Florida Dept. of Transportation v. City of Miami*, Case No. 3D09-2300; 2009 Fla. App. LEXIS 14096 (Fla. Dist. Ct. App. 3d Dist.).

There were about 50 sex offenders living under the Julia Tuttle Causeway as of September 2009, down from 100 several months before. Money from the federal stimulus package, designated to assist the homeless in Miami, is being used to help bridge residents find appropriate housing.

City efforts to relocate the sex offenders living under the bridge are being led by Ron Book, who chairs the Miami-Dade Homeless Trust. Book, a lobbyist, worked to enact stringent sex offender laws, including residency restrictions, after his own daughter was sexually abused; he has referred to sex offenders as "monsters."

"I personally believe that residency restrictions have value and importance," he said. "Nobody said that someone exiting the prison system after committing a sexually deviant act on a child has a right to dictate where they live." Not surprisingly, sex offenders who have been forced to reside under the bridge disagree. "I am not a monster. I'm a human

being," said bridge colony resident Homer Barkley, who emphasized that he had served all of his prison time. "I got family like you got family. ... I don't deserve this. Regardless of what a person did, everyone deserves a second chance at life."

Interestingly, some victims' rights advocates agree that sex offender residency laws may not be the best approach to protecting the public. "I don't think 2,500 feet [as a residency restriction] is the best number, and I don't think anyone should live under a bridge. But do I think they should be away from children? Absolutely," said Ron Book's daughter, Lauren, who founded "Lauren's Kids" to educate and support children who are victims of sexual abuse and their families. "We don't want anyone living under a bridge to be so desperate they reoffend," she noted. Lauren, who has visited the bridge colony, is helping to find suitable housing for the sex offenders living there.

However, even if the problem involving Miami's sex offender colony is resolved, that won't address the larger issue. "Unless the county brings its ordinance in line with state law, another shantytown will spring up as sure as night follows day," observed Howard Simon, executive director of the ACLU of Florida. He said the sex offender colony under the Julia Tuttle Causeway was a result of "unintended consequences." But unintended or not, state and city officials have thus far failed to remedy the situation. ■

Sources: *Miami Herald*, *New York Times*, *Miami New Times*, *ABC News*, *Palm Beach Post*



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Arizona Jail's Medical Failures Due to Inadequate Record Keeping, Understaffing

by Matt Clarke

Medical care for approximately 10,000 prisoners in the Maricopa County jail system is an abject failure. That may explain why the Arizona county, which is the fourth largest in the nation, has had to pay over \$13 million in jury awards, settlements and legal fees in lawsuits involving prisoners' deaths and injuries due to medical neglect over the last decade. The county has also paid \$250,000 to consultants to help identify solutions to the jail's problematic health care services. [See: *PLN*, March 2009, p.34]

The major causes of the breakdown in medical treatment have been identified as poor record keeping and understaffing, with attendant overworking of the jail system's health care personnel. Maricopa County operates six detention facilities, including its infamous tent city, under the direction of also-infamous Sheriff Joe Arpaio.

In the early 1990s, then-Sheriff Tom Agnos asked the Maricopa County Board of Supervisors to create Correctional Health Services (CHS) to assume responsibility over the medical care needs of prisoners in the jail system. By the time Betty Adams took over as director of CHS in 2007, the agency had gone through four other directors in the past ten years. By all accounts, health care at the jail is improving under Adams' leadership. However, by all accounts that is not enough. Maricopa County ignored the warning signs for too long and corrective measures have been too little, too late.

In 1996, the U.S. Department of Justice (DOJ) warned the county that the medical care in its jails was below minimum constitutional requirements. In 1999 the county signed an agreement with the DOJ to improve the level of care. Outside consultants hired in 1998, 2000 and 2003 found substandard health care services and recommended hiring more staff, increasing retention rates and changing to an electronic records system. In February 2006, the jail's medical care system was placed on probation by the National Commission on Correctional Health Care (NCCHC) after a routine review uncovered major deficiencies. In September 2008, NCCHC threatened to withdraw the jail's accreditation. Accreditation was formally withdrawn in January 2009.

The problems are deadly serious.

For example, Deborah Brailard was arrested for suspected drug possession and booked into the Maricopa County jail on January 1, 2005. She went in and out of consciousness and writhed in pain for the next five days. Guards did not take her to the infirmary. After Brailard slipped into a coma she was transferred to a hospital, where she died three weeks later.

Because she was a drug user, jail staff had assumed her symptoms were due to detoxing. In fact, Brailard was an insulin-dependent diabetic, which was noted in her medical records from her previous jail stays. The records were handwritten on paper and stored in a huge warehouse; thus, they were not readily accessible to intake or medical personnel.

Although a jail officer had sent a fax regarding Brailard's diabetic condition to the facility where she was sent after being booked, CHS employees denied receiving it. "Nobody in health care uses faxes to communicate with. That's just absurd," said Dr. Todd Wilcox, a former CHS medical director, noting there is no way to verify a fax is received and read by appropriate medical staff in a timely manner.

An electronic medical records system might have saved Brailard's life. Such a system "is paramount for Maricopa County to move forward," said national prisoner health care expert Jacqueline Moore. "Large jail systems just can't continue the paper chase of finding and filing medical records. [Electronic record keeping] mitigates risks. There's less room for error."

In 2003, Dallas County, Texas switched its jail medical records over to an electronic system. According to Sharon Phillips, who supervises prisoner health care for the 6,000-bed Dallas County jail system, the improvements were immediate and there were long-term cost savings.

Oddly, in 2005, the Maricopa County Board of Supervisors took bids to install an electronic medical records system at the jail. In 2007 they signed a \$5 million contract with Atlanta-based Business Computer Applications, Inc. to purchase a system, and paid a \$218,000 deposit. County officials then put the project on hold, initially claiming they had discovered the software was inadequate and later saying they lacked the funds to pay for the system.

CHS director Betty Adams is now looking into joining with the Maricopa Integrated Health System – the county's public health care provider – and the Maricopa Medical Center to install an electronic records system that is estimated to cost \$83 million over the next ten years.

CHS has hired more than 200 employees since 2004, and presently has over 450 full-time staff members. Despite this improvement, NCCHC noted there was still severe understaffing, even though part-time employees were being used to cover some vacant full-time positions. Wilcox stated in a 2008 deposition that county administrators would approve new positions but not fund them, so no one could be hired.

"This is the game that Office of Management and Budget play," said Wilcox. "The whole time I was medical director, I would have [staff] allocations, but I would have no authorization to hire my allocations." This resulted in understaffing, which in turn led to substandard medical care for prisoners.

Sandi Wilson, who heads the Office of Management and Budget, apparently agreed. "The biggest issue is budget driving policy decisions," she said. "Policy, even if it's not the most cost efficient, should drive decisions, not budget."

So what does Betty Adams think about the crisis in CHS? "We don't feel like we're in a crisis," she remarked. "We feel like there's been a huge distraction in the last six months. All of that was brought on by people that don't like us. We feel like we're humming right along."

All of those pesky medical neglect lawsuits the county has lost, and the revocation of the jail's health care accreditation from the NCCHC, have been caused by people who simply don't like CHS or the Sheriff's Department? With that attitude, it is certain that little will change in regard to the medical care crisis in Maricopa County's jail system. For the record, neither Deborah Brailard nor her family, which filed suit against the county over her death, are "humming right along." ■

Sources: *Arizona Republic*, *Phoenix New Times*

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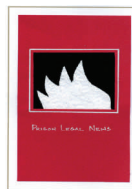
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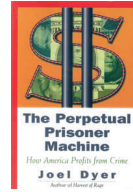
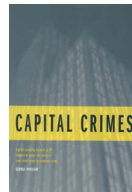
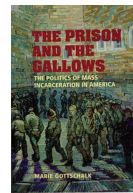
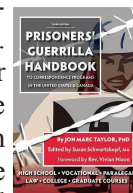
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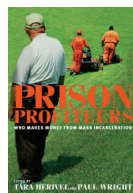
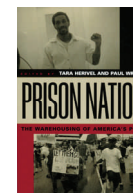
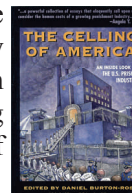
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HABEAS HINTS – CALIFORNIA COMMENT

Pace and *Bonner*: Avoiding and Fighting “Untimeliness” Rulings Under California Law

by Kent Russell

Recently, the interplay of two decisions, one from the U.S. Supreme Court and one from the Ninth Circuit, has created a potential minefield for California habeas corpus petitioners in the form of “untimeliness” rulings under California law, which can result in a federal court dismissing a petition as untimely even though the state petition was filed within the time limits for statutory tolling set forth under AEDPA (the federal habeas corpus statute).

In *Pace v. Guglielmo*, 544 U.S. 408 (2005), the U.S. Supreme Court held that, if a state court denies a state habeas petition as “untimely”, that petition was not “properly filed” under state law. In *Bonner v. Carey*, 425 F.3d 1145 (9th Cir. 2005), the Ninth Circuit held that, because statutory tolling can only be granted for a state habeas petition that was “properly filed”, *Pace* requires the federal court to deny statutory tolling to a petition that a lower California court had found to be untimely, even though the state petition had been filed within the 15-month-from-finality period that the AEDPA statute of limitations allows. Meanwhile, because California does not have any specific time limits that apply to filing habeas corpus petitions – the only requirement being that any “substantial delay” in the filing be “justified” – *Bonner* creates a potentially scary scenario whereby a California petitioner who still has time left under the AEDPA statute of limitations, and who files a state habeas corpus petition with the expectation of being granted statutory tolling, is at risk for having a state judge deny the petition as untimely under CA law after the AEDPA limit has expired and it is too late to file a timely federal petition.

Consider the following “Habeas Hints” in anticipating and dealing with the *Pace-Bonner* dilemma in California.

Explain all the reasons for delay in filing between the date that direct appeal was denied and the date the first state habeas corpus petition was filed.

Question No. 15 on the printed form that is required for California state habeas corpus petitions invites the

petitioner to explain the reasons for any “delay” in the filing of the petition. Use this question to explain, in detail, all the reasons why you waited up to 15 months after the direct appeal was over to file a state habeas corpus petition (e.g., an ongoing investigation into ineffective assistance claims which are outside the record on appeal, lack of funds to hire private counsel, inadequate prison legal resources for pro-pers, etc.).

File directly in the California Supreme Court if there is no ongoing habeas investigation and your primary purpose is to exhaust claims for federal habeas corpus.

Very few California Superior Court or Court of Appeal judges make favorable rulings of any kind on state habeas corpus. Nevertheless, before *Pace* and *Bonner* altered the landscape, it was advisable to file in the lower courts anyway because that bought the petitioner additional time to further develop habeas corpus claims during the months that the petition would be climbing up the ladder to the California Supreme Court. Although that can continue to be a viable strategy in cases where an ongoing investigation is still uncovering facts that should be exhausted before landing in the state’s highest court, there is no need for that extra time when the claims have already been sufficiently developed. Hence, and because California law confers original habeas jurisdiction in the California Supreme Court, it is possible to file a state habeas petition in that court without filing first in the lower courts, which are the ones that have been most prone to issuing untimeliness rulings in non-capital cases.

Granted, any California appellate court can theoretically refuse to hear a habeas corpus petition that was not previously filed in a lower court, but the California Supreme Court, which is used to hearing Petitions for Review that were filed there solely to accomplish exhaustion, rarely declines to decide a habeas case because it was filed first in that court. Meanwhile, at least to date, the only published California Supreme Court decisions that have imposed time limits of less than 15 months from finality

(i.e., the AEDPA limitations period) have been capital cases (see, e.g., *Clark* and *Robbins*, the decisions most often cited in imposing a timeliness barrier), where habeas counsel is appointed and, as a result, there are unique “presumptive” time limits that don’t apply to non-capital cases. Therefore, it seems extremely unlikely that the California Supreme Court is going to rule that a non-capital habeas petition which was filed within the AEDPA limitations period is untimely under California law.

Thus, especially where more than 1 year has elapsed since finality, consider bypassing the lower courts entirely and filing directly in the California Supreme Court. If you do take this route, you can state in answer to Question #18 on the printed habeas corpus form, which asks you to explain the reasons for not filing first in a lower court, that one of your objectives is to promptly accomplish exhaustion.

File a protective petition in federal court before the AEDPA limitations period runs, and ask for stay and abeyance while the California petition is pending.

Pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), a state prisoner may file a federal habeas corpus petition and ask for a stay (“stay and abeyance”) pending exhaustion of his claims in the state courts. Although *Rhines* requires a showing of good cause for a stay, *Bonner* states that “a petitioner’s reasonable confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ for him to file in federal court.” *Bonner*, supra, at fn.20.

Note, however, that one can only obtain stay and abeyance of a “mixed” petition, which is one that contains one or more fully exhausted claims mixed in with one or more unexhausted claims. Therefore, for example, if your only claim is an unexhausted ineffective-assistance claim, seeking stay and abeyance is not an option.

If you do get an untimeliness ruling from a California court, argue that the federal court is not bound by it because California’s untimeliness rules in non-

capital cases are neither well-established nor consistently applied.

As noted above, California's untimeliness rules for non-capital habeas corpus petitions are virtually non-existent, as there is no statutory time limit for filing habeas petitions other than "reasonableness", and currently there is no California Supreme Court authority clearly defining what is unreasonable in the non-capital context. Hence, when a Superior Court judge denies a non-capital habeas petition for untimeliness, it is extremely likely that the ruling will not be supported by any established California precedent, or that whatever precedent the court does cite will be from capital cases, which don't contain clear timeliness rules applicable to non-capital cases. Therefore, if the Attorney General moves to dismiss in federal court on the basis of an untimeliness ruling by a lower California court on state habeas, argue that the ruling is, in effect, one imposing a procedural default; and that the California court's untimeliness ruling is not "adequate" under federal law because the principles on which it is based are neither "well-established" nor "consistently applied" under California

law – both of which are necessary before a state procedural default will stand up in federal court. Indeed, this same argument was successfully made in a recent Ninth Circuit decision which applied that reasoning in holding that an untimeliness ruling by a lower California court was not "adequate" to prevent a hearing on the merits on federal habeas corpus. *Townsend v. Knowles*, 562 F. 3d 1200 (9th Cir. 2009).

Kent A. Russell specializes in habeas corpus and is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus under AEDPA. The 5th Edition, completely revised in September of 2006 and seasonally updated since then, can be purchased for \$49.99, which includes priority mail postage. Prisoners who are paying for the book from their prison account are eligible for the special prisoner discount price of \$39.99, if claimed at the time of purchase. An order form can be obtained from Kent's website (russellhabeas.com), or simply send a check or money order to: Kent Russell, "Cal. Habeas Handbook", 2299 Sutter Street, San Francisco, CA 94115.



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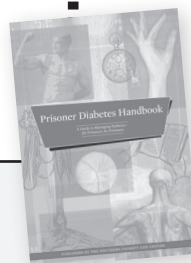
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GPS Used to Track Sex Offenders in Washington State

by Matt Clarke

Like firefighters and airline pilots, the ten Washington Department of Corrections community correction officers (CCOs) assigned to monitor high-risk sex offenders in King County via Global Positioning System (GPS) hope for a really boring day at work. Otherwise, if it isn't boring, bad things are usually happening.

What they hope to see is GPS-monitored sex offenders going to and from work, stores, church and their homes while avoiding "exclusion zones." A computer aids the CCOs in determining where the sex offenders have been and whether they visited a park or school area, which is prohibited.

"The only way a person can offend sexually is to have a cloud of secrecy about them," said Theo Lewis, head of the King County Special Assault Supervision Unit. "This blows that cloud away, and it's highly effective in allowing the CCO to intervene before [sex offenders] get to a point where they are going to reoffend."

Critics point to the February 21, 2009 slaying of a 13-year-old girl by a homeless GPS-monitored sex offender in Vancouver, Washington. They note that GPS tracking doesn't indicate when a sex offender is likely to commit a crime, and gives the CCOs – and members of the public – a false sense of security by knowing the location of sex offenders but not their intentions or what they are doing. Prison officials concede that GPS monitoring is not the sole solution.

"We've said all along that no technology, including GPS, can prevent an offender from committing a new crime. It can, however, help our officers hold offenders accountable for where they've been. Before GPS, it was more difficult to know if an offender had been somewhere he is not allowed to be," said Dept. of Corrections spokesman Chad Lewis.

GPS monitoring is a useful tool because it might alert a CCO to changes in a sex offender's normal pattern, triggering a closer look at what the offender is doing. There are two types of monitoring: active and passive. Active includes real-time tracking of an offender's movements, while passive involves after-the-fact verification, such as once a day. The CCOs in King County use passive monitoring.

The GPS program was initiated at the urging of Governor Chris Gregoire after

Zina Linnik, a 12-year-old Tacoma girl, was murdered by a sex offender in 2007. Prison officials implemented mandatory GPS monitoring for the state's most dangerous Level 3 sex offenders on October 2, 2008. Currently, over 120 high-risk offenders are monitored via GPS in Washington State. Most are Level 3 or homeless; a few are Level 2 with special needs.

The GPS ankle bracelets buzz or vibrate when a sex offender enters an exclusion zone such as a park or school, or a permissible inclusion zone such as the offender's home or work place. Each

monitoring device costs about \$1,500; at least 27 states require GPS tracking for released sex offenders.

Theo Lewis said most offenders don't commit a crime while being monitored. If they remove the tracking bracelet, a nationwide warrant is immediately issued for their arrest. Such was the case with a Snohomish County sex offender who was later captured in Texas after trying to abscond. Still, the CCOs would rather have a boring day. ■

Sources: *Seattle Times*, *CNN*

Secret Red Cross Report Reveals Medical Personnel Collusion in CIA Torture

by Matt Clarke

A leaked confidential report issued by the International Committee of the Red Cross (ICRC) in February 2007, concerning the treatment of fourteen "high value detainees" in CIA custody, revealed torture and collusion by medical personnel in the prisoners' mistreatment.

In September 2006, the CIA moved fourteen high value guerrilla suspects to the military prison at Guantanamo Bay, Cuba. In October and December 2006, members of the ICRC interviewed the fourteen detainees, who were being held in isolation. They had had no opportunity to communicate with each other to concoct a story. Nonetheless, the details they provided of their time in CIA custody were extremely consistent and depicted what the ICRC described as torture and cruel, inhumane or degrading treatment – all in contravention of international law.

The fourteen detainees were initially arrested in foreign countries by those countries' police or security forces, often with American personnel present. They were subjected to harsh conditions in the country of their arrest, then transferred to a CIA prison in Afghanistan (likely Bagram Air Force Base near Kabul), where they typically received the worst treatment of their detention. They were then moved between one and four times to other CIA-operated "black site" facilities.

The transfers by themselves were a degrading ordeal. The detainees would be stripped naked, hooded, handcuffed,

shackled and strapped to a type of horizontal or reclined gurney. A suppository was inserted in their rectums and they were placed in diapers. Headphones with music were used to mask external sounds and conversation. The transfer destination was never disclosed to the prisoners, although all recognized Afghanistan as their second location and some recognized Guantanamo as one of their prior locations after their final transfer. During the transfers, which sometimes lasted many hours, the prisoners were given no access to water, food or a toilet.

All fourteen detainees were subjected to continuous isolation and incognito detention for the duration of their stay in CIA custody, which lasted between 16 and 54 months. They were not allowed to talk to anyone except their interrogators; the guards wore masks to conceal their identities and kept communication to an absolute minimum. The detainees had no access to lawyers or consular officials. Most had no access to news of the outside world and no one was initially informed of their detention, not even their families or the Red Cross.

The detainees were deprived of exercise and access to fresh air. They also were deprived of appropriate hygiene facilities and items such as showers, soap, toothbrushes, toothpaste, toilet paper, towels, outer clothes, underwear, blankets and mattresses, and were denied access to a Koran except in conjunction with interro-

gation to reward perceived cooperation.

Many of the fourteen detainees were subjected to harsher types of ill-treatment and torture, including suffocation by water (water boarding); prolonged stress positions by shackling the prisoner's hands to the wall above his head so that his feet barely touched the ground, forcing him to stand on the tips of his toes; use of a neck collar as a handle to beat the head and body against a wall; beatings with fists and kicking; confinement in tiny boxes that did not allow standing, sitting or lying down; months of prolonged nudity; sleep deprivation using loud noise and cold water; exposure to cold temperatures; prolonged shackling of the feet and hands; forced shaving of hair and beards; deprivation of solid food for weeks; and threats of further mistreatment of the prisoner or his family. One prisoner was subjected to all of these torturous tactics, including being water boarded eleven times and continuously shackled for 19 months.

Some of the fourteen detainees reported that medical personnel were present during the torture, performing functions such as monitoring blood oxygen levels during water boarding and measuring the amount of ankle swelling caused by prolonged standing stress positions. Medical personnel told interrogators to continue the torture or to pause; they also performed examinations prior to and immediately after the detainees were transferred to other locations, and treated torture-related injuries.

The role of medical personnel in furthering the mistreatment and abuse of the prisoners was especially disturbing. The ICRC report specifically found that the primary purpose of medical personnel was not to protect the prisoners but rather to support the interrogators and facilitate torture. The report was unable to conclusively determine whether the medical personnel were physicians or other types or medical professionals, but it found their actions constituted a violation of international law and "a gross breach of medical ethics." The use of medical personnel to supervise the torture of political prisoners is a long standing American practice extending back to at least the 1950s.

The report concluded, "The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture."

The ICRC condemned the disclosure

of its "strictly confidential" report, which was published on the *New York Review of Books* website on March 15, 2009, because the organization depends on guarantees of confidentiality to persuade governments to allow inspections of detention facilities and access to prisoners. "We regret information attributed to the ICRC report was made public in this manner," said Red Cross spokesman Bernard Barrett.

On September 6, 2006, President Bush had announced that there were no more detainees in the CIA interrogation program, but did not discontinue the program. The U.S. has refused to disclose the identities and fates of prisoners who passed through the program other than the fourteen detainees who were transferred to Guantanamo Bay and interviewed by the ICRC. President Obama has issued executive orders that purport to limit the use of interrogations to non-coercive methods listed in the Army Field Manual.

CIA spokesman Mark Mansfield said the agency's director, Leon Panetta, had "taken decisive steps to ensure that the CIA abides by the president's executive orders." Regardless, it seems unlikely that the officials who ordered, condoned, performed and facilitated the torture of the fourteen detainees profiled in the ICRC report, including medical personnel, will be held accountable for their actions.

In August 2009, the U.S. military agreed to provide information to the ICRC concerning prisoners held at secret short-term detention camps in Afghanistan and Iraq; however, the military will not provide the Red Cross with access to those detainees. ■

Sources: *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, *New York Review of Books*, *Washington Post*, *Christian Science Monitor*

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Florida Law Enforcement Officials on the Wrong Side of the Law

by David M. Reutter

“We’re a law-respecting, law-abiding community. ... We teach our children to respect and look up to men and women who wear badges, and that’s the way it oughta be,” said Florida state senator Don Gaetz. But the way it “oughta be” and the way things are do not always coincide.

Numerous incidents in Florida indicate that just because someone wears a law enforcement badge does not mean they are deserving of respect. In fact, corrections and sheriff’s officials involved in recent scandals are in some cases headed to prison or jail themselves, or have joined the ranks of the unemployed.

Senator Gaetz’s comment came after Okaloosa County Sheriff Charlie W. Morris and his director of administration, Teresa Adams, were arrested by federal marshals. At the time of their arrests in February 2009, Morris was president of the Florida Sheriffs Association.

Morris and Adams “created fictitious bonuses to sheriff’s department employees,” according to a statement from the U.S. Department of Justice. “[T]he employees were directed to return all or a portion of the bonuses in the form of cash or cashier’s checks under the pretense that these returned funds were to be used for charitable purposes,” but the money was actually misappropriated.

While Adams turned herself into authorities, Morris was arrested by federal agents in Las Vegas. The charges against him included theft or bribery involving programs receiving federal funds, wire fraud, deprivation of rights to honest services, engaging in monetary transactions in property derived from specified unlawful activity, and conspiracy to commit these offenses. Following Morris’ arrest, Governor Charlie Crist suspended him as sheriff of Okaloosa County.

On August 11, 2009, Morris was sentenced to 71 months in federal prison and three years supervised release after pleading guilty to six charges; he also was ordered to pay \$212,537.53 in restitution and forfeit \$194,002 in property. Adams received a 3-year sentence with three years supervised release, plus the same amount in restitution and forfeiture. See: *United States v. Morris*, U.S.D.C. (N.D. Fla.), Case No. 3:09-cr-00046-LC.

PLN previously reported that Prison

Health Services (PHS) had filed suit against the Sarasota County Sheriff’s Office (SCSO), alleging that former sheriff Bill Balkwill had awarded a three-year, \$9 million contract to Armor Correctional Health Services after receiving gifts from the company, including expensive dinners and a fishing trip. PHS, which was providing medical care at the Sarasota County jail at the time, contends that Balkwill gave the contract to Armor without competitive bidding. [See: *PLN*, Jan. 2009, p.36; March 2008, p.44].

In late January 2009, a sheriff’s official went to Balkwill’s home with a court order for his personal computer. Balkwill said he had a laptop that he would relinquish after he had saved some personal photographs. It was later learned that the laptop was bought by the SCSO in 2006 for \$2,600; before leaving office, Balkwill and IT Director Jeff Feathers signed paperwork stating the laptop was “obsolete,” worth only \$10 and should be recycled. Instead, Balkwill took it home with him.

Investigators determined that Balkwill had deleted 11,000 files from the laptop; he claimed he had removed the files because they contained confidential anti-terrorism information. A computer obtained from former Armor CEO Doyle Moore also had files that were deleted (Moore previously had been convicted in Massachusetts of felony tax evasion). Balkwill denied any wrongdoing, but prosecutors are now considering criminal charges for theft and destruction of public records. Feathers has since resigned from the sheriff’s office.

When the electricity went out at the Florida State Prison on April 8, 2009, prison guards decided to impose some good ol’ boy punishment on 53-year-old prisoner Darrell Stanberry. Believing that the video cameras were not working due to the power outage, six guards pulled Stanberry out of his solitary confinement cell and beat him.

The cameras, however, were on a backup battery, and another guard’s tip led prison officials to check the video footage. As a result, guard Charles Reames resigned before he could be fired. Another five guards were terminated, including Lt. William Hinson, Sgt. Anthony Reed, Sgt. James Coleman, Sgt. Richard Kross and CO Raymond Williams. Five more prison

employees were placed on administrative leave.

“I want to be crystal clear about this: I will never tolerate inmate abuse. I will take swift action, decisive action anytime it occurs,” said Florida Department of Corrections (FDOC) Secretary Walter McNeil. “My goal is to rid the Florida prison system of the handful of employees with this mindset.”

On June 15, 2009, Kross was charged with battery on an inmate and submitting inaccurate, incomplete or untruthful information to investigators. He was booked into the Bradford County jail, pleaded non-guilty and was released on his own recognizance. The State Attorney’s office said charges against the other guards were being considered.

One Putnam County jail guard was fired and disciplinary action was taken against 8 others in June 2009, due to negligence in failing to perform their job duties. Further, the jail’s director of corrections, Major Paula Carter, resigned. These actions resulted after two prisoners escaped in April 2009 and went on a crime spree that included a murder.

Prisoners Doni Ray Brown and Timothy Wayne Fletcher absconded by using a vehicle jack from a jail transport van to rip out a combination toilet and sink in their cell, which opened a hole that they used to escape. The jack and handle were brought into the facility from two different transport trips, and went undiscovered for almost two weeks because guards had failed to conduct searches as required by policy. The Sheriff’s Office said there had been a “significant failure in the supervision of personnel in the jail,” and that “many of the jail operating procedures have been overlooked or ignored for quite some time – some for several years.” Brown and Fletcher were captured three days after their escape and now face murder charges.

Lee County jail guard William J. Edwards, 23, and another suspect were arrested at a car dealership on January 25, 2009 and charged with burglary, possession of burglary tools and petty theft. “While disappointing to say the least ... the events of this weekend involving a ... Lee County corrections officer being arrested proves the resolve of local law enforcement that nobody is above the law,”

said Sheriff Mike Scott.

In Gregg County, jail guard Paul Lynn Smith, 36, was charged with official oppression for assaulting prisoner Decorian Maurice Allen on March 29, 2009. Smith, who allegedly struck Allen in the face while moving him to another area in the jail, was released on \$2,500 bond.

On April 2, 2009, a Corrections Corporation of America (CCA) guard at the company's Bay Correctional Facility was arrested and charged with smuggling contraband into the prison. Sonja Ann Powell, 35, is accused of giving a cell phone to prisoners Francis Marshall and Frank Gomez. Both prisoners also face charges.

Leon County jail guard Charles Johnson, 24, was arrested on April 8, 2009 and charged with unlawful compensation during official duties. He was reportedly charging prisoners' family and friends \$5.00 for an extra 15 minutes of visitation time at the jail. He made \$40 before authorities put a stop to his entrepreneurial scheme.

On May 14, 2009, Hillsborough County jailer Joshua Spencer was arrested on charges of assaulting a teenage prisoner who had spat on him. Spencer was

charged with battery and official misconduct for repeatedly striking Sean Walker, 16, on the back of the head and then lying about the incident. Spencer was released on \$2,500 bond and has been suspended. The Hillsborough County Jail made national headlines last year when a guard was videotaped dumping a quadriplegic prisoner in a wheelchair onto the floor. [See: *PLN*, Jan. 2009, p.21].

Wakulla County jail guard Donald Barber, 61, was arrested in June 2009 and charged with offering crack cocaine to a confidential informant in exchange for sex. Barber was busted after he bought \$40 worth of crack from an undercover officer.

On June 22, 2009, Osceola County jail prisoner Angel Santiago tried to escape using a 9mm Sig Sauer that had been smuggled into the facility. He took guard Gerson Roche hostage and forced him to change clothes, in an apparent attempt to walk out of the facility in disguise. The escape was thwarted when another guard tackled Santiago. Roche resigned in August under threat of being fired; he was accused of violating jail policy by not having backup and not using proper restraints when he removed Santiago, a

maximum-security prisoner serving two life sentences, from his cell to make a phone call.

Osceola County jailer Michelle Hung, who had a personal relationship with Santiago, is accused of giving him the gun and two cell phones to facilitate the escape. Hung was arrested and charged with multiple felonies. [See: *PLN*, August 2009, p.50]. Previously, in January, another guard, Eric Sosa, 30, was arrested on charges of smuggling drugs into the Osceola County jail.

On June 22, 2009, FDOC prison guard Deborah Frisina, 51, attempted to buy prescription drugs from an undercover officer. She purchased Diazepam and also tried to buy Oxycodone, which she said was for her personal use to manage pain. Frisina was booked into the Polk County jail on multiple drug-related charges.

State prison guard Shamel Watson, 30, was arrested by sheriff's deputies on July 1, 2009 after he picked up a large quantity of marijuana and cocaine that he was going to smuggle into the Everglades Correctional Institution. Shamel obtained the drugs from an undercover deputy; he was charged with felony possession with

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Florida LEOs Break Laws (cont.)

intent to deliver, drug trafficking and receiving a bribe.

On July 6, 2009, former Florida State Prison guard Paul G. Tillis, 44, was sentenced to three years in federal prison and two years supervised release on a civil rights charge for pouring scalding water on prisoner Jerry Williams, causing second degree burns. Tillis had resigned prior to being convicted in January. [See: *PLN*, July 2009, p.17; Jan. 2009, p.50].

In July 2009, the Florida Dept. of Corrections announced that three CCA guards employed at the Gadsden Correctional Facility had been fired following an investigation. CCA guard Eric Conrad was suspected of having sex with a female prisoner five times, and a photo of the woman was found on his cell phone. William Wood had a photo of a different female prisoner, while the third guard, Anthony Curinton, was suspected of writing a personal letter to another prisoner. Although no charges were filed, the former guards may lose their law enforcement certifications.

Another incident, at the Union Correctional Institution, occurred in August 2009 when an unnamed prisoner was beaten by state prison guards. Four nurses, including one employed with the FDOC and three contract workers, were fired for not reporting the brutal attack; seven guards were placed on leave pending an investigation. The prisoner was reportedly hospitalized with "serious" injuries.

"I intend to bring the full resources of this agency to bear on the individuals responsible for this violent assault, including prosecution, termination and decertification, so they can never work in a correctional environment again," said FDOC Secretary McNeil. "There is no place in our profession for this depraved mindset."

McNeil also called for an investigation by the FBI into the beating. Previously, four guards at the Union Correctional Institution had been fired for assaulting another unidentified prisoner in April.

On September 8, 2009, Marion County sheriff's deputy Anthony Votta, 31, resigned after being charged the previous month with felony battery for assaulting his pregnant wife during a domestic dispute. Earlier this year, Votta was the subject of a child abuse investigation.

The above-described shameful inci-

dents have a common thread: They all involved law enforcement or detention officials who took an oath to uphold the law. Instead they used their positions for personal gain or to fulfill their own selfish or sadistic desires, thereby breeding disrespect for the law and for those who enforce it. After all, who can you trust when sheriffs, jailers and prison guards end up behind bars themselves? For additional examples of abuse and corruption involv-

ing Florida law enforcement officials, see: *PLN*, Oct. 2009, p.17; July 2009, p.47; and Jan. 2009, p.12. ■

Sources: *News Herald*, *Orlando Sentinel*, *WCTV*, *WUFT*, *Sarasota Herald-Tribune*, <http://correctionofficersgoingwrong.wordpress.com>, *Tampa Bay Online*, www.wesh.com, www.naplesnews.com, www.wjhg.com, *St. Petersburg Times*, *Ocala Star-Banner*, *Associated Press*, www.postonpolitics.com

Increasing Number of Prisoners Obtain Access to Email

by Brandon Sample

Federal and state prisons across the country are slowly beginning to offer email access to prisoners in addition to traditional postal mail service – in some cases limited to receiving email messages, and in others allowing prisoners to send replies.

Leading the charge is the federal Bureau of Prisons (BOP). The BOP, in conjunction with Advanced Technologies Group, an Iowa-based company that develops software solutions for correctional agencies, has developed a secure messaging system called the Trust Fund Limited Inmate Communication System (TRULINCS). TRULINCS allows prisoners to communicate directly with family members, friends, businesses and attorneys. The service operates without prisoners having direct access to the Internet.

TRULINCS is available at over a dozen BOP facilities; the system is scheduled to be implemented in all federal prisons by June 2011. Family members and friends can use the system by creating an account at www.corrlinks.com after they have been added to a prisoner's approved contact list.

TRULINCS is accessed through a workstation or kiosk that allows prisoners to compose messages and read email replies. Messages are limited to 13,000 characters (about 4½ pages), and cannot include attachments. Prisoners purchase time to use the system in blocks of 40, 100, 200, 300 or 600 minutes. Each minute costs five cents; prisoners can also print emails from a secure printing station for 15 cents a page. All messages are screened by prison officials.

There is no charge for members of the public who use TRULINCS to send and receive messages from federal prisoners.

The service is available for communicating with Iowa state prisoners, too, at a cost of \$.25 per email.

The TRULINCS system has been lauded for reducing incoming postal mail and contraband, decreasing the use of stamps as a form of currency in the prison setting, and providing better control over prisoner correspondence. TRULINCS is also largely self-funded through user fees and the BOP's Inmate Trust Fund, eliminating the need for taxpayer support.

Further, the BOP has acknowledged that providing prisoners with email access has a rehabilitative component, stating, "Electronic messaging has now become a standard form of communication within most American homes and businesses, and it can now be used to help inmates stay connected to their families. Strengthening or re-establishing family ties helps inmates improve the likelihood of a successful re-entry into the community, thus reducing the potential for recidivism."

While the TRULINCS email system has many benefits, there are some downsides. Messages sent to attorneys are not protected by attorney-client privilege. Additionally, prisoners are restricted from sending emails to certain addresses. They cannot, for example, send messages to the Department of Justice's Office of the Inspector General. Presumably, the BOP restricted the Inspector General's email address to make it less convenient for prisoners to report misconduct by prison officials. This *PLN* writer is allowed to use TRULINCS to send Freedom of Information Act requests to the BOP as part of a settlement in a federal lawsuit. [See: *PLN*, June 2009, p.20].

A different email system is being used by at least seven other states, including Colorado, Indiana, Kansas, Michigan,

North Dakota, Pennsylvania and Texas. Those states allow prisoners at some facilities to receive – and in a few cases send – electronic messages through JPay (www.jpayers.com). When emails are sent to prisoners using JPay, the messages are printed at the facility and then delivered, usually within 24 hours. The cost per email, which is paid by the prisoner's correspondent, ranges from \$.20 to \$.60. JPay claims that over 1 million prisoners use its electronic messaging service.

"We really try to make things as convenient to friends and family as possible, while at the same time on the department's point of view we try to streamline operations and save resources," said L.D. Hay, the company's chief marketing officer.

In addition to JPay, the Pennsylvania Dept. of Corrections uses several other email systems at different facilities, including Electronic Message Exchange (EME) and SECURUS. EME is also used at two North Carolina jails, the Snake River and Warner Creek prisons in Oregon, and the Pima County Detention Center in Arizona; the service charges about \$10.00 a month for sending and receiving up to 30 electronic messages.

SECURUS (www.4inmates.com)

offers email delivery at various jails in Illinois, Indiana, Texas, Ohio, Michigan, Maryland and Kansas, as well as the Kentucky Dept. of Corrections, the Maryland Correctional Institution for Women in Jessup, and six state prisons in Pennsylvania. Fees for the company's Secure Instant Mail start at \$.50 to \$1.00 per page; emails are printed at the facility and delivered to prisoners.

A smaller company, ICS Letters (www.icsletters.com), provides electronic messaging at two jails in Florida and one in Illinois. The firm previously offered email delivery at some Pennsylvania state prisons, but recently discontinued that service. ICS Letters charges \$.25 to \$.70 per page.

Although these electronic messaging systems are useful, consider that prisoners and their correspondents comprise the only constituency that has to pay for email, which is otherwise largely free to members of the public. While some would argue there are costs involved in prison staff having to review or print electronic messages, those costs are easily offset by staff not having to open and check postal mail for contraband. As with prison phone services, however, prisoners and their family members and friends who want to

stay in touch must pay for the privilege of doing so, even with email. ■

Sources: *Advanced Technologies Group*, www.themorningcall.com, www.bop.gov, www.corrlinks.com, www.jpayers.com, *Associated Press*

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LULAC Returns CCA Donation

by Matt Clarke

As the League of United Latin American Citizens (LULAC) prepared for a June 20, 2009 protest in Williamson County, Texas outside the T. Don Hutto Family Residential Facility, a secure immigration detention center run by Corrections Corporation of America (CCA), it was revealed that LULAC had accepted substantial donations from the private prison company.

According to LULAC's national convention programs for 2005, 2006 and 2007, CCA was a Patron-level donor for each of those years. Patron-level means a donation of \$10,000 or more; the company was also an exhibitor at the 2005 and 2007 conventions. Some critics said CCA's sponsorship of LULAC events dated back to 2002.

Jaime Martinez, a San Antonio labor activist and LULAC's National Treasurer, explained that he and LULAC President Rosa Rosales initiated the return of CCA's 2007 sponsorship funds as soon as they learned about disturbing conditions at Hutto – conditions that resulted in a lawsuit against the Immigration and Customs Enforcement agency (ICE), which led to much-needed reforms at the facility. [See: *PLN*, Jan. 2008, p.20; Aug. 2007, p.10]. Referring to the money as “tainted,” Martinez said LULAC didn't want CCA's sponsorship.

Before the controversy erupted over the maltreatment of immigration detainees at Hutto, including women and children, LULAC was on good terms with CCA because the company had a program for detainees to earn a GED equivalent prior to their deportation. CCA has been involved in immigrant detention for well over a decade. According to LULAC National Executive Director Brent Wilkes, CCA's most recent donation was used to sponsor a Latino law enforcement awards breakfast during LULAC's 2007 national conference.

“But when we found out about the Hutto facility,” said Wilkes, “we returned the funds. We felt very strongly that we didn't want to be associated with that.” Wilkes also noted that the inclusion of CCA on LULAC's current list of preferred companies was an oversight. “I imagine that's an old list,” he said. “That'll be fixed.”

Federal officials announced in August

2009 that immigrant detainee families would no longer be housed at the Hutto prison, and would instead be placed at a more suitable residential center in Pennsylvania. The move was part of a restructuring of ICE detention priorities. Hutto will continue to hold female immigration detainees, but not families or children.

ACLU attorney Vanita Gupta, who led the lawsuit over conditions at Hutto, expressed cautious optimism about the population change at the CCA facility. “The ending of family detention at Hutto is welcome news and long overdue,” she said. “However, without independently enforceable standards, a reduction in

beds, or basic due process before people are locked up, it is hard to see how the government's proposed overhaul of the immigration detention system is anything other than a reorganization or renaming of what was in place before.”

The last immigrant detainee families left Hutto in September 2009 after being deported, paroled or released from custody. Williamson County Commissioners voted on September 1, 2009 to end the county's contract with CCA, pending a new contract with ICE to house female detainees at the facility. ■

Sources: www.sacurrent.com, www.lulac.org, *New York Times*, *Associated Press*

Rape Victim and Family of Exonerated Man Who Died in Prison Become Activists

by Matt Clarke

Tim Cole achieved widespread recognition when he was exonerated 24 years after his arrest for the rape of a university student in Amarillo, Texas. Another man confessed to the crime and DNA tests proved that Cole was innocent. Unfortunately that didn't help him, as he had died while incarcerated on December 2, 1999.

Michele Mallin was the student who had been brutally raped; she had tentatively identified Cole as her assailant after the Amarillo police used a suggestive photo lineup and other questionable identification techniques.

Devastated by her unintentional role in sending an innocent man to prison, Mallin joined with Cole's family to obtain a posthumous exoneration. A Texas court did just that in a ruling issued on April 7, 2009, almost ten years after Cole's death, finding that he had been wrongly convicted. [See: *PLN*, July 2009, p.12].

Mallin has also lobbied the Texas Legislature to enact laws to increase the amount of compensation paid to exonerated prisoners (HB 1736, which passed), and to standardize witness identification procedures so witnesses cannot be manipulated by the police as she was. In an August 1, 2009 *Houston Chronicle* editorial, Mallin urged Congress to create a National Institute to oversee research on

the accuracy of forensic sciences and to set and enforce standards for the use and presentation of forensic evidence.

Equally important as regulating the use of forensic science in the courtroom is preventing the use of non-science by police officers. Tim Cole had come to the attention of police after they observed him briefly speak to a young woman on his way to buy a pizza. They sent an undercover policewoman into the pizzeria. Cole talked to her for about five minutes, was polite and gave her his real name. This was the opposite of the behavior exhibited by a serial rapist who had been preying on women in the area, who the police were trying to catch. Further, the rapist's victims had described him as a heavy smoker; Cole, who had asthma, did not smoke.

Nonetheless, the policewoman “felt” that Cole was the rapist. Police then lied to Cole to obtain his photo. It was a color Polaroid, but was used in a photo lineup shown to Mallin even though it looked very different from the black and white mug shots in the rest of the pictures. When Mallin gave a hesitant identification the police pressed her to make it definite, and wrote “that is him” on Cole's photo even though Mallin had said “I think that is him.” No one ever told Mallin that her assailant might not be in the lineup at all,

and she made the natural assumption that the rapist was in one of the photos.

On September 25, 2009, Cole's mother, Ruby Sessions, filed a lawsuit seeking answers from the police officers who had investigated the university rapes that resulted in her son's arrest, conviction and eventual death behind bars. She is not seeking monetary damages in her suit.

"You can't put someone in prison and let them die and then prove their innocence and say, 'OK, we're sorry,'" said Cory Session, Cole's half-brother. "You have to find out why it happened to make sure it never happens again. And that's the reason we're going to proceed with this."

A bill introduced by state Senator Rodney Ellis would have created an institute at Sam Houston State University in Huntsville, Texas to study the best practices for live and photo police lineups, to reduce the possibility of misidentification. The bill also would have required police agencies to develop written guidelines to implement the institute's findings.

Since most of the 39 (to date) DNA-based exonerations in Texas have involved faulty eyewitness identification, the Texas District & County Attorneys Association did not oppose the bill – though they had it

amended so that the police's failure to follow the guidelines would not disqualify a witness from testifying. However, the police officers' union strongly opposed the legislation. As a result, the bill, which had passed the House committee with a favorable recommendation and even made it out of the black hole of the Calendars Committee, died without having been brought to a vote.

One can only wonder why police officials would oppose a bill designed to improve identification procedures and reduce the risk of misidentification, unless they were already satisfied with the quality of their investigative techniques. For example, manipulating a witness's identification of a suspect who they "felt" was a serial rapist based on a short conversation in a pizza shop, as in Cole's case.

On October 13, 2009, lawyers, judges and other criminal justice experts attended the first meeting of the Tim Cole Advisory Panel on Wrongful Convictions. The panel was created by the Texas Legislature to provide recommendations for legislation to avert wrongful convictions. The panelists largely agreed on how wrongful convictions could be prevented, which has already been extensively researched – such as videotaped police interviews with

suspects, better police lineups, expanded access to DNA testing, and avoidance of jailhouse snitch testimony.

"We don't need to study it anymore," said Barry Macha, who represents the Texas District & County Attorneys Association. "We know what the problems are. We know what the solutions are. We just need to pass it."

Which puts the wrongful conviction ball back in the Texas Legislature's court. ■

Sources: *Associated Press, Houston Chronicle*

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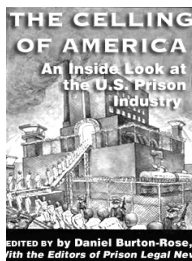
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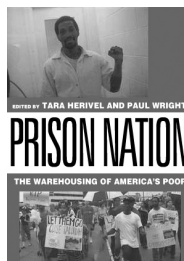
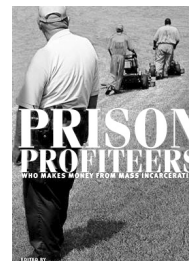
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Pennsylvania Prison Porn Ban Improperly Promulgated, but Not Unconstitutional

The Commonwealth Court of Pennsylvania has held that a state prison rule prohibiting prisoners from receiving or possessing materials containing pornography or nudity was invalid because it was not promulgated as a regulation pursuant to the Commonwealth Documents Law. However, a decision by the state Supreme Court issued the same day demonstrates that when prison officials promulgate the rule properly it will be difficult to challenge, because the Supreme Court found it was supported by a “legitimate penological interest.”

Earl R. Vance, Jr., a state prisoner, sought declaratory and injunctive relief to invalidate Pennsylvania Department of Corrections (PDOC) Policy DC-ADM 803.1, titled “Inmate Mail and Incoming Publications.” Under that rule, prisoners cannot receive or possess pornography, which is defined as material containing nudity that shows “human male or female genitals, pubic area, or buttocks with less than a fully opaque covering or showing the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.”

There was no dispute that the rule was implemented when the PDOC issued an amendment bulletin on December 29, 2005. The Commonwealth Court agreed with Vance that the rule was invalid because, under the Commonwealth Documents Law, the PDOC was required to give “public notice of its intention to promulgate, amend, or repeal any administrative regulation.” As the PDOC had failed to do so, the Court granted Vance’s motion for summary judgment and held that provisions of “DC-ADM 803.1, relating to inmate mail and incoming publications, that are different from the published and properly promulgated regulation at 37 Pa. Code § 93.2 are of no effect.” See: *Commonwealth Ex Rel. Vance v. Beard*, Commonwealth Court of Pennsylvania, Case No. 592 M.D. 2006 (July 20, 2009).

However, a decision by the Pennsylvania Supreme Court concerning the same PDOC rule, released on the same day as the ruling in *Vance*, indicates that prisoners’ victory on this issue may be short-lived. Before the Supreme Court was a challenge to DC-ADM 803.1 by prisoner Shannon Brittain, who argued the

anti-pornography rule violated his First and Fourteenth Amendment rights and respective state constitutional rights.

The Court analyzed Brittain’s claim under *Turner v. Safley*, 482 U.S. 78 (1987). The PDOC contended that it had a legitimate penological interest in the rule – to foster the rehabilitation of sex offenders like Brittain by discouraging prisoners from “objectifying” others rather than seeing them as individuals. Further, the PDOC said the rule prevented prisoners from fostering inappropriate sexual desires that were a precursor to sexually-offending behavior. Moreover, the rule prohibiting pornography was necessary to maintain a non-hostile work environment for prison employees.

As Brittain had only presented “self-serving, non-expert averments of fellow prisoners ... assert[ing] that they do not believe their rehabilitation and treatment are hindered by viewing pornography,” he failed to “raise a factual issue regarding whether the [PDOC’s] professional judgments to the contrary were unreasonable.” Therefore, the Supreme Court reversed the lower court’s order denying the PDOC’s motion for summary judgment.

The Court did not address whether the rule had been properly promulgated pursuant to the Commonwealth Documents Law (the issue in *Vance*), as that argument was not raised in Brittain’s suit. See: *Brittain v. Beard*, 974 A.2d 479 (Pa. 2009). ■

New Jersey DOC Report: Megan’s Law Costly and Ineffective

by Matt Clarke

In December 2008, the New Jersey Department of Corrections (DOC) submitted a research report on the practical and monetary effects of Megan’s Law to the U.S. Department of Justice. The report concluded that Megan’s Law, which requires registration of sex offenders and community notification of their presence, is both costly and ineffective.

The DOC undertook research to investigate “1) the effect of Megan’s Law on the overall rate of sexual offending over time; 2) its specific deterrence effect on re-offending, including the level of general and sexual offense recidivism, the nature of sexual re-offenses, and time to first rearrest for sexual and non-sexual re-offenses (i.e. community tenure); and 3) the costs of implementation and annual expenditures of Megan’s Law. The study focused on the ten years prior to and ten years immediately following the enactment of Megan’s Law, reviewed data on 550 sex offenders released between 1990 and 2000 and collected information on the implementation and ongoing Megan’s Law administration costs in the 15 counties that responded to a survey. Over the twenty-year period, 48 of the studied sex offenders were rearrested for another sex offense, a rate of 7.6%.

Among other things, the research revealed that Megan’s Law had no ef-

fect on community tenure or reducing sexual re-offenses. It also had no effect on the type of first-time sexual offense or re-offense or on the number of victims involved in sexual offenses. Sentences for sexual offenses were about twice as long prior to the enactment of Megan’s Law than thereafter, but amount of time served in prison remained about the same. Significantly fewer sex offenders were paroled after Megan’s Law was enacted than before.

The report stated that start-up costs for Megan’s Law totaled \$555,565 and, in 2007, administrative costs were \$4 million for the 15 of New Jersey’s 21 counties that responded to information requests. Implementation costs for all of New Jersey are estimated at \$714,457 and annual costs are estimated to be \$5,110,477.

The report concluded that, “[g]iven the lack of demonstrated effect of Megan’s Law on sexual offenses, the growing costs may not be justifiable.”

All 50 states and the District of Columbia have enacted versions of Megan’s Law after the federal government pressured them to do in 1996. New Jersey’s version of Megan’s Law requires sex offenders to register their addresses with local police stations within specified time limits. The public is then notified of the presence of

the sex offender in the neighborhood.

New Jersey has a three-tier community-notification system according to likelihood to re-offend. Tier one is for those least likely to re-offend and requires notification of only the victim and law enforcement. Tier one registrants received a low risk assessment score and are in therapy, employed and free of drugs and alcohol. Tier two requires notification of organizations, day care centers, schools and summer camps. Tier two registrants received a moderate to high risk assessment score, are unemployed, didn't comply with supervision, maintain their innocence, show no remorse, abused drugs or alcohol, stalked children and/or made threats. Tier three requires that the entire community be notified through posters and pamphlets. Tier three registrants committed a heinous crime, have a high-risk assessment score, exhibit repetitive and compulsive behavior, have a sexual preference for children, refuse or fail to comply with treatment, claim innocence and/or show no remorse.

The overall rate of sex offenses in New Jersey has fallen steadily from 51 crimes per 100,000 population in 1986 to 29 crimes per 100,000 population in 2005. The rate of decline was unaffected by the enactment of Megan's Law. ■

Source: *Megan's Law: Assessing the Practical and Monetary Efficacy*, Research & Evaluation Unit, Office of Policy and Planning, New Jersey Department of Corrections, December 2008, National Institute of Justice Grant #200-IJ-CX-0018

Electronic Court Records Permissible in Florida, but Restricting Disclosure is Not

Florida's Supreme Court has implemented rules related to court reporting services and the use of electronic recordings of court proceedings. The rules were promulgated as amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure.

The amendments to judicial administration are in Rule 2.535, and add several definitions. The amended rule defines "approved court reporter" and "civil court reporter" as persons "who meet the court's certification, training, and other qualifications for court reporting." An "approved transcriptionist" is someone "who meets the court's certification, training, and other qualifications for transcribing proceedings." These persons are considered officers of the court.

The amended rule defines an "electronic record" as the "audio, analog, digital, or video record of a court proceeding." While an electronic record is allowed, the "official record" is the transcript, "which is the written record of court proceedings and depositions prepared in accordance with" previously established requirements.

The rule also defines the ownership of "all records and electronic records" required to be reported at public expense or for the court's own use, which belong to the "chief judge of the circuit in which a proceeding is pending, in his or her official capacity."

The Supreme Court declined to adopt several proposed amendments that

"would restrict disclosure of electronic records except as permitted under certain circumstances in the discretion of the court or the chief judge." The Court said that "such a provision is overly restrictive and contrary to Florida's well established public policy of government in the sunshine and this Court's longstanding presumption in favor of openness for all court proceedings and allowing access to records of those proceedings." Thus, "these recordings should not be denied or left to the unfettered discretion of the trial court or the chief judge."

To safeguard confidential communications when electronic recording equipment is used in the courtroom, the Supreme Court adopted a rule that places a duty on all participants to "protect confidential information." For attorneys, "precautions may include muting microphones or going to a designated location that is inaccessible to the recording equipment." The court's personnel is supposed to provide notice to all participants that electronic recording is in use, who should safeguard information they do not want recorded.

The new rules became effective upon the filing of the Court's order on July 16, 2009. See: *In Re: Amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure – Implementation of Commission on Trial Court Performance and Accountability Recommendations*, 13 So.3d 1044 (Fla. 2009). ■

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\$100 Million Settlement in Michigan Prisoners' Sexual Abuse Suit

by David M. Reutter

A record-breaking settlement has been reached in a 13-year-old class-action lawsuit filed on behalf of female prisoners who were "subjected to sexual abuse, sexual harassment, privacy violations by male [prison] staff ... and/or retaliation for reporting such abuse while incarcerated in a Michigan Department of Corrections (MDOC) facility." The settlement covers four related cases and associated appeals.

This protracted litigation involved more than 3,000 docket entries at the trial court level, over 20 appellate proceedings, two trials involving 18 class members, mediation evaluations for 36 class members with extensive discovery, and multiple court-ordered arbitration meetings before the parties entered into a settlement agreement on July 15, 2009. *PLN* has previously reported on these proceedings. [See: *PLN*, Jan. 2006, p.12; Oct. 2008, p.42].

In addition to the monetary settlement, the litigation resulted in injunctive relief and policy changes. Beginning in 2000, the MDOC implemented policy and training reforms to improve investigations into complaints of sexual abuse and harassment of female prisoners by male staff. Further, male guards were removed from areas where they could view women while they were nude or partially clothed; this gender-based staffing policy was upheld by the Sixth Circuit Court of Appeals following a challenge by prison employees. [See: *PLN*, Sept. 2005, p.34].

The settlement provides that the MDOC must inform all prisoners, regardless of transfer or release from custody, of the results of investigations into their complaints of sexual harassment or sexual assault. Upon their release, the MDOC must notify all female prisoners that they can report such harassment or assault to the Michigan State Police. For one year after the settlement becomes final, the MDOC must establish and maintain a Retaliation Review Committee to evaluate allegations that female prisoners were subjected to retaliation in the form of "major and minor misconduct tickets issued against the prisoner."

Additionally, the MDOC must "facilitate outside, ongoing independent counseling/psychological treatment" paid for by the plaintiffs, and must "create a counseling group to provide group coun-

seling, at a minimum of once per year, for female prisoners who are victims of custodial sexual abuse." Any grievances alleging sexual misconduct must be referred to the MDOC's Internal Affairs, which will conduct semi-annual reviews of complaints involving prison staff. Finally, the MDOC's Director will appoint a staff member to prepare a report recommending policy changes to ensure the prison system is in compliance with the Prison Rape Elimination Act.

The \$100 million settlement will be distributed to class members over a six-year period, with 10% being paid in 2009 and 2010, 15% in 2011, 20% in 2012 and 2013, and the final 25% in 2014. The class members have been divided into four "pools," and members are eligible to participate in only one pool. Additional enhancement payments are available to some class members based on their participation during various stages of the litigation.

Pool 1 includes \$37 million to compensate members who were subjected to sexual intercourse, oral sex or digital penetration by male prison staff. Pool 2 includes \$11 million for class members who suffered cross-gender pat downs, groping by a male MDOC employee or attempted sexual assault, or were subjected to a male employee purposefully exposing his genitals and/or masturbating, or were forced to touch a male employee's genitals. Pool 3 provides \$5 million for members who were sexually harassed or subjected to prurient viewing while nude or partially clothed by a male MDOC employee.

Pool 4 is the trial pool, which consists of \$15.85 million. The ten class members who went to trial on February 1, 2008, resulting in a \$15.4 million jury award, will receive 67% of that amount. Another eight former prisoners who went to trial ending on November 12, 2008, which resulted in a jury award of \$8.45 million, will receive 65% of the judgment.

The funds in each pool will be distributed among the class members after determination of their eligibility. Pool 3 awards are limited to \$10,000 for each eligible member. The exact amount paid to each class member will be determined by a system of 2 to 10 points based on the severity of their injuries due to sexual abuse or harassment.

About \$1.6 million will be allocated for a court-appointed settlement claims master, and \$1.28 million was set aside for the additional enhancement payments. The 14 class representatives will each receive a \$10,000 enhancement, and eight class members will each get a \$15,000 enhancement for "exceptional contributions to the litigation."

Additional enhancements for class members are as follows: \$500 for completing a questionnaire; \$1,500 for completing interrogatories; \$5,000 for a deposition appearance; \$2,000 for participation in mediation; \$10,000 for appearing for one Independent Medical Examination (IME); and \$20,000 for appearing for two IMEs. Members of the trial pool are not eligible for enhancement payments.

More than 900 current and former Michigan prisoners filed claims to participate in the settlement by the August 14, 2009 deadline. Some, including class members who obtained the jury awards at trial, were not happy with the terms. "I didn't know about the settlement agreement until after it was accepted," said Wendy Garagiola, one of the plaintiffs who went to trial, who had been raped by a prison guard. "We're being told to settle for half of what the jury awarded us. I don't think it's fair at all."

The attorneys who negotiated the settlement noted that the jury awards were still on appeal by the state; thus, there was no guarantee they would stand, while the settlement was assured even if it meant less money for the class members who won at trial. The Court of Appeals had upheld the first jury verdict on January 27, 2009 in a lengthy unpublished opinion that referred to the state's appellate arguments as "muddled" and "disingenuous." See: *Neal v. Dep't of Correction*, 2009 Mich. App. LEXIS 182.

The prisoners' attorneys will receive \$28.7 million from the settlement for more than 30,000 hours of work over the past 13 years. The trial court preliminarily approved the payment of an additional \$1 million for expenses incurred during the protracted class-action lawsuit and for future costs to administer the settlement.

The case would not have lasted so long, of course, if state officials had not

fought it every step of the way, including an attempt by the Michigan legislature to retroactively exempt prisoners from the state's civil rights law in an effort to thwart the litigation. [See: *PLN*, Jan. 2008, p.40; March 2000, p.22].

"It's a good thing to put hopefully this chapter behind," said Deborah LaBelle, the lead attorney in the class-action suit.

"A hundred million dollars recognizes the kind of human rights violations that went on by the state. We have equitable relief that will go toward preventing this ever happening again."

In addition to LaBelle, the prisoners were represented by attorneys Richard A. Soble of Ann Arbor; Molly Reno of Whitmore Lake; Michael L. Pitt, Peggy

Goldberg Pitt and Cary S. McGehee of Royal Oak; and Ralph J. Sirlin and Ronald J. Roesti of Pleasant Ridge. See: *Neal v. Michigan Department of Corrections*, Circuit Court of Washtenaw County (MI), Case No. 96-6986-CZ. ■

Additional sources: *Associated Press*, *Michigan Lawyers Weekly*

\$2.7 Million Settlement for Oklahoma Double Leg Amputee Jail Prisoner

On April 9, 2009, a federal district judge in Oklahoma signed a consent decree memorializing a \$2.7 million settlement between an Oklahoma county and a former jail prisoner who suffered amputation of both legs while incarcerated at the jail.

Russell Mounger, a former prisoner at the Creek County Jail, was arrested for possession and manufacture of drugs. By the end of his two-week stay in the jail, he had been charged with assaulting a guard and was about to lose both of his legs. Mounger filed a 42 U.S.C. § 1983 civil rights suit in federal district court against the Sheriff of Creek County and five jail employees, alleging that mistreatment and denial of medical attention caused him to lose his legs.

According to the lawsuit, upon arrival at the jail, Mounger informed jail personnel that he required several prescription medications. He was never given the medications. The lack of medication allegedly caused him to deteriorate mentally and physically and act in a bizarre fashion which should have made his need for medical attention apparent. Instead of providing medical aid, guards at the jail allegedly beat Mounger twice, placed him in a restraint chair for longer periods than allowed under jail policy and held him in solitary confinement.

After two weeks of this kind of alleged abuse, Mounger was discovered to be weak, lethargic and unresponsive in his cell. He was transported to a hospital where it was determined that he was suffering from "severe metabolic derangement including hyperkalemia, hypotension, respiratory distress, severe metabolic acidosis secondary to acute renal failure, rhabdomyolysis due to disseminated intravascular coagulation, multi-organ failure, and venous thrombosis of the lower extremities." He was in a state of extreme hypothermia and his left


leg was deep purple below the knee with his right leg similarly discolored from the ankle to the foot. Both legs were pallored with diminished or absent pulses.


The physicians determined that Mounger was at significant risk of limb loss and possible death due to gangrene. Therefore, Mounger was kept at the hospital and stabilized for two days before his left leg was amputated at the hip. Mounger's right leg was amputated below the knee two weeks later. Mounger was in possession of a video tape showing him in a holding cell in obvious need of medical attention, but being ignored. Defendants agreed to settle the suit before filing motions or taking depositions. The settlement required that all defendants except the sheriff be dismissed from the suit and an award of \$2.7 million, including all fees, costs, attorney fees and medical expenses, be paid to Mounger. \$1 million was paid by the county's insur-

ance as \$200,000 to Mounger's lawyers and \$4,290.00 per month to Mounger for 20 years. The remaining \$1.7 million is to be paid by the county in three annual payments over the next three years and financed by a \$17 per \$100,000 increase in the county's property taxes. The county admitted no liability.

Mounger also accepted a plea bargain for 5-years probation on the charge of possession of possession of marijuana with intent to distribute. All other charges were dropped. Three jail employees were fired as a result of the Mounger incident and other jail employees resigned, possibly related to the incident. Mounger was represented by Tulsa attorneys Clark O. Brewster and Guy A. Fortney. See: *Mounger v. Toliver*, U.S.D.C.-N.D. OK, Case No. 08-CV-080-GKF-TLW. ■

Additional Sources: *Tulsa World*; *Associated Press*.

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\$750,000 Settlement in Chicago Jail Mass Beating Suit

On June 4, 2009, the finance litigation subcommittee of the County Board of Cook County, Illinois moved to settle a lawsuit over an alleged mass beating at the Cook County Jail.

In August 2006, Dwond Donahue, Jerome Fountain, Bernard Garcia, Darryl Johnson, Archie Mitchell, Bernard Rhone, Jarrod Rodriguez, Edward Sanders, Roberto Segura, Jamaar Turner, Raymont Davis and Eddie Macon were pretrial detainees incarcerated in Division V of the jail. According to the plaintiffs, another Division V prisoner severely beat a guard. Then, in an attempt to coerce information on who beat the guard, numerous other guards severely beat prisoners who had nothing to do with the guard's beating. The beatings included kicking and stomping and caused injuries such as bruises, broken bones and chipped teeth. Beaten prisoners who asked for medical care were allegedly denied it and punished with solitary confinement.

The dozen plaintiff prisoners filed a civil rights suit in federal district court pursuant to 42 U.S.C. § 1983. The suit alleged that guard supervisors condoned and participated in the mass beatings and that former Cook County Sheriff Michael Sheahan promulgated policies that encouraged the beatings and failed to properly train the jail's guards. It also alleged that evidence of the beatings was intentionally destroyed by the guard carrying the handheld videotape camera by pointing it away from the scene of the beatings when they were taking place. The policy of taping potential confrontations between guards and prisoners with a handheld videotape camera, instead of the fixed security cameras, allegedly encouraged abuse of prisoners by allowing the guard holding the camera to edit the tape by pointing the camera away when prisoners are abused by guards.

The FBI is investigating the mass beatings. In 2008, the U.S. Department of Justice-Civil Rights Division issued a scathing report on the jail's Southwest Side Complex, finding that guards systematically beat prisoners, prisoners were left unsupervised--allowing them to attack each other--and prisoners received very poor medical care.

Subcommittee Chairman Peter Silvestri (R-Elmwood Park) said the settlement was "the recommended amount from

the judge" and "driven by the lack of conclusive facts, the presence of a federal investigation, which will prevent necessary facts from seeing the light of day in state court and the potential cost of litigation." Silvestri ignored the fact that the Department of Justice had already made factual determinations and that the suit was in federal, not state court. He continued with typical political obfuscation.

"We can look at the same facts and come to separate conclusions," said Silvestri. "That's the problem."

Or, you can look at the same facts and decide that you had better settle quickly for three-quarters of a million dollars before a jury awards the plaintiffs a lot more

of the Chicago taxpayers' money. The state's attorney and sheriff's office have already signed off on the settlement. The reason is summed up nicely by Chicago attorney Richard Dvorak, who represents the plaintiffs.

"The plaintiffs have alleged that they were subjected to a mass beating and that essentially this was a jail guard riot in response to one of their own being beaten by an inmate." In settling the suit, the defendants did not admit to any wrongdoing. See: *Donahue v. Dart*, U.S.D.C.-N.D. Ill. Eastern Div.), No. 07-C-4534. ■

Additional Source: *Chicago Tribune*, www.chicagobreakingnews.com

Violence Against Blacks Decreases In The U.S.

by Gary Hunter

Violence against blacks in the U.S. has dropped dramatically over the last decade. The Bureau of Statistics for the U.S. Justice Department showed that, between 1993 and 2001, violent victimization of blacks decreased by nearly 57% and remained stable through 2005. These rates were consistent for all age subgroups except those over 50 years old.

Black males fared better (61%) than black females (53%) in the overall decline. However, urban areas still proved to be more dangerous for the black population than rural areas, violent victimization from 2001 to 2005 did not vary significantly between any of the subgroups. However, in 2005 black males were more likely to be victims of violent crimes than their female counterparts.

In 2005 blacks accounted for nearly half of all homicide victims. While blacks comprise only 13% of the U.S. population they accounted for 8,000 of the 16,500 murder victims that year. About 6,800 of those victims were males while 1,200 were females. Just as with non-fatal victims, murder rates for blacks increased with population density.

About 93% of single-victim/single-offender black homicides were committed by other blacks as compared to 85% for whites. Women were the offenders in about 10% of those homicides.

When subgrouped by "intimate partners" (current or former spouses, boyfriends/girlfriends and same-sex relationships)

homicide rates were only half (6%) that of whites (12%) in 2005. Gang related homicides was also slightly less (5%) for blacks than for whites (7%). However, over three-quarters (77%) of blacks were killed with some type of firearm as compared to only (60%) of white homicide victims.

Intraracial victimization was also the norm for most non-fatal violence committed against blacks. About 80% of black victims described their attackers as other blacks. Only 12% of black victims said they were attacked by whites.

Black males were, in most cases, victimized by strangers while black females were usually victimized by intimate partners. The rate of victimization among intimate partners was consistent along racial lines.

In about 31% of non-fatal attacks victims sustained some form of injury. However, more than half (54%) of those injuries did not require a sustained hospital visit. Most were treated either at the scene, at home (including neighbors or friends) or in an out-patient status. Still, over half (52%) of victims of violent attacks were likely to be treated as compared to only 37% of simple assault victims.

The study shows that, in 2005, about 72% of serious non-fatal violent crimes against blacks involved some form of weapon. About 35% of those victims actually reported being confronted with some sort of weapon. One in seven black victims of non-fatal violence were confronted

with a firearm. These statistics remained consistent from 1993 to 2005. This consistency also remained across the racial demographic when compared to whites and Hispanics. Whites and Hispanics had a slightly higher percentage of injury during non-fatal, violent encounters.

Black victims of violent, non-fatal crimes were less likely than almost every other racial group to have been attacked

by someone on alcohol or drugs. Only 25% of black victims perceived that their attacker was on drugs as compared to 27% for Hispanics, 31% for whites and 40% for Native Americans.

The rate for victims of gang initiated violence was similar among blacks as compared to Hispanics and American Indians but was lower than whites. However, these numbers are suspect since, in 43% of

non-fatal attacks, black victims could not say for sure if their assailant was a gang member or not.

The study did not postulate any correlation between the lower rates of violence and the aging out of the baby boomer population. ■

Source: Bureau of Justice Statistics Report; August 2007

Oklahoma Lawmen Charged with Sundry Crimes

by Mark Wilson

In separate incidents, five Oklahoma prison and jail guards have been charged with crimes ranging from contraband smuggling and assault to murder.

Former Sequoyah County jail guard Jarrod Anthony Yates pleaded guilty on October 2, 2008 to violating the civil rights of an unnamed detainee by punching, kneeling and stomping on the prisoner's head and face, resulting in a fractured orbital socket and other serious injuries. On January 14, 2009, Yates was sentenced to 21 months in federal prison and three years supervised release.

On February 2, 2009, Oklahoma County Detention Center guards Gavin Douglas Littlejohn and Justin Mark Isch were indicted by a federal grand jury for causing the death of Christopher Beckman, a prisoner at the facility.

Beckman had been arrested for drug possession, drunk driving and other traffic offenses, according to court records. On May 26, 2007, he suffered a seizure in his cell. Jail staff restrained him and transported him to the medical clinic.

The federal indictment accuses Isch of using Beckman's head to push open a steel door; it also accuses Littlejohn of

repeatedly striking Beckman in the head and face, causing his death. The two guards were charged with federal civil rights violations resulting in death by assault and excessive force.

An Oklahoma County Sheriff's Office (OCSO) statement said Sheriff John Whetsel had asked state and federal officials to investigate the "accident," and declared that it had "long been the desire of the OCSO to find out the truth about this incident."

The OCSO was "disappointed that these two former employees have found themselves in this situation," according to the statement. Despite facing life in prison without the possibility of parole for causing Beckman's death, Isch and Littlejohn were released on bond following their arraignment. They have not yet gone to trial.

The U.S. Dept. of Justice had criticized the Oklahoma County Detention Center in 2008, citing violence by prisoners and excessive force by guards.

In an unrelated case, on April 15, 2009, federal officials reported that former Choctaw County, Oklahoma deputy sheriff Ben Milner was indicted on three

counts of violating civil rights and two counts of obstructing justice.

The indictment alleges that on October 31, 2005, deputy Milner assaulted a man during a traffic stop. It also states that he assaulted two prisoners at the Choctaw County Jail on October 18, 2007, causing them bodily harm. Milner then falsified reports to provide false justification for his excessive use of force.

Finally, on February 26, 2009, former Bureau of Prisons guard Monte Walbaum was sentenced to one year on probation and 50 hours of community service for smuggling cigarettes, sunglasses and protein pills to prisoners at the Federal Correctional Institution in El Reno, Oklahoma.

At trial, Walbaum had tried to sell the jury a sympathy defense, claiming he committed the offenses because he was a single father raising a daughter and caring for his elderly mother. The jurors didn't buy it. He has since paid the government \$17,000 in proceeds netted from his contraband smuggling operation. ■

Sources: U.S. Department of Justice press releases, *The Edmond Sun*, UPI, Associated Press, PRNewswire

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Prison, Jail and Law Enforcement Corruption Continues in Georgia

by David M. Reutter

As the number of people in prison and jail in Georgia has increased, so too has the number of corruption cases involving detention and police officials. One of every 13 Georgians are under the watchful eye of law enforcement authorities – but based on the following incidents, one has to wonder who is watching the watchers.

Two days before Victor Hill's term expired as sheriff of Clayton County, Georgia, he filed for bankruptcy. Hill claimed that he could not afford to pay \$1.7 million in damages stemming from several lawsuits. In October 2008 he was ordered to pay \$475,000 to Mark Tuggle, the brother of a former Clayton County sheriff, for false arrest. He also faced five other suits.

After his bankruptcy filing it was discovered that Hill had stashed \$25,000 in a stock account that he failed to report to the bankruptcy court. In February 2009, federal trustee Tamara Miles Ogier ordered Hill to turn the money over so it could be divided among his creditors. Federal officials are also investigating whether Hill stole weapons and other sheriff's equipment before he left office.

The Clayton County Commission is reviewing a Las Vegas trip that Hill had charged to the county without the chairman's approval. He said he attended a conference during the trip. Hill's term as Sheriff was wracked with controversy, such as when he gathered dozens of employees into a jail holding area and fired them, reportedly for political reasons. A lawsuit over that incident settled for \$6.5 million. [See: *PLN*, May 2008, p.36].

In February 2009, six employees at the Hays State Prison were fired. Their names were not released; it was only reported that five were guards and one was a lieutenant. The firings were related to the October 13, 2008 escape of prisoners Michael Tweedel and Johnny Mack Brown. Brown was caught several weeks later after taking a woman hostage at knifepoint, while Tweedel remained at large for four months.

A 53-page report by the Dekalb County Sheriff's Office has exposed the shenanigans of former police chief Terrell Bolton. The report claims that Bolton falsified

documents to hide a \$32,000 Range Rover and a \$55,000 Mercedes that he kept for his personal use. The report also indicates that from September 2007 to December 2008, Bolton submitted paperwork claiming 448 hours – or 56 days – of unapproved comp time. The investigation led to his termination last February, which was upheld by county officials on August 17, 2009.

Accusing an entire jail of homicide is rare, but a coroner's inquest jury ruled that the Whitfield County Jail was guilty of homicide in the death of prisoner Barnes Thomas Nowlin, Jr. Nowlin, 39, was arrested on June 2, 2008 after he failed to appear in court on a charge of failing to stop and render aid. Two days later, Nowlin, a diabetic, was found dead in his cell. His death was caused by diabetic ketoacidosis (DKA), which is "a state of inadequate insulin levels resulting in high blood sugar and accumulation of organic acids and ketones in the blood."

"The man was incarcerated by Whitfield County, and on the second day he was incarcerated he expired," said juror Dewey Moss. "The jury felt he exhibited enough symptoms to be sick, but help was not provided. That's why we determined it to be a homicide." Regardless, the inquest jury's finding did not result in any charges.

In Fulton County, five jail guards have been arrested and indicted on federal offenses. The first arrest was on March 20, 2009 and involved a prisoner's death.

Jail guard Curtis Jerome Brown, Jr. was charged in the March 2008 beating of mentally ill prisoner Richard Glasco. Glasco was found unconscious in his cell after he had kicked and pounded on the cell door and window; he later died. Brown is also being investigated for beating a handcuffed prisoner in August 2007, leaving him bloodied and in need of medical attention.

In May 2009, federal officials arrested Fulton County jail guards Derontay Anton Langford and Mitnee Markette Jones on charges of filing a false report, making false statements to federal agents and obstruction of justice in the investigation of Glasco's death. Both were

released on \$10,000 bond.

Federal investigators arrested Fulton County Sheriff's Office lieutenants Robert W. Hill, Jr. and Earl Glenn in April 2009 on charges of violating the civil rights of a prisoner, obstructing justice, filing a false report and making false statements to federal agents. The charges related to an August 9, 2008 incident involving prisoner Christopher Trammell, who was beaten while in wrist and leg restraints. Hill was further charged with soliciting subordinates to commit civil rights violations.

Glenn pleaded guilty in August 2009 and Langford pleaded guilty on Sept. 22. Both are awaiting sentencing hearings. Brown and Jones are scheduled to go to trial in January 2010, while Hill's case remains pending.

"Whether or not we ultimately determine that other officers committed crimes against inmates, any officer who obstructs our efforts to find the truth should expect to be arrested and charged with serious federal felony offenses," said U.S. Attorney David Nahmias. "Our message to Fulton County jail employees should be clear: You don't want to be next."

On May 27, 2009, Sumter County Correctional Institution guard James Cooper was arrested by the Georgia Bureau of Investigation and charged with transporting unspecified contraband.

Finally, Joshua David Lowe, a former Polk County jail sergeant, was indicted by a federal jury on May 27, 2009 and charged with using excessive force on a prisoner. He pleaded guilty and was sentenced on October 15, 2009 to 21 months in federal prison and three years supervised release.

Apparently, not even the daily reminder of crime's consequences can keep some prison, jail and law enforcement officials from breaking the law and abusing their public positions. Then again, perhaps it is those very positions that make them feel untouchable, which leads them to commit crimes. ■

Sources: *Atlanta Journal-Constitution*, www.northfulton.com, *Associated Press*, www.northwestgeorgia.com, www.dcor.state.ga.us, www.wtvm.com, *FBI press release*

Catholic Mass and Sacraments Made Available to Louisiana's Death Row

Officials at the Louisiana State Prison (LSP), better known as Angola, have agreed to a settlement agreement in a lawsuit alleging a prisoner's rights were violated by the officials' mandating of Baptist religious television to the exclusion of all other religious programming. The settlement provided for the prisoner to watch and participate in Roman Catholic sacraments.

The lawsuit was filed in December 2008 by the ACLU of Louisiana on behalf of death row prisoner Donald Lee Leger, Jr. Prior to his imprisonment, Leger was active in his local Catholic parish. Being in the "Bible belt," the opportunities to practice his faith became difficult at LSP.

That inability, however, was not due to location alone, but was due in large part to the religious preferences of LSP officials. Warren Burl Cain had "decided[...] I would never again put someone to death without telling him about his soul and about Jesus." Warden Cain's

brand Christianity is Baptist.

Beginning in April 2007, LSP staff routinely set every television on death row to Baptist religious programming every Sunday. Often, two services were broadcast from the same church. Cain has appeared on such broadcasts, and one preacher blessed the warden, prison administration and staff.

From April 2007 to December 31, 2008, only one Catholic Mass was broadcast on LSP's death row television. In addition, Leger was not allowed to participate personally in Mass or to receive the Eucharist. When the Catholic diocese sent Leger a plastic rosary, LSP officials destroyed it.

Leger's requests or grievances to be allowed to watch Catholic Mass on television were denied. Assistant Warden Robert Butler suggested Leger should convert religions. When that did not happen, and Leger continued with his grievances, LSP officials took retaliation against him by transferring him to a tier with "a reputation for ill-behaved

prisoners who receive many disciplinary infractions." A false disciplinary report, which was later vacated, was written against Leger.

In settling the matter on July 1, 2009, Leger dropped his retaliation claim. The settlement provides that Leger will be given the opportunity to watch Catholic Mass on Sunday mornings and up to twice during the week. Prisoners will no longer be forced to listen to the religious services, for the volume will be fully muted while allowing them to listen with headphones on an FM channel. Leger will also be allowed to receive the Eucharist and to participate in confession with a priest, which cannot be listened to or recorded by staff. When possible, Mass will be made available on death row.

The settlement resulted in both parties voluntarily agreeing to dismiss the suit. The defendants also paid an undisclosed amount of attorney fees. See: *Leger v. State of Louisiana*, USDC, M.D. Louisiana, Case No: 08-CV-820. ■

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Nearly 15,000 California Prisoners Held in Long-term Isolation

by Michael Brodheim

The American Friends service committee (AFSC) has taken the position that “long-term solitary confinement is ineffective and inappropriate in all circumstances.”

In May 2008, it launched a national STOPMAX campaign calling for an end to the use of solitary confinement in U.S. prisons. In conjunction with the launch of that campaign, the AFSC Oakland office published *Buried Alive: Long-term Isolation in California's Youth and Adult Prisons*, authored by Laura Magnani.

Magnani traces the history of extended solitary confinement to the killing of a guard at the U.S. Penitentiary in Marion, Illinois in 1972. Following that incident, a large part of the penitentiary was converted into a Management Control Unit -- a “prison within a prison” -- one of only a handful of such units around the country at the time.

By 1997, according to a 2003 AFSC report, 45 states, the Federal Bureau of Prisons and the District of Columbia were operating one type of control unit or another. Notable among those was/is the Administrative Maximum Facility (ADX) in Florence, Colorado -- the first prison built specifically for the purpose of solitary confinement.

By 2006, more than 40 states had specially designed “supermax” facilities. In California, the first such prison -- Pelican Bay state Prison (PBSP) -- became operational in 1989. Purportedly designed to hold California’s “most serious criminal offenders,” PBSP now operates one of five security Housing Units (SHUs) in California; the others operate in Corcoran, Tehachapi, High Desert State Prison in Susanville and the Valley state Prison for Women in Chowchilla. Together, these SHUs now house over 3,500 men and nearly 100 women.

But this is only a fraction of the total population of California prisoners held in isolation. AFSC estimates that, on any given day, the total number of prisoners held in long-term lockdown exceeds 14,600 (approximately 8½ percent of the entire California prison population). Of that number, over 7,500 are in administrative segregation, over 2,500 in protective custody, over 600 in different types of psychiatric lockup and about 100 in death row’s adjustment center.

Magnani’s report describes the harsh conditions in supermax units. Those conditions include an “eerie silence” or its opposite, a “din of constant noise;” no windows; cell lights left on 24 hours a day; extremely limited contact with other human beings; 30 minutes a day of exercise alone in a cage; no jobs or programs; restricted visits, mail and telephone calls. It notes that approximately half of California’s SHU prisoners are “validated gang members;” that “validation” is an arbitrary process with few procedural safeguards; that it is often racially motivated (and consequently discriminatory); and that validated gang members, unlike behavior-based offenders, serve indeterminate SHU terms, potentially for the rest of their lives.

Conditions are so harsh that mental illness is common. A disproportionate number of SHU prisoners commit suicide. While several federal court cases have led to decisions ostensibly improving medical and mental health care -- both in the SHUs and throughout the rest of the prison system -- Magnani reports that the Department of Corrections “seems consistently to be able to undermine the decisions and delay compliance.”

Magnani’s report includes a brief overview of the conditions in California’s juvenile prisons. It found over 300 wards in restricted housing, in conditions that were “oppressive and punitive -- certainly not conducive to treatment and rehabilitation.” The report is available on PLN’s website. ■

PLN Associate Editor Attends ACA Conference

From August 7 to 12, 2009, the American Correctional Association (ACA) held its 139th Congress of Correction at the Opryland Hotel and Convention Center in Nashville, Tennessee. The theme of the conference was “Effective Re-entry is Good Public Safety.”

Founded in 1870 as the National Prison Association, the ACA is a non-government membership organization for corrections officials that advocates for criminal justice-related issues and policies. The ACA also provides accreditation for correctional facilities or agencies that meet its self-proclaimed standards. One of the ACA’s stated goals is to “Lead and serve as the voice for corrections.”

PLN associate editor Alex Friedmann attended the ACA’s last convention in Nashville, in 2006, to report on the event as a member of the media. When he contracted the ACA to likewise attend the August 2009 conference, however, he was rebuffed. Friedmann was informed by ACA Director of Government & Public Affairs Eric L. Schultz, Jr. that “To cover the conference and any events associated with the conference you’ll need to be registered as an attendee.” In other words, to report on the ACA conference as a member of the press, Friedmann would have to register like any other conference-goer -- at

a minimum cost of \$140 per day.

PLN declined to pay for the privilege of covering the conference; it was later learned that the ACA had allowed a local news agency to cover the event for free. In a phone conversation, Schultz said the ACA had restricted its media policy because they had been “burned” in the past by negative coverage. In response, Friedmann noted that might have “something to do with how you treat members of the press.”

Fortunately, Friedmann was able to attend through another organization that he works with, the Private Corrections Institute (PCI), which had an exhibitor’s booth at the conference. PCI opposes the privatization of correctional services and was the only group at the ACA event speaking out against private prisons. Which isn’t surprising, considering that many private prison companies were sponsoring the conference -- including Corrections Corp. of America (CCA), GEO Group, Keefe Group (which operates prison commissaries), Wexford Health Sources, Correctional Medical Services and Prison Health Services.

Several private prison officials stopped by the PCI booth, which was manned by Friedmann and PCI field organizer Frank Smith, to argue the merits of privatization. While they were doing so, videos of

major riots at private prisons were playing on two LCD monitors in the background, lending a certain sense of irony to the discussion.

In terms of professional development, the conference included a number of seminars on corrections and criminal justice-related topics. Some of the sessions were fairly straightforward, such as "Care of Aging and Infirm Inmates" and "Female Offender Management." Others catered to private prison firms, including "The Corporate Pathway to Addressing Retention and Creating a Great Place to Work." The seminar entitled "Tightening the Belt on Food Costs" was moderated by a representative from Aramark, the for-profit company that provides cut-rate correctional food services. [See: *PLN*, Oct. 2009, p.36].

As at most ACA conferences, though, the main attraction was the exhibitor's hall, where companies display a wide variety of corrections-related wares ranging from custom transport vehicles and restraint devices to prison construction services, perimeter fencing, suicide smocks and unbreakable food trays. Hot items this year included cell phone detection equipment.

Noticeably lacking among the dozens of vendors hawking razor wire and prison and jail management services, however, were resources in line with the conference's theme of re-entry. Only a small handful of exhibitors provided products or services intended to address re-entry issues for released prisoners. One of those companies now offers a re-entry manual, *Starting Out! The Complete Re-entry Handbook*,

for sale through *PLN*.

While the ACA promotes itself as an independent advocate for corrections professionals, it is influenced by funding from the private and public prison industry and income generated from providing accreditations. Further, there is no oversight over the ACA's accreditation process except by the organization itself. In the past, abusive conditions have been found at ACA-accredited prisons and jails. This may be because ACA standards are based on whether correctional facilities meet specified requirements and have certain policies – not necessarily on whether those policies are actually followed.

The ACA sometimes waives a facility's failure to meet standards, and routinely allows prisons or jails that fail

initial accreditation audits to re-apply. ACA officials have previously refused to reveal the number of correctional facilities that have failed audits or had their accreditation status revoked. According to its Form 990, in 2007 the ACA received over \$3.8 million in accreditation fees alone. Which amounts to a taxpayer subsidized prisoncrat lobby.

PLN has reported on the ACA for over a decade, noting the organization's ineffectiveness at providing oversight of prisons and jails, as well as the ACA's receipt of funding by the private prison industry and its de facto "sale" of accreditations to correctional agencies, both public and private. [See: *PLN*, Sept. 2005, pp.1 and 7; Sept. 2004, p.22; April 1995, p.19]. ■

\$2.2 Million Settlement: Murder by Washington State Community Service Releasee

On October 17, 2008, the State of Washington settled a lawsuit brought by the survivors of a man killed by a man on community supervision for \$2.2 million.

Andrew J. Brown, a state prisoner in Washington State, was convicted for robbery and received 12 months community supervision as part of his sentence. While on community supervision, Brown attacked and beat Darrell Johnson, who was on his morning walk in Tacoma, Washington. Johnson succumbed to his injuries five days later. Brown was convicted of Johnson's murder

and sentenced to 361 months in prison.

Johnson's estate, wife, son and four daughters filed a lawsuit in state superior court alleging that the Washington State Department of Corrections' gross negligence in its failure to properly supervise Brown was a proximate cause of Johnson's death. Without admitting liability, Washington State settled the suit for \$2.2 million. The plaintiffs were represented by Tacoma law firm Messina Bulzomi Christensen. See: *Johnson v. State of Washington*, Pierce Co. Superior Court, Wash., Case No. 08-2-0401-1. ■

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Mental Illness Prevalent Among County Jail Prisoners, Especially Women

by Gary Hunter

A random sampling of 2,000 prisoners in five county jails found that, on average, nearly 15 percent of male prisoners and 31 percent of female prisoners suffer from serious mental illness.

The study was headed by Dr. Henry Steadman, Ph.D and Dr. Steven Samuels, Ph.D of Policy Research Associates Inc. and Dr. Fred C. Osher, M.D. of the Council of State Governments Justice Center.

Five jails participated in the two-phase, data-collection study. Phase one ran from May 2002 through January 2003. Phase two ran from November 2005 through June 2006. Nine interviewers were trained to conduct the clinical research interviews for phase one and sixteen were trained for phase two. Intensive training, numerous practice interviews and graded evaluations ensured a high rate of aptitude reliability among interviewers. Many of the interviewers from phase one also participated in phase two.

Four jails participated in each phase. Phase one included Montgomery County Jail and Prince George County Jail in Maryland and Albany County Jail and Rensselaer County Jail in New York. Phase two included the same jails with the exception of the

Albany jail which was replaced by New York's Montgomery County Jail.

Screening for mental illness began with a Brief Jail Mental Health Screen (BJMHS) upon admission. During phase one data was collected from 11,438 male and female prisoners. Phase two included 10,562 prisoners.

Prisoners exhibiting symptoms of mental disorders during the BJHMS were then administered "a semi-structured clinical interview designed to assess the presence of selected DSM-IV axis I diagnoses (18)." (SCID) DSM-IV is the Diagnostic Statistical

Manual - IV Edition used by clinicians to identify behavioral disorders.

Interviewers screened participants for evidence of bipolar disorder I, II, various schizophrenic disorders, delusional and psychotic disorders. SCID interviews were conducted within 72 hours of admission into the jails. Signed consent forms were obtained from each of the participants. Overall refusal rate for both phases was

31 percent. The refusal rates were higher for women than men.

Percentages for admission of male prisoners with serious mental illness ranged from 12.8 to 20.8 percent in phase one and from 7.7 to 16.3 percent in phase two. Percentages for women ranged from 28.3 to 47.7 percent in phase one and 20.7 to 32.1 percent in phase two. Pooled data from both phases showed an average of 14.5 percent for men and 31 percent for women.

Generalizing the data, researchers concluded that "When these estimates are applied to the 13 million annual jail admissions in 2007...there were about two million (2,161,705) annual bookings of persons with serious mental illnesses into jails." Researchers noted that the prevalence rate for females is double that of men. This is troubling "given the rising number and proportion of female inmates in U.S. jails."

The study attributes the high rate of serious mental illness among prisoners to a "limited access to community behavioral

health services." This data is valuable for planning purposes and shows that jail administrators should anticipate that almost 15 percent of male admissions and 31 percent of female admissions will include some form of serious mental illness.

Several very debilitating axis I disorders such as anxiety disorder, which are also prevalent among prisoners, were not included in the study. Results call for "a clearer explication of the contributing factors and discussion of appropriate responses" not currently being met by our country's criminal justice system.

The study, considered the most reliable research in the last 20 years, advocates the need to "address the tremendous cost of incarceration" and "alternatives to incarceration where appropriate." It points out that incarceration only further deteriorates the condition of mentally ill prisoners. The problem only gets worse if those afflicted are sent to prison. [See PLN October 2008; pages 10 [40]. Source: *Prevalence of Serious Mental Illness among Jail Inmates.* ■

Michigan's Prison Industries Mismanaged and Unprofitable

by David M. Reutter

A June 2009 report issued by Michigan's Office of the Auditor General on the performance of the state's Bureau of Correctional Industries (BCI), which operates under authority of the Department of Corrections, listed several reportable conditions of management and operational failures. The report highlights failures of basic business management.

Under its mission statement, BCI is to "produce products and provide services that meet or exceed customer expectations while providing professional growth opportunities for staff and marketable job skills to prisoners." It produces a variety of products in its 28 factories in 13 prisons and 1 camp. The products and services are sold to governmental and nonprofit organizations throughout the nation, employing around 1,900 prisoners to fill approximately 1,000 full-time equated work assignments. BCI also employed 176 free-world employees as

of September 30, 2008.

In its first finding, the report found that between 2004 and 2008 BCI lost over \$7 million. While Michigan law does not require it to maximize profit, BCI is required to be "a total self-supporting system." In FY 2007-08, BCI had sales of \$41.4 million with a net loss of \$2.7 million. "The continuance of certain unprofitable activities could potentially threaten the sustainability of the entire organization," says the report.

Several circumstances attribute to the unprofitability. In the fiscal years between 2004-05 and 2006-07, 13 of BCI's 28 factories sustained financial losses in at least two fiscal years. Those 13 factories incurred supervisory costs that averaged 83% of sales, ranging from 9% to 355%. In contrast, the other 15 factories averaged only 29% of net sales for total supervisory costs.

Close to one-third of total prisoner

labor costs was for idle time or for time not attributable to production, totaling \$1,051,338 of the \$3,364,041 for total prisoner labor expenses. BCI responded to this by saying it does not have flexibility to reduce factory supervision or labor costs during periods of lower production. Additionally, BCI said it provides “intrinsic value” to prisoner labor by providing prisoners life skill development, preparing them for the next planned production cycle, teaching them how to maintain a job, teaching job skills, and reducing the potential for recidivism from these activities.

Amazingly, BCI had not developed and implemented a comprehensive business plan. “A well-developed comprehensive business plan may have helped to prevent or lessen the financial losses during the audit period,” states the report. The failure to have a business plan has kept BCI from identifying its non-State customers’ needs and from ensuring that jobs performed by prisoners provided marketable skills for outside of prison. Rather than assuring its training prisoners for viable employment upon release, BCI monitors “soft skills” such as arriving to work on time, following directions, and putting forth a consistent effort while at work.

Next, the Auditor General found waste in BCI’s scheduling and utilization of its trucks and drivers for delivery of products and services. BCI lease rates for each truck and tractor/trailer combination were \$1,370 and \$1,722 respectively.

BCI has no coordination or fixed routes for the trucks operating out of its distribution center operations other than agribusiness and laundry, which have fixed routes. This has resulted in employee overtime, excess travel and duplication of delivery points, and idle trucks. The annual cost of the trucks alone was estimated at \$69,004.

Another contributor to the financial losses was a basic in business: price setting. Michigan law requires BCI to set its prices to at least recapture all direct and indirect costs. Despite that, of the 92 top dollar sale items in BCI factories as of April 14, 2009, 23 of those products and services were priced below cost without justification for the prices. “The prices for these items ranged from 1% to 92% below cost with an average of 22% below cost,” states the report. “Also, 16 of the 23 items priced below cost were from six factories that reported losses in fiscal year 2005-06 and fiscal year 2006-07.” Most mystifying is the fact that for 19 of those 23 items “BCI had recalculated product costs but had not adjusted the selling prices.”

A missing component of its business is not having in place a Continuous Quality Improvement (CQI) process. A CQI will allow BCI to measure the outputs and outcomes of its operations, evaluate the achieved level of performance, compare actual data with desired performance, and provide more useful reporting data to management.

Missing from BCI’s operations was a comprehensive marketing strategy. It

had no formal marketing plan, it had in place no measurable and quantifiable goals for its sales division, and sales staff training was not developed. BCI did not monitor its sales staff’s marketing efforts, it had not utilized all available sources to identify potential customers, and it had not surveyed its current and potential customers to identify additional business opportunities.

Finally, BCI failed to actively survey its customers to determine whether its products and services met or exceeded customer expectations. The Auditor’s own surveys found that 66% of customers found quality to be excellent or good. The results found that 38% of potential customers were not familiar with BCI products and services, and many were not even aware they were eligible to purchase BCI products and services.

To its credit, BCI agreed with most findings and agreed to implement the recommendations. Whether it actually does so remains to be seen. The Michigan Office of the Auditor General June 2009 report, *Performance Audit of the Bureau of Correctional Industries, Department of Corrections*, is available on PLN’s website. 📄

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AMA Study Finds Link Between Confinement and Hypertension

An American Medical Association (AMA) study found that incarceration is associated with future hypertension and left ventricular hypertrophy (LVH) among young adults. Untreated, this can lead to increased cardiovascular disease (CVD) mortality.

Researchers conducted “a longitudinal investigation of CVD risk factors and subclinical coronary disease in a population of black and white men and women aged 18 to 30 years at baseline in 1985-1986.... The study enrolled 5,115 young adults, who were recruited from 4 U.S. cities.” Only 4,350 subjects who participated in the study for at least five years were included in the analysis.

Seven percent of participants (288) reported having been incarcerated. “Black men and less-educated participants were most likely to have a history of prior incarceration.” Additionally, former prisoners “were more likely to report family earnings below 200% of the federal poverty line, smoking, illicit drug use, and excessive alcohol consumption compared with those without incarceration history.”

The study “found that a history of incarceration is associated with a significantly elevated risk of future hypertension and with LVH.” Three to five years after incarceration, those 23 to 35 years old had a 12% incidence of hypertension, compared with 7% among those without an incarceration history. “Subgroups with the highest rate of incarceration – black men and less educated participants – showed significant associations between incarceration and incident hypertension.”

Researchers found that increased substance abuse or obesity, and lower socioeconomic status did not account entirely for the hypertension risk among former prisoners. Rather, the increase may be due to “increased hostility or stress among individuals with prior incarceration that has been shown to increase the risk for hypertension and ultimately atherosclerosis. The stress of incarceration may increase catecholamine or stress hormone levels that lead to hypertension, or incarceration may cause lasting dysregulation of these hormones that might lead to the development of hypertension later in life at faster rates.

Study results “suggest that hypertension and associated LVH in young former inmates may contribute to the previously

observed increased risk of CVD death after their release.”

Only 17 percent of former prisoners, compared with 41 percent of non-incarcerated participants, obtained medical treatment for their hypertension seven years into the study. Those with an incarceration history “were less likely to have insurance, access to health care, or be using antihypertensive medications. Current and former inmates with chronic diseases such as hypertension typically fall at the intersection of 2 poorly functioning health care systems: the correctional health care system and the public safety net health care system,” researchers found. “Neither health care system is well equipped to take care of the growing population of individuals with chronic medical conditions who cycle in and out of both systems. Ninety percent of those released from jail are uninsured and lack financial resources to pay for their medical

care in the community.”

Researchers suggested that “detention in jail, where health care is constitutionally guaranteed, may present a prime opportunity to screen soon-to-be released inmates for hypertension and to link inmates with chronic conditions to health care services in the community on release.”

“While incarceration is not a traditional risk factor for CVD, our results suggest that a history of incarceration should be understood as part of the risk profile for the development of hypertension and LVH in young adults,” wrote researchers. Further study was recommended as to “the true effect of the type, frequency and intensity of incarceration on the development of hypertension, especially given the high rates of recidivism nationwide.”

See: *Arch Intern Med*/Vol. 169 (No. 7), Apr. 13, 2009, www.archinternmed.com. ■

Judges: Umpires They Are Not

by *Brandon Sample*

U.S. Supreme Court Chief Justice John G. Roberts famously said during his confirmation hearing that judges are like umpires, each calling balls and strikes as they come. But is that really a fair comparison? “Batters” like Kevin Phelps and other prisoners who are fighting their criminal cases will tell you that judges are anything but umpires.

For eleven years, Phelps’ habeas petition has languished in the “netherworld” of the federal courts, going back and forth between the district court and the U.S. Court of Appeals for the Ninth Circuit. It has never been heard on the merits.

Phelps’ journey is unfortunately a familiar one for many prisoners. In the name of “efficiency,” “parity” and “judicial economy,” courts have increasingly placed excessive reliance on empty formalism – often at the expense of ensuring that justice is served. Such was the case with Phelps.

Convicted of murder in 1994 after two hung juries, Phelps sought federal habeas relief in 1998. The district court, however, dismissed his petition as untimely under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), finding it had been filed 15 days late.

Phelps appealed and the Ninth Cir-

cuit affirmed the district court. See: *Phelps v. Alameda*, 2000 U.S. App. LEXIS 5954 (2000). His petitions for rehearing, rehearing en banc and certiorari to the U.S. Supreme Court were all denied. Ordinarily that would be the end of the road.

However, shortly after Phelps lost his appeal, different panels of judges on the Ninth Circuit concluded that petitions like Phelps’ that had been dismissed on timeliness grounds were in fact timely under certain circumstances. The appellate court issued a published ruling to that effect in *Bunney v. Mitchell*, 262 F.3d 973 (9th Cir. 2001) [*PLN*, Dec. 2001, p.21].

Phelps went back to the district court and filed a Rule 60(b) motion that argued his original habeas petition was timely – as he had maintained all along – based on the Ninth Circuit’s decision in *Bunney*. In a results-oriented ruling, the district court again denied Phelps relief. According to the court, his Rule 60(b) motion was an unauthorized successive habeas petition barred under the AEDPA.

Phelps tried to appeal that decision, but the Ninth Circuit dismissed his appeal. See: *Phelps v. Alameda*, 366 F.3d 722 (9th Cir. 2004). His petitions for rehearing and rehearing en banc were denied. Eleven months later, the U.S. Supreme Court

decided *Gonzalez v. Crosby*, 545 U.S. 524 (2005), which held that not all Rule 60(b) motions are successive habeas petitions.

In light of *Gonzalez*, Phelps again sought reconsideration in the district court. Amazingly, the court again denied his motion, stating only that Phelps had “failed to set forth any cognizable ground to warrant reconsideration of the court’s prior order.”

Phelps, now proceeding pro se, appealed to the Ninth Circuit. The appellate court initially declined to issue a certificate of appealability but agreed to hear the appeal upon Phelps’ motion for reconsideration. This time, whether by sheer luck or happenstance, he received a panel that took notice of the injustices in his case.

Determining that Phelps was indeed entitled to relief under Rule 60(b), the Ninth Circuit held that the courts which had previously considered his petition – including prior appellate panels – had forgotten “the incessant command of the court’s conscience that justice be done in light of all the facts.” The Court of Appeals called Phelps’ frustrating journey through the judicial system “the epitome of our obsession with form over substance.”

The Court also praised Phelps, saying,

“At every stage of this case over the past decade, Phelps has pressed all possible avenues of relief, has been remarkably undeterred by the repeated and often unjustified setbacks he has suffered, and has put forward cogent, compelling, and correct legal arguments, at times doing so without the benefit of professional legal advice.” The Ninth Circuit concluded that the state’s position opposing Phelps’ most recent appeal was “meritless.”

Accordingly, the case was remanded with instructions that the district court consider the merits of Phelps’ habeas petition. See: *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009) [PLN, Oct. 2009, p.8].

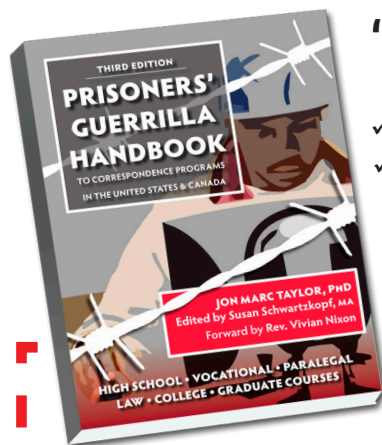
On remand, the district court appointed counsel to represent Phelps. The state, apparently not satisfied with the decade-plus delay in reaching the merits of his petition, unsuccessfully moved for rehearing en banc in the Ninth Circuit. The state then filed a petition for certiorari with the Supreme Court, which remains pending.

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If judges are like umpires, as described by Chief Justice Roberts, then Phelps’ eleven-year odyssey through the federal courts is an indication they are sometimes blind. Though that does not necessarily mean they should stop calling balls and strikes in the cases that come before them. As Lee Weyer, who umpired the 1982 World Series, once quipped, “being blind never stopped me from umpiring before.”

Additional source: *The Spokesman-Review*

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Class Action Alleging Unconstitutional Michigan Indigent Defense System Survives Summary Judgment

Michigan's Court of Appeals has upheld the denial of a summary judgment motion filed by state officials in a class action lawsuit that claims indigent defendants subject to felony prosecutions in trial courts in three Michigan counties have been, are being and will be denied their state and federal constitutional rights to counsel and the effective assistance of counsel.

The "highly-detailed complaint" alleged that the indigent defense systems in place for Berrien, Genesee and Muskegon Counties "are underfunded, poorly administered, and do not ensure that the participating defense attorneys have the necessary tools, time, and qualifications to adequately represent indigent defendants and put the cases presented by prosecutors to the crucible of meaningful adversarial testing."

The alleged inadequate performances by various court-appointed defense attorneys included "counsel speaking with plaintiffs, for the first time, in holding cells for mere minutes prior to scheduled preliminary examinations while in full hearing range of other inmates; counsel advising plaintiffs to waive preliminary examinations without meaningful discussions on case-relevant matters; counsel failing to provide plaintiffs with police reports; and counsel generally neglecting throughout the entire course of criminal proceedings to discuss with plaintiffs the accuracy and nature of the charges, the circumstances of the purported crimes, and any potential defenses."

The class action suit further alleged instances of "counsel entering into plea negotiations without client input or approval; counsel perfunctorily advising plaintiffs to plead guilty as charged absent meaningful investigation and inquiry; counsel improperly urging plaintiffs to admit facts when pleas were taken; and, counsel not preparing for hearings and trials, nor engaging in any communications with plaintiffs concerning trials." The complaint named the State of Michigan and Governor as defendants.

The defendants moved for summary judgment based on governmental immunity and other justiciability theories. The trial court denied the motion on grounds that the alleged facts were sufficient to survive summary judgment, and the Court of Appeals affirmed on July 11, 2009.

The appellate court found that the defendants were not entitled to governmental immunity, that they were the correct defendants, and that the Circuit Court had jurisdiction and the authority to enter declaratory relief, prohibitory injunctive relief and some level of mandatory injunctive relief.

The Court of Appeals noted that it "may and must" engage in a protection-

ary role where litigation encompasses unconstitutional conduct by the executive and legislative branches. "If not by the courts, then by whom?" the Court asked, rhetorically. "We are not ruling that a constitutional failure has in fact occurred here, but it has been alleged and must be judicially addressed." See: *Duncan v. State of Michigan*, 284 Mich.App. 246 (Mich. Ct. App. 2009). ■

Massachusetts Man's Estate Resolves Wrongful Conviction Suit for \$14.1 Million

by David M. Reutter

In July 2009, the estate of a man who served over 18 years in Massachusetts prisons for a murder and robbery he did not commit reached a \$3.4 million settlement with 5 of the 6 insurers for the Town of Ayer. Damages of \$10.7 million were later assessed against the sixth insurance company. None of which will help Kenneth Waters, the wrongly-convicted former prisoner who spent almost two decades behind bars, because he died in 2001.

The story of Waters' conviction and subsequent exoneration in the heinous murder of Katharina Brow is a drama that would make a compelling Hollywood movie – though it was a tragedy for everyone involved in the case.

Brow was found stabbed to death in her mobile home on May 21, 1980. She had suffered over 30 stab wounds; a struggle was obvious, as blood was found throughout the home. Robbery was determined to be the motive of the crime after it was learned that money was missing from Brow's pocketbook and a ransacked linen closet.

Crime scene investigators were able to recover several latent fingerprints left in blood on a water faucet and a toaster, several strands of hair from Brow's hand, and blood that presumably came from the person who killed her. Kenneth Waters' name came up during the investigation into the murder, which occurred between 7:00 and 10:45 a.m. However, investigators were able to exclude him as a suspect.

Using time cards from the local diner where he was employed, Waters proved that he had worked a double shift and did not leave the diner until 8:30 a.m. with a

waitress, who drove him home. Waters then changed clothes and attended a court appearance at 9:00 a.m. He did not leave the courthouse until 11:00 a.m.

Further, detectives examined Waters' entire nude body and discerned that he had no scratches or injuries and thus could not have left blood at the crime scene. Waters also passed a voice-stress test, and the hair evidence excluded him. For the next 2 ½ years the case lay dormant.

In October 1982, based on a tip provided by Robert Osborne, a paid informant, Ayers Police Department (APD) chief Philip L. Connors and Nancy Taylor-Harris, an officer/dispatcher, began questioning Waters' ex-girlfriend, Brenda Marsh. They told Marsh that if she did not corroborate Osborne's claim that Waters had confessed to the murder, they would charge her as an accessory and she would lose her children.

Based upon Marsh's falsified testimony, Waters was arrested on an affidavit sworn out by Taylor-Harris, who then did everything she could to convict him. Taylor-Harris not only falsely testified at grand jury proceedings and Waters' criminal trial that only "smeared" fingerprints had been recovered, but she hid from both the defense and prosecution all logs, memos and other evidence related to the fingerprints – which would have cleared Waters – and his proven alibi defense.

Waters was convicted and sentenced to life. His motion for a new trial, appeal and petition for a writ of habeas corpus were all denied. Waters suffered terribly in prison; he tried to commit suicide several times and engaged in self-mutilation. He

had anxiety and panic attacks, as well as severe depression. He contracted hepatitis C. A therapist who had counseled Waters noted with frustration, "It is difficult to help this man as all he wants to do is prove his innocence to me."

Waters' sister, Betty Anne, never gave up hope. A mother of two with a GED who worked as a waitress and bartender, she served as a paralegal for her brother's attorneys and put herself through law school. She began representing Waters, and located the blood evidence from the crime scene in a box in a courthouse basement. She filed a motion that preserved the evidence. Betty Anne and the Innocence Project then obtained permission for DNA testing, which led to Waters' exoneration. After 18 years, 5 months and 3 days, Kenneth Waters was released from prison on March 15, 2001. Sadly, he died just six months later due to a head injury resulting from an accidental fall.

An investigation by the State Police into Taylor-Harris' malicious involvement in Waters' case revealed how she had concealed the evidence that would have cleared him, not only during the prosecution but also during post-trial proceedings. Both Connors and Taylor-Harris have since retired from the APD.

Betty Anne, as the administratrix of Waters' estate, filed a federal lawsuit against the Town of Ayer, Philip Connors and Nancy Taylor-Harris for her brother's wrongful arrest, prosecution and conviction.

\$91,059.83 in Damages, Fees and Costs Awarded to Alabama Prisoner Beaten by Guard

An Alabama federal jury has awarded \$20,000 in compensatory and punitive damages to a man beaten by a guard at the Lauderdale County Detention Center (LCDC).

The lawsuit alleged that LCDC guard Philip King was aware that prisoner Kris Thornton had previously undergone brain surgery, and thus was more vulnerable than the average person to a head injury. Apparently for that reason, King focused on Thornton's head when he assaulted him without justification on March 11, 2005.

The beating involved King grabbing Thornton and slamming his head against a wall between six and eight times. He then pushed Thornton to the floor and stomped on his head twice. As a result, Thornton's ears and nose began bleed-

ing. The defendants did not contest their liability, and a \$3.4 million settlement was reached with 5 of the town's 6 insurers on July 13, 2009. The district court held a bench trial to determine damages against the sixth insurer, Western World Insurance Group, which had refused to settle.

In a September 17, 2009 ruling, the court awarded damages in the amount of \$1,000 per day that Waters had been incarcerated, amounting to \$6,729,000. The district court also awarded \$1 million "for physical illnesses and injuries incurred during and because of his incarceration" and \$3 million for "mental anguish, pain and suffering," for a total of \$10.729 million.

Representing the estate in the civil suit were New York-based attorneys Barry C. Scheck, Monica Shah, Robert N. Feldman and Deborah Cornwall of Nuefeld, Scheck & Brustin LLP, and Massachusetts attorneys Howard Friedman and Jennifer L. Bills of the Law Offices of Howard Friedman. See: *Waters v. Town of Ayer*, U.S.D.C. (D. Mass.), Case No. 04-cv-10521.

As to whether the story of Waters' wrongful conviction and eventual exoneration might make a good movie, Hollywood apparently thought it would. *Betty Anne Waters*, starring Sam Rockwell and Hilary Swank, is scheduled to be released in theaters in 2010. 📺

Additional source: *The Boston Globe*



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\$16.5 Million-Plus Settlement in Oklahoma City False Conviction Case

by Matt Clarke

On June 8, 2009, a federal district judge in Oklahoma City signed a judgment following the settlement of a suit awarding a man who spent 17 years in prison for a rape he did not commit over \$16.5 million from the forensic chemist and district attorney involved in his conviction.

In 1983, a woman was kidnapped and raped in Oklahoma City. During the rape, the woman bit her assailant's penis. He ran away screaming in pain. At that time, David Johns Byson was a 28-year-old accounting student. He went to the hospital for treatment of an injury to his penis twelve days after the rape. Because of the injury, police arrested him and charged him with the rape. Ignoring Byson's strong alibi, differences in the penis injury from that reported by the woman who was raped and differences in Byson's appearance and state of sobriety from that of the assailant, then-Oklahoma City District Attorney Robert Macy pressed forward with the prosecution. Based upon Oklahoma City Police Department chemist Joyce Gilchrist's testimony that hairs left at the crime scene could only have come from Byson and his blood type matched the crime-scene sample, he was convicted and sentenced to 75 years for rape and 10 years each for kidnapping, oral sodomy and anal sodomy.

After hearing about DNA testing in 1988, Byson began seeking testing. Macy blocked the testing by resisting it in court, having Gilchrist issue a false memorandum that the evidence had been destroyed, and promulgating an administrative policy to prevent prisoners from getting post-conviction DNA testing. In December 1996, an investigator working for Byson discovered that the evidence had not been destroyed, but was in the court clerk's file. Byson renewed efforts to get DNA testing. Macy tried to get the evidence destroyed.

In 1997, DNA testing exonerated Byson. Nonetheless, Macy and Gilchrist resisted his release by making up fantastic crime scenarios in which he could have still been the rapist with semen coming from another man found in the victim. In 1999, Byson was re-

leased from prison on bond. On June 24, 2003, the charges against Byson were dismissed.

Courts have found that Gilchrist "acted to either alter or intentionally lose evidence" in the false conviction of another Oklahoma man, Curtis Edward McCarty. Macy has been implicated in the false convictions of McCarty and Clifford Henry Bowen. It has also come out that Gilchrist had made poor grades in the sciences while studying forensic sciences and her former instructor compared the hairs from the crime scene and discovered that Byson should have been excluded based on them in 1982. A department review board found that Gilchrist mismanaged the laboratory, behaved dishonestly, mishandled evidence and case files, made offensive remarks in writing and verbally, failed to establish or follow proper lab procedures, brought flawed forensic work

to court and testified to undocumented conclusions.

Gilchrist reacted to the criticism with arrogance and denial of wrongdoing. Even though she and Macy settled the Byson case, they claim not to have done anything wrong and have criticized the forensic scientists--especially those working for law enforcement--who spoke out against Gilchrist's work.

An indemnity battle is brewing. Oklahoma City carries a \$10 million insurance policy for damages caused by an employee, but claims Gilchrist violated city policies and shouldn't be indemnified. Macy settled separately and that settlement is sealed. Byson was represented by Norman attorneys Mark Barrett and Michael Salem. See: *Byson v. Macy*, U.S.D.C.-W.D. OK, Case No. CIV-05-1150-F. ■

Additional Source: *Oklahoma Gazette*

Former Alabama Judge Acquitted of Paddling, Sexually Abusing Jail Prisoners

by Mark Wilson

On March 27, 2009, former Mobile County, Alabama Circuit Court Judge Herman Thomas was indicted on 57 charges for allegedly checking young male prisoners out of the Metro Jail, taking them to his office, and paddling them on their bare buttocks or asking them to engage in sex acts. Seven months later, in what many considered to be an astonishing verdict, the ex-judge was found not guilty following a jury trial.

Thomas and his attorney, Robert "Cowboy Bob" Clark, had held a news conference to denounce the charges when they were filed. While speaking with the press in front of the jail, police walked up to Thomas, tapped him on the shoulder and took him into custody. He was released within hours on \$287,500 bond.

The indictment accused Thomas of kidnapping, extortion, assault, sexual abuse and sodomy involving nine different jail prisoners who had previously appeared before him on criminal charges

when he was on the bench. One defendant went before Thomas repeatedly before he was sentenced to prison; Thomas later ordered his early release, according to the *Mobile Press-Register*. A second indictment issued in August 2009 added more charges. After some of the charges were dropped, Thomas faced a total of 103 counts involving 14 victims.

Thomas had a furnished storage room set up as an office near his chambers in the courthouse, where he forced prisoners to expose their bare buttocks for "paddling and/or whipping," the indictment alleged. Several victims testified in affidavits and in court that Thomas asked to paddle them and engage in sexual encounters in the make-shift office. [See: *PLN*, Aug. 2009, p.6; Feb. 2008, p.30].

On March 9, 2009, Mobile County Circuit Court Judge Joseph "Rusty" Johnston had issued an order barring Thomas from his courtroom, writing that during Thomas' tenure on the bench he had "used his office to threaten criminal defendants with jail time, penitentiary time and pro-

bation revocations if they did not engage in sexual acts with him." Judge Johnston attached a disc under seal that contained "the interviews of three criminal defendants who [said they] were subjected to" such abuse by Thomas. On appeal, the Alabama Supreme Court declined to overturn Johnston's order.

Thomas denied the charges. While he admitted to removing young men from the jail and taking them to his office, he said he was counseling them to help them straighten out their lives. His attorney attacked the victims who had accused the former judge, all of whom had criminal records. "Everybody that's listed in the indictment is either serving life for murder or some other horrible crime," Clark said.

"This is racism at its very finest," he added. "Did you ever think of the fact that this is the only black circuit judge we've ever had in Mobile County and that the right-wing Republicans have gotten rid of him?" Characterizing the charges as "a high-tech lynching," Clark suggested that "the South hasn't changed all that much." He vowed to "fight till the last dog falls."

Mobile County District Attorney John Tyson, Jr. scoffed at the charge of racism. "In this case, as in every case, we try to react to the law and facts, and that's all," he said. "Anything else is outside our authority. I can assure anybody that's interested that this is not being pursued for some racial agenda." All of Thomas's accusers were black.

Rather than answer an ethics complaint, Thomas had stepped down from

the bench in October 2007. The complaint was dismissed after Thomas resigned; it did not allege any sexual abuse, but accused Thomas of "extrajudiciary personal contact" with defendants. His law license was suspended by the Alabama State Bar.

Eighty-two of the charges in the indictments were dropped before Thomas' trial, including all charges related to three of the victims. Some were dropped by the district attorney's office and others were dismissed by the court. Amid extensive local media coverage, Thomas went to trial on the remaining 21 charges on October 7, 2009.

Prosecutors portrayed Thomas as having a "Dr. Jekyll, Mr. Hyde" persona—a prominent and respected authority figure in his public life, and a sexual deviant who took advantage of vulnerable jail prisoners to satisfy his private desires. Thomas' attorneys painted the prisoners who said they had been victimized by Thomas as lying criminals. "He ain't no pervert," Clark said in his closing statement.

The last dog fell on October 26 when the jury returned a verdict of not guilty on seven of the charges and deadlocked on the remaining 14, which the trial court then threw out due to insufficient evidence.

The jury sided with Thomas despite testimony from the victims, DNA reports that semen from two of the prisoners had been found on the carpet in the judge's office, and testimony from one of the victim's mothers who said Thomas had asked her during a phone conversation for

permission to paddle her adult son.

"We are extremely disappointed," said Tyson. "We worked very hard in this case and we did what we thought was the right thing."

Three of the jurors later came forward with concerns about the verdict, saying the jury had reached a unanimous decision on only two of the seven charges where they had found Thomas not guilty. However, one of those jurors was unclear about the jury's deliberations and the other two refused to sign affidavits attesting to problems with the verdict. Prosecutors had failed to poll the jury at the conclusion of the trial.

The district attorney's office decided not to pursue the matter. "This case is over," said Tyson. "Congratulations to Mr. Thomas and to his legal staff."

Notwithstanding the not-guilty verdict, the Alabama State Bar is trying to revoke Thomas' law license, claiming he engaged in unprofessional conduct when he checked prisoners out of the jail and intervened in their cases. ■

Sources: *CNN, Mobile Press-Register, www.al.com, Birmingham News*

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Eight More Prison Closures in Michigan

Since taking office in 2003, Michigan Governor Jennifer Granholm has closed six prisons. To pare \$120 million from the state's budget, she recently decided to close eight more, including five minimum-security prison camps. The announcement of the closures on June 5, 2009 created an uproar in communities that have embraced the facilities as a way to boost their local economies.

One Michigan town even offered to take in terrorist detainees from Guantanamo Bay after it learned that its local prison, the Standish Maximum Correctional Facility, was scheduled to close. [See: *PLN*, Oct. 2009, p.28]. The facility shut down on October 31, 2009.

Despite having the highest unemployment rate in the nation due to the demise of the U.S. auto industry, Michigan's prison population has declined 7.3% since January 2007. After the closure of the eight facilities, the state's prison capacity will drop by 6,400 beds from its end-of-2008 capacity of 50,435. The prison population is presently around 46,400.

"Our top priority is public safety, and that is at the core of every decision we make in operating our state correctional facilities," said Michigan Department of Corrections (MDOC) Director Patricia Caruso. "But just as we are committed to the public's safety, we are also committed to spending their tax dollars wisely and in ways that make sense."

Those opposed to the prison closures said they were "shocked," and touted the usual scare tactics. "This is a dollar-driven corrections policy, not good public policy. Just opening the gates and letting out 4,000 prisoners – that image is something. People should lock their doors," said Mel Grieshaber, executive director of the Michigan Corrections Organization, the union that represents MDOC prison guards.

In fact, opposition to closing the prisons itself seems to be dollar-driven. "I think the prison brings in something like \$14 million a year to the economies of all five counties around here, so closing it will have a big impact on the area," noted David Munson, who owns the Summer Trail Inn about two miles east of the Standish facility. Most of the money that flows from prisons to the local community is in the form of payroll and utility payments.

In addition to Standish, the other facilities slated for closure included the

Muskegon Correctional Facility, the Hia-watha Correctional Facility and prison camps Ottawa, Cusino, Kitwen, Lehman and Whitelake. All but the Muskegon prison have since been shut down. The facility closures have resulted in the loss of around 200 jobs; the rest of the MDOC employees at affected prisons were shifted elsewhere.

Two of the eight facilities may remain in service, but not for the MDOC. Pennsylvania is seeking temporary out-of-state bed space for 1,500 prisoners, and is sending prison officials to examine the Standish and Muskegon facilities on November 19, 2009.

What happens to prisons after they close is also a matter of concern in light of what occurred at Camp Brighton, which shut down in 2007. The buildings at Brighton were stripped of all copper pipe and metal fixtures, and vandals shattered the windows that weren't broken by thieves.

Notwithstanding that potential problem, the state's prison closures are deemed not only necessary but a benefit of a 5-year-old initiative to reduce recidivism that has led to the dramatic drop in the

MDOC's prison population.

Michigan plans to spend \$60 million from the savings from the prison closures toward increased parole supervision. The state currently has over 21,000 parolees, the highest ever; however, parolees are committing fewer violations than when there were 15,000 on parole. Statistics like that, and a drop in crime rates since a peak in the 1990s, are resulting in government officials reexamining their usual "lock-em-up" mentality in these tough economic times.

Twenty-five states have cut spending on corrections in fiscal year 2009. "It's a trend we'll be seeing more and more of in coming months given the dire revenue situation states are in," said Sujit M. CanagaRetna, an analyst with the Council of State Governments. For more on prison closures nationwide, see *PLN's* April 2009 cover story. ■

Sources: *Associated Press*, *Detroit News*, *CNN Money*, *Iron County Reporter*, *Livingston Community News*, *Wall Street Journal*, www.mlive.com, *Detroit Free Press*, www.upnorthlive.com

Ohio Prison Employees Involved in Improper Relationships, Drug Smuggling, Sexual Misconduct

by Mark Wilson

Four Ohio prison employees resigned or were fired amid an investigation into their improper relationships with prisoners, while in unrelated incidents four state prison guards were accused of sexual misconduct, smuggling drugs and soliciting bribes.

The Lorain/Medina Community-Based Correctional Facility (CBCF), a secure rehabilitation and substance abuse treatment center for low-security Ohio prisoners, has come under scrutiny for inappropriate relationships involving staff members.

CBCF Executive Director Mike Willets offered few details about the investigation but suggested that "out there in the population it was a slow rumor that some people were getting preferential treatment, some people were getting this, some people were getting that."

One of those people was apparently

Program Director Sandra Wright, who joined CBCF in 1997 and rose in the ranks to one of the facility's top positions. Wright, formerly a juvenile probation officer, was suspended on August 21, 2008 and resigned less than two weeks later rather than attend "a predisiplinary hearing on allegations she had 'unauthorized relationships with residents' and other ethics violations."

Willets also ended a longstanding relationship with Wright's church, Worship Cathedral Inc., where CBCF prisoners had performed community service for several years. Questions had been raised about whether the work the prisoners were doing was appropriate. "There was work on perhaps some parishioners' houses," Willets admitted. He also acknowledged that Wright may have received discounts on merchandise she bought from a prisoner, including a television, but did not elaborate.

Two full-time resident advisors at CBCF also resigned during the investigation. Maxwell Wicks had worked at the facility since 2000 with very few infractions, but on September 8, 2008 he was "accused of exchanging sexual favors with current or former residents, using his position to secure 'privileges and advantages,' losing his objectivity, negligence, doing private work at the CBCF and dishonesty for failing to cooperate with an investigation." Rather than face a September 11, 2008 disciplinary hearing, Wicks chose to quit.

Deborah Donald, who was initially hired as a part-time cook at CBCF before being promoted to resident advisor in 2006, resigned on August 21, 2008. She had repeatedly skipped training classes over the past two years, and a performance review indicated that she "at times may be too close to residents."

On August 22, 2008, part-time resident advisor Cassandra Allen was fired from CBCF after less than two weeks on the job when she admitted during the investigation "to engaging in activities with current and former CBCF residents that violated the facility's code of ethics." She had previously worked as a case manager at the prison from 1999 until March 2008.

Representatives from the county prosecutor's office and Adult Probation Department had participated in the investigation, but Assistant County Prosecutor Dave Muhek declined to comment. Willets did not believe the investigation reflected poorly on CBCF, because "policing your own place makes it a bit more respectable," he said.

In an unrelated incident, Stephen Howard, 49, a state prison guard at the Warren Correctional Institute, was arrested on March 24, 2009 on felony charges of attempting to convey drugs

onto the grounds of a detention facility and possession of criminal tools. Howard had tried to smuggle marijuana into the prison in hollowed-out markers and a Subway sandwich. Two prisoners also were charged.

Iona D. Cowan, 60, resigned from the Lebanon Correctional Institution on June 12, 2009 after being interviewed by the Ohio State Highway Patrol. She was later indicted on four counts of sexual battery, based on allegations that she had sex with an unidentified prisoner on multiple occasions. She was released on bond.

Orient Reception Center guard Herb Edwards resigned in July 2009 during an investigation into whether he had solicited bribes to smuggle contraband into the prison, including cigarettes and clothing. According to news reports, Edwards, who worked as a mail screener at the facility, asked prisoners for money and a video game system in exchange for supplying the contraband items. He has not been charged.

Edwards was one of eight prison employees involved in a 2004 incident in which a prisoner was transported across the state while naked. He received a suspension as a result of that episode, and two other guards were fired.

Lastly, another Lebanon Correctional Institution guard was arrested on October 2, 2009, for attempting to smuggle marijuana into the facility. Dennis O'Rourke, 25, faces charges of attempting to convey drugs and child endangerment. O'Rourke was meeting with his supplier to pick up the marijuana when he was busted by State Highway Patrol troopers. He had his two-year-old daughter with him at the time. 📺

Sources: *The Chronicle-Telegram*, *Dayton Daily News*, www.enquirer.com, www.wbn-10tv.com, <http://statepatrol.ohio.gov>

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4,000 Kenyan Death Sentences Commuted to Life

by Matt Clarke

On August 3, 2009, Kenyan President Mwai Kibaki announced that he had commuted the death sentences of all 4,000 prisoners on Kenya's death row to life in prison. Explaining his rationale for this action, Kibaki said an "extended stay" on death row while awaiting execution caused "undue mental anguish and suffering, psychological trauma and anxiety." Kenya has not carried out an execution since 1987.

Kibaki insisted that the mass commutation did not mean that Kenya's judges would no longer be issuing death sentences. To the contrary, under Kenyan law capital punishment is required for murder, armed robbery and treason. One of the criticisms of the mandatory sentencing law is that a man convicted of stealing a chicken while armed with a stick would receive a death sentence.

Prisoners' rights activists and experts on Kenyan prisons noted that the actual effect of Kibaki's commutation might be more practical: it may help keep prisoners from being unruly and will allow the government to put them to work, with the added bonus of quelling criticism by international death penalty opponents. According to a presidential press release, exempting death row prisoners from the otherwise-mandatory work requirement in Kenyan prisons had led to "idleness and subsequent negative impact on prison discipline as recently witnessed in some facilities." That "negative impact" likely referred to the killing of two Kenyan prison wardens by death-sentenced prisoners earlier this year.

One would expect that lengthy delays before executions and Kibaki's mass commutation would thrill death penalty abolitionists. However, some human rights groups have observed that like former Kenyan President Daniel Moi, President Kibaki has merely moved the death sentences from the back end of the judicial process to the front end. In February 2009, United Nations Envoy Phillip Alston found a "systematic, widespread and carefully-planned strategy" of extrajudicial killings by Kenyan police forces that was almost certainly sanctioned by top government officials.

"We're living in a situation of massively heightened criminality and insecurity and we're also living in situation where,

due to failures in the criminal justice system, security services have resorted to extrajudicial killings as [a] way to manage rising crime," said Muthoni Wanyeki, director of the Kenya Human Rights Commission. "We might not have legal executions taking place, but we certainly have illegal executions taking place."

President Kibaki has refused to respond to criticism about extrajudicial killings by police officers, and was accused of making "woolly statements that amount to shoot-to-kill orders." As a result, hundreds of Kenyans suspected of committing crimes have been shot by police, resulting in de facto executions in the streets rather than on death row.

There is hope for a repeal of the death penalty during revisions to Kenya's national constitution, which is

currently under review. President Kibaki has called for the government to evaluate whether the existence of the death penalty is effective in deterring crimes. This seems unlikely. The crime rate in Kenya has skyrocketed, with robbery and carjackings common in Nairobi even when 4,000 condemned prisoners sat on death row, before Kibaki commuted their sentences.

According to Amnesty International, over 60 percent of all African nations have either abolished or no longer use capital punishment. South Africa's Constitutional Court ruled on June 6, 1995 that that country's death penalty was unconstitutional. [See: *PLN*, Oct. 1995, p.9]. ■

Sources: www.time.com, allafrica.com, www.amnestyusa.org

California Struggles to House Sex Offenders

by Michael Brodheim

When California voters approved Proposition 83 (Jessica's Law) in 2006, the non-partisan Legislative Analyst's Office estimated that enforcement of the law's provisions – which included GPS monitoring and banning sex offenders from living within 2,000 feet of a school or park where children "regularly gather" – would cost taxpayers "a couple hundred million dollars annually within 10 years."

State corrections officials responded to the passage of Jessica's Law by providing financial assistance to an increasing number of sex offenders who, unable to locate or afford scarce housing, would otherwise be left homeless, difficult to track and thus more likely to reoffend.

The cost to house sex offenders in California has increased significantly since Jessica's Law was enacted, with the state dishing out almost \$22 million in 2008 to place hundreds of paroled sex offenders in apartments and motel rooms – an almost ten-fold increase since mid-2006, before the law was passed. Although the housing assistance is considered a loan, few offenders are able to pay it back.

Officials have sometime put sex offenders in locations they later learned were prohibited under the vaguely-written law (which does not define "park" or specify

whether to measure the prohibited 2,000-foot zone by travel distance or by GPS measurements). In one case, parole officials in El Cerrito housed sex offenders at a Budget Inn that was within 700 feet of a park with a playground, until they realized they were in violation of Jessica's Law.

In the face of an unprecedented state budget crisis, corrections officials, noting with unintended irony that they are "not in the housing business," have announced plans to sharply scale back the housing payments and return to a practice of providing only limited, short-term assistance. No doubt, one consequence of the state's money-saving efforts will be to increase the already-swelling ranks of homeless sex offenders.

In the two years subsequent to the passage of Jessica's Law, the number of paroled sex offenders in California registered as "transient" ballooned from just 88 to over 1,250. Due to higher costs resulting from increased recidivism and re-incarceration of homeless sex offenders, little money is likely to be saved by the state's decision to limit housing assistance.

According to a December 2008 report by the California Sex Offender Management Board, "Residential instability leads to unstable employment and lower levels of social support. Unstable

employment and lack of social support lead to emotional and mental instability. Emotional and mental instability breaks down the ability to conform and leads to a greater risk of committing another sex crime.”

“I think it’s reasonable we provide that housing on a temporary basis, but we’re not going to pay for housing indefinitely,” stated Scott Kernan, undersecretary for adult operations for California’s prison system. “I’m not saying we’re going to put them homeless. But if you continue to pay for housing, the offender has no incentive to go out and find other housing.” Assuming, of course, that any suitable and affordable housing is available to be found. Although both state and federal courts have ruled that Jessica’s Law cannot be applied retroactively to offenders who committed crimes before the law was enacted [See: *PLN*, July 2007, p.27], Governor Arnold Schwarzenegger’s administration has chosen to adopt a broad, tough-on-crime interpretation of the measure, applying it to all registered sex offenders who return to prison for any reason. Of the California parolees who qualify for the 2,000-foot ban imposed by Jessica’s Law, it is estimated that over 90 percent committed their crimes before the law was passed; thus, an expansive application of the law imposes a significant drain on the state’s already overburdened budget.

The costs for re-incarcerating sex offenders who violate the stringent provisions of Jessica’s Law are expensive, too, but that hasn’t stopped strict enforcement of the law. Sexual Assault Felony Enforcement (SAFE) task forces have been formed in partnership with local and state police agencies to ensure compliance by sex offenders, including address verifications and searches of parolees’ homes. “Sex offenders need to know we’re watching them,” said Santa Clara County Sheriff Laurie Smith.

PLN has previously reported on problems associated with finding appropriate housing for sex offenders in California. [See: *PLN*, April 2008, p.30; Jan. 2007, p.24]. Recently, there has been an increased focus on sex offenders following the high-profile arrests of Phillip Garrido and his wife for kidnapping Jaycee Dugard, 11, in 1991 and sexually abusing her over an 18-year period. Garrido was a registered sex offender on parole supervision at the time of his arrest on August 26, 2009.

California has approximately 83,000 registered sex offenders. 📖

Sources: *Contra Costa Times*, *New York Times*, *Mercury News*, www.casomb.org

\$150,000 Settlement in Tennessee Jail Beating

Sullivan County, Tennessee has paid \$150,000 to settle the claim of a former prisoner who was beaten at the county’s jail. The suit alleged the sheriff’s department failed to properly train and supervise jail guards, deliberately placed the prisoner in a dangerous situation, and neglected to treat his injuries after he was assaulted by other prisoners.

In 2006, Nathaniel Robinson was taken to the Sullivan County Jail to serve an 18-month sentence for failure to appear and violation of probation. Robinson, an African-American, was placed in a cellblock with only one other African-American and about 35-40 white prisoners.

Robinson claimed in his subsequent lawsuit that it was “readily apparent” that “a number of white supremacist, gang related” prisoners were present in the cellblock. After “a racially motivated television program” aired on the morning of August 1, 2006, Robinson and the other African-American prisoner become the subject of racial slurs and threats.

For his own safety, the other African-American prisoner was moved by guards to a different cellblock, leaving Robinson as the only African-American in the unit. Shortly thereafter, Robinson was struck

in the back of the head; he woke up lying on the floor. Guards then moved him to another cellblock.

Robinson was given a medical evaluation but was returned to his cell without treatment. Three hours later he was found unconscious and transported to a local hospital, where he underwent two surgeries to repair a subdural hematoma. He woke up after six weeks, unaware of what had happened.

On August 11, 2006 a judge ordered Robinson’s release on furlough, while he was still hospitalized, which relieved the county of his medical bills because he was no longer in custody.

The settlement in this case was reached in February 2009. It provides for the outstanding medical bills to be paid from the \$150,000 settlement, with Robinson receiving the remainder. The amounts of the medical bills and attorney’s fees were not disclosed. Robinson was represented by Nashville attorney Benjamin E. Waters and Kingsport attorneys R. Wayne Culbertson and Julia C. West. See: *Robinson v. Sullivan County*, U.S.D.C. (E.D. Tenn.), Case No. 2:07-cv-00101. 📖

Additional source: *Times News*

**For Elizabeth Alexander, with the gratitude of your friends and colleagues
for**

your immeasurable contributions to the cause of human rights;

your courage in shining the light into dark prisons;

your vision in challenging government policies of mass incarceration;

and

**your selflessness in leading the work of the ACLU National
Prison Project, and of the broader community of prisoner advocates,
for nearly three decades.**

**You have given hope to countless men, women and children in our
nation’s prisons, jails and detention centers,**

**You have lessened their suffering,
and you have helped and inspired us all to follow your example.**

December 4, 2009 Washington, D.C.

News in Brief:

Brazil: At least five prisoners died and around 40 others were injured in a fire at the Joao Pessoa jail in northeastern Brazil in October 2009. According to a military police spokesman, prisoners had set the fire to protest another prisoner's transfer to a high-security facility.

California: In January 2009, Weusi McGowan was on trial for robbery and burglary charges in San Diego Superior Court. During the middle of his trial, McGowan pulled out a bag of his own feces that he had hidden in his clothing, rubbed it on his attorney and tossed it at the jury. McGowan was subsequently convicted of robbery and burglary, as well as two additional assault charges for throwing the excrement. He was sentenced on October 26 to thirty-one years in prison.

California: On September 3, 2009, police were called to the home of Michael O'Riley, a counselor at the Rio Cosumnes Correctional Center. Police discovered that he had been holding his wife hostage, denying her food and money, and sexually abusing her for nearly two years. O'Riley was arrested on a variety of charges, including sexual assault and kidnapping.

Colorado: Cesar Corzo, a former lead therapist at the Ridge View Academy, a youth prison, and his girlfriend Laura Perzinski were charged with sex- and drug-related offenses in March 2009. Perzinski allegedly had sex with two teenage boys at the facility, while Corzo was accused of providing drugs to juvenile prisoners, letting them view pornographic materials on his computer, and showing them pornography during group sessions (including a video called "Barnyard Babes"). The couple denied the allegations. Corzo said the complaints were made in retaliation for expelling boys from group therapy sessions, and Perzinski noted that she had passed a polygraph test and that one of her accusers could not identify her in a photo lineup.

Great Britain: In early September 2009, guards at the Ranby prison in Nottinghamshire discovered a copy of a master key made from a plastic knife during a routine cell search. The prison was placed on lockdown until all of the locks could be replaced at a cost of £78,000.

Hawaii: On October 16, 2009, James Gouveia was charged with manslaughter for killing fellow prisoner Monte Louis Young, Jr. at the Halawa Correctional Facility. Young and Gouveia were reportedly

arguing on the prison yard on October 14 when Gouveia began punching Young in the head. Young was taken to a local hospital where he died from his injuries.

Indiana: On October 6, 2009, unnamed prisoners at the Jennings County jail took three guards hostage, handcuffing and pepper spraying them. At least two of the guards were also stabbed. Officers from the Sheriff's Department, Indiana State Police and North Vernon Police Department confronted the prisoners in a hallway, subdued them with Tasers and freed the hostages. One of the guards, Walter Peace, was flown to an Indianapolis hospital; another was treated and released at a local medical center. The condition of the third guard was unknown.

Inner Mongolia (China): Qiao Haiqiang, Dong Jiaji, Gao Bo and Li Hongbin escaped from the No. 2 prison in Hohhot on October 17 by kidnapping and killing one guard and wounding another. The four prisoners, two serving life sentences and the other two awaiting death sentences, hijacked a taxi and escaped into the city. More than 6,000 officers participated in a region-wide search. On October 20, one of the escapees was shot and the others were captured.

Iowa: On October 20, 2009, Dennis Drake, the husband of Iowa Supreme Court Chief Justice Marsha Ternus, pleaded no contest to a charge of harassing a public official. Drake was accused of arguing with police on July 12 after they discovered his 19-year-old son, Rob, and six other teenagers drinking on the couple's property. Rob Drake later pleaded guilty to possession of alcohol as a minor. Ternus denied any knowledge that her son and his college friends were drinking while on her property, saying she was asleep at the time. Dennis Drake was fined \$65 and placed on probation for one year.

Kansas: John Manard was sentenced on October 5 to ten years in federal prison for felony possession of a firearm. Manard, who was already serving a life sentence in Kansas for murder, made headlines in 2006 when he escaped from the Lansing Correctional Facility in a dog crate. Toby Young, a female volunteer with the Safe Harbor Dogs program at the prison, had smuggled Manard to freedom in the crate. The two were discovered 12 days later living in a cabin in rural Tennessee. Young served almost two years in

federal prison for helping Manard escape and giving him a firearm.

Kansas: On September 8, 2009, a disturbance erupted at the Reno County jail when one prisoner began complaining that he hadn't received his medication. Other prisoners joined in and barricaded themselves in the dorm by pushing furniture against the doors. Guards used rubber pellet grenades to break up the protest. No injuries were reported, and property damage was minor.

Kentucky: Warren Lee Back, a federal prisoner at the Big Sandy Penitentiary who was once featured on "America's Most Wanted" for a string of bank robberies, was shot and killed by a guard on October 29 while he was stabbing another prisoner. According to BOP officials, the fatal bullet was fired after Back ignored a warning shot and verbal commands to stop fighting. The prisoner who was stabbed is recovering.

Massachusetts: On October 5, 2009, Jason Ciampa was sentenced to 8 to 20 years in state prison for raping his 17-year-old cellmate in the Middleton Jail in 2005. After the teenager was placed in segregation with Ciampa for a disciplinary infraction, Ciampa fondled and digitally raped him. The teen could not scream for help because Ciampa was squeezing his genitals. The assault ended when the boy defecated. Ciampa, who had been convicted of molesting a 4-year-old boy in 1999, has a long history of mental illness and substance abuse.

Michigan: Officials in Van Buren County have passed an ordinance making it illegal for citizens to shout at prisoners in the county jail. The jail has no air conditioning and the facility's barred windows, which are close to a public sidewalk, are left open in warm weather. Some prisoners' families and friends would stand outside and hold loud conversations with jail residents. Violation of the ordinance, which goes into effect in December 2009, can result in up to 90 days in jail.

Missouri: James Lamont Moore, formerly a guard at the St. Louis Justice Center, was sentenced to two years in federal prison on October 30, 2009 for smuggling what he thought were drugs into the facility. Moore was one of three guards caught in a DEA sting. Justice Center guards Peggy Lynn "Pumpkin" O'Neal and Marilyn Denise "Peaches" Brown also were charged. O'Neal pleaded

guilty and is awaiting sentencing, while Brown has pleaded not guilty and is awaiting trial.

New Jersey: On September 2, 2009, Roy Solomon, a former prison guard at the Southern State Correctional Facility, pleaded guilty to smuggling cocaine and a syringe to a prisoner. He faces up to five years. Prison officials would not say how Solomon smuggled the contraband and have refused to identify the prisoner involved.

New York: On October 20, 2009, New York's highest court, the Court of Appeals, removed Westchester County Judge Joseph S. Alessandro from the bench and admonished Bronx Civil Court Judge Francis M. Alessandro. The judges, who are brothers, had violated ethics rules in connection with a loan that Joseph received for his re-election campaign in 2003. Joseph borrowed \$250,000 from his campaign manager, failed to repay the funds, and then neglected to reveal the transaction on other loan applications. Although Francis failed to disclose that he had co-signed the loan for his brother as required by law, the Court of Appeals determined that admonishment was sufficient in his case because he did not actually benefit from the loan.

Tennessee: Sifrona Cotton, a guard at the CCA-operated Silverdale Detention Center in Chattanooga, was arrested on October 26, 2009 for drug possession and having sexual contact with prisoners. The incident allegedly took place on October 17, Cotton's birthday. She was fired and faces up to 15 years in prison if convicted. Cotton is the second Silverdale guard to be charged for having sex with prisoners; last June, Angel Harris was fired and charged with a similar offense.

Tennessee: Nashville police officer Mark Chesnut and his wife filed suit against CCA on October 30, 2009. Chesnut was shot five times during a traffic stop on June 25 by Joseph Jackson, Jr., a prisoner at CCA's Delta Correctional Facility in Mississippi who had escaped earlier the same day when he was taken to an off-site doctor's office. Jackson and his cousin, Courtney Logan, who helped him escape, were quickly captured after the shooting. Chesnut claims in his lawsuit that CCA is liable for his injuries due to the company's failure to prevent Jackson from escaping.

Texas: On October 22, 2009, it was reported that Montgomery County Jail finance clerk Phyllis Ann Traylor, 51, had

been indicted for stealing approximately \$70,000 from prisoner trust accounts. She was charged with felony theft by a public servant and released on bond. Her husband, Michael Traylor, is employed as a sheriff's deputy.

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Texas: Michael Roy Toney spent ten years on death row for a suitcase-bombing murder he did not commit. He was released on September 2, 2009 after a state appeals court reversed his conviction upon finding the lead prosecutor had withheld

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In Brief (cont.)

evidence. The Attorney General's office decided not to retry the case. A month later, on October 4, Toney was driving home in his pickup truck when it veered off the road and flipped over. Toney, who was not wearing a seat belt, was ejected and the truck rolled over him. He was pronounced dead at the scene.

Texas: On October 26, 2009, Joel Lopez, Sr. was sentenced to life in prison for soliciting the murder of U.S. District Court Judge Ricardo Hinojosa. Joel's wife, Aracely Lopez-Gonzalez, pleaded guilty to lesser charges and testified against her husband in exchange for a 108-month sentence for her role in the plot. Lopez sought to have Judge Hinojosa killed in retaliation for the life sentence he received

from the judge for drug convictions in 2006. He had approached another prisoner and offered millions for the hit. The prisoner agreed, but then reported Lopez and his wife to the FBI.

Utah: Former Cache County jail guard Steve Romero was sentenced on October 27 after he pleaded guilty to two counts of sexual exploitation of a minor. The offenses were discovered when detectives with the Internet Crimes Against Children task force traced an on-line advertisement for child porn to Romero. A search warrant was issued and investigators found 19 "child pornographic videos" on his computer. Romero was ordered to serve one year in jail and 36 months on probation; he also must register as a sex offender. Romero's peace officer certification was revoked after his arrest. He had worked

as a patrol deputy and jail guard for the Cache County Sheriff's Office.

Washington: Beginning on November 2, 2009, prisoners at the Yakima County jail will be required to visit with friends and family via video conferencing. Jail officials implemented the new policy because video visits are purportedly safer and more efficient than in-person visits.

Washington: On October 26, 2009, a Kitsap County jail guard was fired for having sexual contact with both a prisoner in the jail and a former prisoner outside the facility. The incidents took place in July 2007, but were not discovered until August 2009. No charges were filed because the statute of limitations had expired. The Sheriff's Department refused to disclose the guard's name because he had not been charged with a crime. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprison.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

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Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi; Seal Press, 295 pages. \$15.95. Best book available explaining and covering the issues of imprisoned women. Detailed account of a crisis hiding in plain sight. 1066

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$19.00. Documented first hand reporting on law enforcement's war on the poor. Covers paramilitary policing, the INS and prisons. 1002

Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Ceiling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$35.95. Exposes the dark side of America's 'lock-em-up' political and legal climate. 1041

The Ceiling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 pages. \$22.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$14.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

Deposition Handbook, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$34.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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Two of O.J.'s attorney's explain how defendants are wrongly convicted on a regular basis. Detailed explanation of DNA testing and how it works to free the innocent. Devastating critique of police and prosecutorial misconduct and the system that ensures those abuses continue. 1030

Roget's Thesaurus, 717 pages. \$8.95. Over 11,000 words listed alphabetically linked to over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. 1045

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The Citebook, by Tony Darwin, Starlite, 306 pages, \$49.95. This plain language legal manual lists positive cases (cases that give you a right, not take one away) and gives a short synopsis detailing each. 1057

Capital Crimes, by George Winslow, 360 pages. \$19.00. Explains how economic policies create and foster crime and how corporate and government crime is rarely pursued or punished. 1024

Everyday Letters For Busy People, by Debra Hart May, 287 pages. \$18.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Lots of tips for writing effective letters. 1048

The Perpetual Prisoner Machine: How America Profits from Crime, by Joel Dyer, 318 pages. \$19.00. Exposes how private prisons, banks, investors and small companies profit from the prison industrial complex, and prison growth adds to revenue & profits. 1025

Crime and Punishment In America, by Elliott Currie, 230 pages. \$16.95. Refutes arguments in favor of prison building as a crime solution. Demonstrates crime is driven by poverty and discusses proven, effective means of crime prevention. 1019

Worse Than Slavery: Parchman Farm & the Ordeal of Jim Crow Justice, by David Oshinsky, 306 pgs \$16.00. Analysis of prison labors roots in slavery. Focuses on prison plantations and self sustaining prisons. Must reading to understand prison slave labor today. 1007

States of Confinement: Policing, Detention and Prison, revised and updated edition, by Joy James; St Martins Press, 368 pages. \$19.95. Activists, lawyers and journalists expose the criminal justice system's deeply repressive nature. 1032

Seize the Day! 7 Steps to Achieving the Extraordinary in an Ordinary World, by Danny Cox & John Hoover, 256 pages, \$15.99. Provides 7 common sense steps to changing your expectations in life and envisioning yourself as being a successful and respected person. 1052

Marijuana Law: A Comprehensive Legal Manual, by Richard Boire, Ronin, 271pages. \$17.95. Examines how to reduce the probability of arrest and successful prosecution for people accused of the use, sale or possession of marijuana. Invaluable information on legal defenses, search and seizures, surveillance, asset forfeiture and drug testing. 1008

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Hepatitis and Liver Disease: What you Need to Know, 2004 Rev Ed, by Melissa Palmer, MD, 470 pages. **\$17.95**. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow and exercises to perform. 1031 ☐

All Things Censored: Mumia Abu-Jamal, ed. by Noelle Hanrahan, 303 pgs. **\$14.95**. Includes 75 articles by Abu-Jamal. Attacks capital punishment & critiques the dehumanizing prison system. 1040 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin, 1998, 368 Pages. **\$16.00**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson; Lawrence Hill Books, 368 pages. **\$18.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 30 years ago. 1016 ☐

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Federal Prison Employees Convicted of Stealing Prisoners' Meds

by Gary Hunter

On January 6, 2009, three former employees at the Buffalo Federal Detention Center in Batavia, New York pleaded guilty to misdemeanor charges of theft of government property.

Richard Lawson, a captain and pharmacist; Lisa Schwab, a pharmacist technician; and Leonard Iannello, a contract guard at the facility, admitted they had stolen medicine intended for prisoners.

The three former staff members came under investigation in May 2007 after prisoners complained of difficulty in obtaining their medications. Drugs taken from the prison included Fiorcet, a prescription painkiller; Ibuprofen; Cephalexin, an antibiotic; Sudafed, and various other psychotropic and pain medications.

Court documents indicated that federal prosecutors were also investigating a captain who served as the facility's health service director, a lieutenant and two "jail commanders" for receiving stolen drugs. The lieutenant, who was not charged, reportedly received Fiorcet pills "almost

daily for two to three years." Federal officials refused to disclose whether the other implicated employees had been reassigned or reprimanded, citing a pending investigation.

Because the drugs involved were only prescription medicines and not controlled substances, Lawson, Schwab and Iannello were charged with misdemeanor offenses. "If they were controlled substances or narcotics, we would have looked at more serious charges," said federal prosecutor James P. Kennedy.

Captain Lawson told one witness that he took some inhalers home with him so he could burn them in a trash fire, and admitted to stealing vitamins and syringes to treat his dog for rat poisoning. Lawson also claimed his dog had chewed up some of the stolen "psychotropic and pain" meds that he left in a box in his garage, apparently relying on the age-old "dog ate the evidence" excuse.

Norman P. Effman, vice president of the State Defenders Association, said depriving prisoners of medication was nothing new.

"With the budgetary problems that jails and prisons have, it's often very difficult for prisoners to get the meds they need," said Effman. "Often, the jails give them less costly meds than the ones they really need." The problem is exacerbated when staff members outright steal prisoners' medicine.

Despite the serious breach of trust by the three former prison employees, they received lenient punishments. Lawson and Schwab were sentenced on March 3, 2009; Lawson received two years probation and a \$2,000 fine, while Schwab was ordered to pay a \$250 fine. Iannello was sentenced on May 15, 2009 and only assessed a \$25 fine.

The Buffalo Federal Detention Center is operated by Immigration and Customs Enforcement (ICE), which is under the authority of the U.S. Department of Homeland Security. About 130 staff members at the facility are ICE employees while another 200 are contract workers. ■

Sources: www.buffalonews.com, www.dhs.gov/xaig



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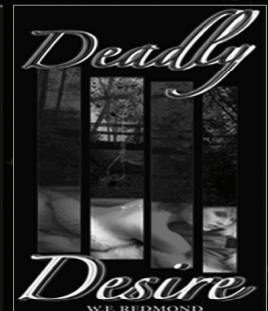
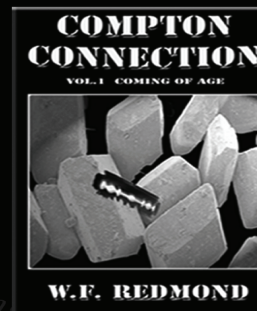


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